

DISTRICT OF COLUMBIA OFFICIAL CODE

2001 Edition

TITLE 22

**Criminal Offenses and Penalties
(Chapters 1 to 32)**



40th ANNIVERSARY
of
HOME RULE



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DISTRICT OF COLUMBIA

OFFICIAL CODE

2001 EDITION

Containing the Laws, general and permanent in their nature,
relating to or in force in the District of Columbia (Except such
laws as are of application in the General and Permanent
Laws of the United States) as of September 13, 2012.

VOLUME 11

Title 22

Criminal Offenses and Penalties
Chapters 1 to 32



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OFFICIAL CODE

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VOLUME II

Title 22

Criminal Offenses and Penalties

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Foreword to 2013 Commemorative Set

LexisNexis presents the 2013 republication of the District of Columbia Official Code, 2001 Edition to the D.C. bench and bar and to the citizens of the District of Columbia in a sincere belief that it will prove a material contribution to the orderly and efficient conduct of the government of the District and to the practice of law. LexisNexis is proud to help commemorate the 40th anniversary of Home Rule for the District of Columbia.

LexisNexis continues its tradition of excellence with its District of Columbia Official Code, 2001 Edition. This 2013 Volume 11 replaces any existing Volume 11 of the 2001 Edition and its 2012 Supplement, both of which may now be discarded, recycled, or retained for historical reference. Future supplements will be keyed to this 2013 Volume and not to any of its predecessors.

The District of Columbia Official Code, 2001 Edition, represents the eighth compilation of the laws of the District of Columbia and reflects an extensive renumbering of the 1981 Edition. Users should consult the historical citations at the end of each statute, and corresponding amendment notes, as guides to legislative currency. Research features such as case annotations, section references, effect of legislation notes, editor's notes, and the comprehensive index have been prepared by LexisNexis. Your set is kept up to date through regular supplementation, free access to the on-line Official Code at <http://www.lexisnexis.com/hottopics/dccode> and the periodic replacement of volumes. All case citations are Shepardized for accuracy and continued relevance. LexisNexis also publishes a District of Columbia Advance Legislative Service (ALS). The ALS gives you the latest session laws as they are passed, along with tables showing you which sections of the Code are affected.

We actively solicit your comments and suggestions. If you have questions or comments about the statutes, or if you have suggestions regarding index improvements, please write to us or call us toll-free at 1-800-833-9844; fax us toll free at 1-800-643-1280; E-mail us at customersupport@bender.com; or visit our website at <http://www.lexisnexis.com>. By providing us with your informed comments, you will be assured of having a working tool which increases in value each year.

LEXISNEXIS

June 2013

PREFACE TO THE 2001 EDITION

The 2001 Edition of the District of Columbia Official Code marks the eighth time that a compilation of the laws of the District of Columbia has been published by, or under the authority of, the government of the District of Columbia or that of the United States. The District of Columbia Code was first published in 1929; eleven years later, the Second Edition (1940) was published; another eleven years later, the Third Edition (1951); ten years later, the Fourth Edition (1961); six years later, the Fifth Edition (1967); another six years later, the Sixth Edition (1973); and 8 years later, the Seventh Edition (1981) was published. The time between the publication of the Seventh Edition and this Eighth Edition represents the longest period, by almost a decade, that the District of Columbia Code has gone unrevised in its 72 year history.

The District's Charter, which in 1973, established the current tripartite government of the District of Columbia, makes it incumbent upon the legislative branch to publish and codify every act of the Council, as the Council directs, upon becoming law, so that the residents of the District may have ready access to the laws by which they are governed. In 1973, however, the framers of the District's constitution could not have foreseen the incredible technological advances that would occur in the next 25 years nor the impact they have on the Code.

With the close of the 20th Century the world has witnessed the triumph of the Information Age, the rise of the World Wide Web, and the explosion of word processing and data storage technology. These phenomena have helped make the reproduction of legal text and data a fast, easy, and inexpensive enterprise, giving rise to a plethora of publishing mediums, and have made it a relatively simple task to reproduce existing legal text, including the District of Columbia Code. The rapid rise of the Computer Age has allowed virtually anyone with an ordinary personal computer to reproduce and compile the laws of the District of Columbia.

The laws of the District, however, are fluid, not stagnant, as they are amended several times each year. The quality and accuracy of publications not directed by the Council are beyond its control. The Council can only warrant the Code for which it has authorized publication. Therefore, in order to ensure that the residents of the District may distinguish between the compilation of District laws as produced under the direction of the elected officials of the District of Columbia and those of other persons, we have added the word "Official" to the title of the Code. Also to ensure that the Council never loses the right to publish its own laws, the government of the District of Columbia has retained the copyright to the District of Columbia Official Code.

The codified laws of the District of Columbia are created as a result of legislative action on the part of 13 individuals elected by the residents of the

District of Columbia to enact the laws that govern the District, and by the Congress. Once the legislative process is complete, the Council, through its delegation of authority to its Office of the General Counsel, codifies the laws in the form of this Code. In the process of codification, the Office of the General Counsel interprets any discrepancies in the drafting of the laws using commonly recognized rules of statutory construction. No other entity is authorized by law to make these determinations. As set forth by federal law and recognized by the Courts of the District of Columbia, this Code establishes *prima facie* evidence of the laws in force in the District of Columbia.¹ It is this continuity of authority, from enactment to codification to judicial review that gives this Code its authenticity and officiality as the content of the laws of the District of Columbia.

The 2001 Edition represents a recodification of the 1981 Edition in that it contains a reorganization of the presentation of the laws, inclusion of some previously omitted legal provisions, and the omission of non-substantive extraneous provisions. The theory behind the recodification is to purify the organization of the Code which over many decades has seen the haphazard mixing of original (“organic”) provisions of laws throughout the Code. In the 2001 Edition, we have established a system of codification that follows the legislative drafting principals established over many years in the Council’s Office of the General Counsel.

The recodification is not an overhaul of the Code. Although a cleanup of the antiquated, repealed and omitted provisions is long overdue, it is not the province of the Office of the General Counsel to determine which laws should be expunged as obsolete. Such decisions should be left to a working group commissioned by the Council to recommend revisions to the Code. The Office of the General Counsel has simply separated the organic laws into discrete divisions and topical categories. As much as is possible, we have followed a rule that requires that all organic law remain intact: closely following the layout of the originating act. We have retained notes to repealed sections to aid in legal research and preserved the numbering style that was first introduced in the Second Edition. Thanks to the resourcefulness of the publisher and the Council’s Office of the General Counsel staff, we have corrected provisions of law erroneously added to, or deleted from, prior editions.

The Code is organized into eight Divisions of practical law: government organization; judicial organization; decedent estates; criminal law; business law; education; property; and general laws. Each division is subdivided by subject matter called **Titles**, organic laws, called **Chapters** and **Subchapters**, and finally, individual **Sections** representing the individual sections of organic law. Occasionally, **Subtitles** are used to organize chapters of organic law, **Units** to organize subchapters, and **Parts** and **Subparts** to organize the additional divisions within the organic law. One important change that the user will notice, and hopefully appreciate, is that the District’s Charter, the Home Rule Act, is codified in its entirety in one location so that the

1. See 1 U.S.C. § 204(b) (1994); *Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993).

framework of the current District government can be readily found. We hope that the organization of the 2001 Edition of the District of Columbia Official Code will serve as a foundation for further refinement by future law revision commissions or their equivalent.

The 2001 Edition has been prepared under the supervision of Benjamin. F. Bryant, Jr., Codification Counsel, Office of the General Counsel, Council of the District of Columbia.

_____/s/_____

Linda W. Cropp

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Council of the District of Columbia

_____/s/_____

Charlotte Brookins-Hudson

General Counsel

Council of the District of Columbia

USER'S GUIDE

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the District of Columbia Official Code, a User's Guide has been included in Volume 1 of the Code. This guide contains comments and information on the many features found within the District of Columbia Official Code intended to increase the usefulness of the Code to the user.

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2. Government Administration.
3. District of Columbia Boards and Commissions.
4. Public Care Systems.
5. Police, Firefighters, Medical Examiner, and Forensic Sciences.
6. Housing and Building Restrictions and Regulations.
7. Human Health Care and Safety.
8. Environmental and Animal Control and Protection.
9. Transportation Systems.
10. Parks, Public Buildings, Grounds and Space.

DIVISION II. JUDICIARY AND JUDICIAL PROCEDURE

- *11. Organization and Jurisdiction of the Courts.
- *12. Right to Remedy.
- *13. Procedure Generally.
- *14. Proof.
- *15. Judgments and Executions; Fees and Costs.
- *16. Particular Actions, Proceedings and Matters.
- *17. Review.

DIVISION III. DECEDENTS' ESTATES AND FIDUCIARY RELATIONS

- *18. Wills.
- *19. Descent, Distribution, and Trusts.
- *20. Probate and Administration of Decedents' Estates.
- *21. Fiduciary Relations and Persons with Mental Illness.

DIVISION IV. CRIMINAL LAW AND PROCEDURE AND PRISONERS

22. Criminal Offenses and Penalties.
- *23. Criminal Procedure.
24. Prisoners and Their Treatment.

*Title has been enacted as law.

Title

DIVISION V. LOCAL BUSINESS AFFAIRS

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- 26. Banks and Other Financial Institutions.
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- *28. Commercial Instruments and Transactions.
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- 31. Insurance and Securities.
- 32. Labor.
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- 48. Foods and Drugs.
- 49. Military.
- 50. Motor and Non-Motor Vehicles and Traffic.
- 51. Social Security.

*Title has been enacted as law.

CITE THIS BOOK

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TITLE 22. CRIMINAL OFFENSES AND PENALTIES.

SUBTITLE I. CRIMINAL OFFENSES.

Chapter

1. Abortion.
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28. Robbery.
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SUBTITLE I. CRIMINAL OFFENSES.

CHAPTER 1. ABORTION.

Sec.

22-101. [Repealed].

§ 22-101. Definition and penalty. [Repealed].

Repealed.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 809; June 29, 1953, 67 Stat. 93, ch. 159, § 203; May 10, 1989, D.C. Law 7-231, § 28, 36 DCR 492; Apr. 29, 2004, D.C. Law 15-154, § 3(a), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-201. 1973 Ed., § 22-201.

Legislative history of Law 7-231. — Law 7-231, the “Technical Amendments Act of 1988,” was introduced in Council and assigned Bill No. 7-586, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 29, 1988 and December 13, 1988, respectively. Signed by the Mayor on January 6, 1989, it was assigned Act No. 7-285 and transmitted to both Houses of Congress for its review.

Legislative history of Law 15-154. — Law 15-154, the “Elimination of Outdated Crimes Amendment Act of 2003”, was introduced in Council and assigned Bill No. 15-79, which was referred to Committee on the Judiciary. The Bill was adopted on first and second readings on October 7, 2003, and November 4, 2003, respectively. Signed by the Mayor on November 25, 2003, it was assigned Act No. 15-255 and transmitted to both Houses of Congress for its review. D.C. Law 15-154 became effective on April 29, 2004.

CASE NOTES

ANALYSIS

Burden of proof.
Health of mother.
Indictment.
Instructions.
Validity.
Verdict.

Burden of proof.

In prosecution under District of Columbia abortion statute, burden is on the prosecution to plead and prove that abortion was not necessary for the preservation of the mother's life or health. *United States v. Vuitch*, 402 U.S. 62,

91 S. Ct. 1294, 28 L. Ed. 2d 601, 1971 U.S. LEXIS 50 (1971).

Health of mother.

Under District of Columbia abortion statute prohibiting abortions unless “necessary for the preservation of the mother's life or health,” abortion is permitted for mental health reasons whether or not the patient has previous history of mental defects. *United States v. Vuitch*, 402 U.S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601, 1971 U.S. LEXIS 50 (1971).

Within District of Columbia abortion statute, “health” is that state of being sound in body or mind and includes psychological as well as

physical well-being. *United States v. Vuitch*, 402 U.S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601, 1971 U.S. LEXIS 50 (1971).

Neither the antiabortion statute of the District of Columbia nor the rules and regulations governing therapeutic abortions at general hospital of district preclude hospital from making available its facilities for performance of therapeutic abortions for mental health reasons whether or not patient has had previous history of mental defects. *Young v. Hutchins*, 383 F. Supp. 1167, 1974 U.S. Dist. LEXIS 6392 (1970), affirmed in part and reversed in part by 531 F.2d 1264, 1976 U.S. App. LEXIS 11245 (5th Cir. Fla. 1976).

Indictment.

A statute prohibiting use, to procure miscarriage, of instrument or means unless necessary, does not contemplate actual miscarriage, but attempt to procure miscarriage, and hence, indictment for violation of statute was sufficient which charged that means used were unnecessary, as against contention that indictment should have charged that miscarriage was unnecessary. *Crichton v. U.S.*, 92 F.2d 224, 1937 U.S. App. LEXIS 4531 (1937).

Instructions.

In prosecution for violating statute prohibiting use, to procure miscarriage, of instrument of means unless necessary, where court read statute to jury and stated that it was offense to

procure miscarriage by instrument, medicine, drugs or any substance or means unless necessary, and accused made no claim that he committed abortion through necessity, refusing instruction to acquit unless alleged operation was not necessary was not prejudicial. *Crichton v. U.S.*, 92 F.2d 224, 1937 U.S. App. LEXIS 4531 (1937).

In prosecution for using instruments upon and administering drugs to named woman, then pregnant, with intent to procure her miscarriage, charge of court that it was immaterial whether or not woman was pregnant, if at time defendant believed she was pregnant, was not erroneous. *Peckham v. U.S.*, 226 F.2d 34, 1955 U.S. App. LEXIS 3013 (1955).

Validity.

District of Columbia abortion law, as properly construed, is not unconstitutionally vague. *United States v. Vuitch*, 402 U.S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601, 1971 U.S. LEXIS 50 (1971).

Verdict.

In prosecution for violating statute relating to abortion, under three counts charging use of catheter, means and instruments unknown, and means unknown, verdicts of acquittal on first two counts and of conviction on third count were inconsistent and repugnant, but not legally objectionable, and conviction would be sustained. *Crichton v. U.S.*, 92 F.2d 224, 1937 U.S. App. LEXIS 4531 (1937).

CHAPTER 2. ADULTERY.

Sec.
22-201. [Repealed].

§ 22-201. Definition and penalty. [Repealed].

Repealed.

(Mar. 3, 1901, 31 Stat. 1332, ch. 854, § 874; May 21, 1994, D.C. Law 10-119, § 2(d), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(b), 41 DCR 2608; Apr. 29, 2004, D.C. Law 15-154, § 3(b), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-301. 1973 Ed., § 22-301.

Emergency legislation. — For temporary amendment of section, see § 105(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to

both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

CASE NOTES

ANALYSIS

Construction with other statutes.
Discovery.
Examination of witnesses.
Indictment and information.
Nature and elements of offenses.
Right to trial by jury.
Sentence and punishment.

Construction with other statutes.

Of the various forms of sexual conduct prohibited by statute, such as adultery, indecent exposure, incest, fornication, seduction, indecent liberties with children, and sodomy, only sodomy, indecent exposure, and indecent sexual acts with children can reasonably be deemed “lewd, obscene or indecent,” within meaning of sexual proposal statute, with the result that statute’s “sexual proposal” clause could be fairly construed to prohibit only proposals to commit sodomy, indecent exposure, or in the case of sexual proposals with children, to perform some sexual act. D.C. Code §§ 22-301, 22-1002, 22-1112, 22-1901, 22-3001, 22-3501, 22-3502. *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S.

Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Discovery.

Former husband’s counterclaim requesting divorce on ground of living separate and apart for more than one year and seeking division of property had no bearing on his alleged adultery, and thus it was not abuse of discretion to decline to strike his counterclaim for his invocation of Fifth Amendment privilege against self-incrimination when questioned during deposition as to his alleged adultery. D.C. Code 1981, § 22-301; U.S. Const. Amend. 5. *Hackes v. Hackes*, 446 A.2d 396, 1982 D.C. App. LEXIS 372 (1982).

Examination of witnesses.

A correspondent may properly refuse to answer question concerning her alleged adultery with defendant more than three years ago, on ground that an answer might incriminate her, notwithstanding Rev.St. § 1044, as amended in 1921, 18 U.S.C. § 3282, requiring an indictment charging adultery to be found within three years after act charged, in absence of proof that no indictment was pending against correspondent. *O’Neil v. O’Neil*, 299 F. 914, 1924 U.S. App. LEXIS 3491 (1924).

Adultery constituted criminal conduct in District of Columbia, and thus it was proper for former husband to invoke his Fifth Amendment privilege against self-incrimination in answering deposition questions concerning his alleged adultery. D.C. Code 1981, § 22-301; U.S. Const. Amend. 5. *Hackes v. Hackes*, 446 A.2d 396, 1982 D.C. App. LEXIS 372 (1982).

Indictment and information.

Two acts of adultery by the defendant with the same woman, provable by the same evidence, may be joined under Rev.St. § 1024, 18 U.S.C. § 557 now Fed.Rules Crim.Proc. rules 8, 13, 14, 18 U.S.C. *Kleindienst v. U.S.*, 48 App.D.C. 190, 1918 U.S. App. LEXIS 2378 (1918).

Failure of the government, on a prosecution for adultery under an indictment containing two counts, to identify the two offenses until the close of defendant's evidence, is prejudicial error, where its evidence showed repeated offenses, covering a period of more than a year and including the period named by it at the opening of the case, and almost a score of offenses during the period so named. *Kleindienst v. U.S.*, 48 App.D.C. 190, 1918 U.S. App. LEXIS 2378 (1918).

Nature and elements of offenses.

Under Code D.C. § 874 (D.C. Code 1929, T. 6, § 175), an act of adultery, if committed by a woman while sole, is not indictable, but, if

committed by her while married, it is indictable. *O'Neil v. O'Neil*, 299 F. 914, 1924 U.S. App. LEXIS 3491 (1924).

Right to trial by jury.

A motion, asking either that trial of a man for adultery be certified to another division of the court or a jury panel be required to be certified from another division to hear the case, should be granted to preserve his constitutional right to an impartial jury, where it is admitted the woman in the case was convicted in the same court for keeping a bawdy house, by a jury drawn from the same panel from which a jury to try defendant would be drawn, and in her trial evidence was given tending to show he was a frequenter of the house. *Kleindienst v. U.S.*, 48 App.D.C. 190, 1918 U.S. App. LEXIS 2378 (1918).

Sentence and punishment.

One convicted of adultery in the Supreme Court of the District of Columbia should be sentenced under section 874 of the Code (D.C. Code 1929, T. 6, § 175), and not under section 316 of the federal Penal Code, since such section 874 is within the exception of chapter 13 of the federal Code, in which appears section 316, which chapter ordains that, "except as otherwise expressly provided," the offenses defined therein shall be punished as thereafter provided. *Kleindienst v. U.S.*, 48 App.D.C. 190, 1918 U.S. App. LEXIS 2378 (1918).

CHAPTER 3. ARSON.

Sec.

22-301. Definition and penalty.

22-302. Burning one's own property with intent to defraud or injure another.

Sec.

22-303. Malicious burning, destruction, or injury of another's property.

22-304. [Repealed].

§ 22-301. Definition and penalty.

Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years.

(Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 820.)

Cross references. — Kindling of bonfires, see § 22-1313.

Murder in the first degree, description, see § 22-2101.

Section references. — This section is referred to in §§ 22-2101 and 23-546.

Prior Codifications. — 1981 Ed., § 22-401. 1973 Ed., § 22-401.

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Admissibility of evidence.

Evidence that defendant attempted to find a source of gasoline on night of fire in his estranged girlfriend's apartment was relevant, and thus admissible, in arson prosecution, regardless of whether gasoline was actually used in starting fire. D.C. Code 1981, § 22-401. Grayton v. United States, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Proposed evidence of arson victim's prior use of crack cocaine was not relevant to question of whether victim started fire in her apartment by smoking crack cocaine, where there was no evidence victim was using cocaine on night of fire. D.C. Code 1981, § 22-401. Grayton v. United States, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Evidence that defendant sold drugs to victim for years, that defendant supplied crack cocaine to victim and roommate two days before fire, and had threatened to burn down apartment building if victim did not pay him for recent drug sale was admissible in prosecution for arson and murder to put arson in context, and as direct and substantial proof of crimes charged. D.C. Code 1981, §§ 22-401, 22-403, 22-2401, 22-2403. Bonhart v. United States, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

In proceeding in which accused was convicted of second-degree murder and arson, trial judge did not err in refusing to admit proffered evidence that accused's voluntary ingestion of drugs induced a toxic psychosis on date of offense or err in instructing jury that voluntary taking of drugs was not a defense to the charges. D.C. Code §§ 22-401, 22-2403. Barrett v. United States, 377 A.2d 62, 1977 D.C. App. LEXIS 374 (1977).

Where fire inspectors, after fire, entered premises occupied by defendant, without objection by defendant, and defendant consented to removal of various items, items were not subject to suppression as evidence. D.C. Code §§ 22-401, 22-402; U.S. Const. Amend. 4. Chaconas v. United States, 326 A.2d 792, 1974 D.C. App. LEXIS 284 (1974).

Death resulting from arson.

Where evidence at trial tends to show that

defendant has committed arson, and that fire was sole cause of victim's death, defendant is either guilty of first degree murder or he is to be acquitted. D.C. Code 1951, § 22-401, 22-2401. *Green v. U.S.*, 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

Arson victim's voluntary and deliberate reentry into burning building to save dog was natural response and was not legal cause of victim's death superseding defendant's felonious act of setting fire so as to insulate defendant from criminal liability for felony murder. D.C. Code 1981, §§ 22-401, 22-2401. *Bonhart v. United States*, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Double jeopardy.

Where jury was authorized to find defendant guilty of either first degree murder or alternatively of second degree murder and jury found him guilty of second degree murder, defendant, by appealing, did not prolong his original jeopardy, and when his conviction for second degree murder was reversed and case remanded he could not be tried again for first degree murder without placing him in new jeopardy. D.C. Code 1951, §§ 22-401, 22-2401, 22-2404; U.S. Const. Amend. 5. *Green v. U.S.*, 78 S.Ct. 221, 1957 U.S. LEXIS 1 (U.S. Dist. Col. 1957).

Concurrent sentences for arson, felony murder, and second-degree murder violated double jeopardy, in action in which one victim died in burning building; underlying felony was lesser offense included within offense of felony murder, and concurrent sentences for second-degree murder and felony murder constituted dual punishment for just one offense. U.S. Const. Amend. 5; D.C. Code 1981, §§ 22-401, 22-2401, 22-2403. *Bonhart v. United States*, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Examination of witnesses.

Fact that witness who allegedly smoked crack cocaine with victim on night of fire did not testify as defense counsel had proffered rendered harmless any error in trial court's precluding cross-examination of victim about smoking crack cocaine on night of fire, before court knew that witness's testimony would not live up to the proffer, especially in light of strong evidence of guilt, in arson prosecution. D.C. Code 1981, § 22-401. *Grayton v. United States*, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Prosecutor's cross-examination of defendant's parents about their testimony concerning defendant's whereabouts on night of arson, which testimony contradicted victim's account, was relevant, was well within scope of direct examination, and was entirely proper. D.C. Code 1981, § 22-401. *Grayton v. United States*, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Trial court did not abuse its discretion in precluding cross-examination of victim about whether she smoked crack cocaine on night of fire, in arson prosecution arising from fire in victim's apartment; probative value of proposed cross-examination was minimal, risk of prejudice was considerable, and defendant was not totally prevented from cross-examining victim in an effort to show possible bias, and indeed he did so. D.C. Code 1981, § 22-401. *Grayton v. United States*, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Requisite factual predicate did not exist for cross-examining arson victim about whether she might have started fire by smoking crack in her apartment; only basis for defendant's theory about start of fire was fact that victim, who was defendant's estranged girlfriend, had smoked crack before, and defendant could offer no evidence that victim had done so on night in question. D.C. Code 1981, § 22-401. *Grayton v. United States*, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Given defense counsel's proffer that witness would testify that she and victim smoked crack on night in question, shortly before residential fire began, trial court erred in precluding cross-examination of victim about smoking crack cocaine in her apartment on night of fire before court knew that witness's testimony would not live up to the proffer. D.C. Code 1981, § 22-401. *Grayton v. United States*, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Defendant had the right to challenge credibility of victim, who was defendant's estranged girlfriend, by offering extrinsic evidence to show bias, in prosecution for various offenses including burglary and arson. D.C. Code 1981, §§ 22-401, 22-1801(b). *Grayton v. United States*, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Instructions.

Giving of instruction that jurors were permitted to infer that second defendant was "guilty of the crimes charged," if they determined, beyond a reasonable doubt, that he was found in unexplained, exclusive possession of recently stolen property was reversible error where the presumed fact of guilt of arson, possession of a Molotov cocktail and second-degree burglary while armed with a Molotov cocktail did not flow from possession of recently stolen military rifles. D.C. Code §§ 22-401, 22-1801(b), 22-3202, 22-3215a. *United States v. Carter*, 522 F.2d 666, 1975 U.S. App. LEXIS 13956 (C.A.D.C. 1975).

Where, in arson and murder prosecution, all testimony as to what occurred in burning house pointed to first degree murder only, giving of second degree murder instruction was error. D.C. Code 1951, §§ 22-401, 22-2401. *Green v.*

U.S., 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

Where, had not erroneous second degree murder instruction been given in arson and murder prosecution defendant, who was found guilty by jury of second degree murder, might have been found not guilty under the murder count, giving of such second degree murder instruction constituted reversible error. D.C. Code 1951, §§ 22-401, 22-2401. *Green v. U.S.*, 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

In prosecution for crimes including two counts of first-degree murder while armed, no reversible error arose from use of verdict form which, according to defendant, was misleading in that it encouraged the jury to find defendant guilty of the first count so that the jurors would not have to consider the remaining lesser offenses listed. D.C. Code §§ 22-401, 22-2401 to 22-3202. *Hallman v. United States*, 410 A.2d 215, 1979 D.C. App. LEXIS 539 (1979).

Juvenile adjudications.

Evidence identifying juvenile as person who committed arson was insufficient to support delinquency adjudication where only eyewitness was unable to positively identify juvenile as perpetrator in either in-court testimony or out-of-court photographic lineup. D.C. Code 1981, § 22-401. In re R.H.M., 630 A.2d 705, 1993 D.C. App. LEXIS 218 (1993).

Eyewitness' out-of-court statement during photographic lineup, that photographs selected "looked familiar" from the night that the arson was committed, was not sufficient evidence of identification to support juvenile delinquency adjudication. D.C. Code 1981, § 22-401. In re R.H.M., 630 A.2d 705, 1993 D.C. App. LEXIS 218 (1993).

Trial court erred in finding juvenile guilty of malicious burning, since such crime was not included as a charge in delinquency petition and was not a lesser included offense of the offense of arson which was charged in the petition. D.C. Code §§ 22-401, 22-403. In re W.B.W., 397 A.2d 143, 1979 D.C. App. LEXIS 282 (1979).

Lesser included offenses.

Malicious destruction of property cannot be a lesser-included offense of arson, because malicious destruction of property contains an additional element of proof, i.e., that the property was valued either above or below \$200; furthermore, no "inherent" relationship between the two offenses exists so as to warrant consideration of the facts adduced at trial to determine the availability of a jury instruction on the lesser offense, since the statutes defining the offenses protect different interests, and proof of malicious destruction of property is not necessarily presented as part of a showing of arson.

D.C. Code 1973, §§ 22-401, 22-403. *Logan v. United States*, 460 A.2d 34, 1983 D.C. App. LEXIS 354 (1983).

Malicious burning is not a lesser included offense of arson, since value is essential element of malicious burning offense. D.C. Code §§ 22-401, 22-403. In re W.B.W., 397 A.2d 143, 1979 D.C. App. LEXIS 282 (1979).

Nature and elements of offenses.

An essential element of the crime of arson is the burning or attempted burning of a building. D.C. Code § 22-401. *United States v. Carter*, 522 F.2d 666, 1975 U.S. App. LEXIS 13956 (C.A.D.C. 1975).

"Arson" involves conduct endangering human life and offending the security of habitation or occupancy. D.C. Code 1981, § 22-401. *Gilmore v. United States*, 742 A.2d 862, 1999 D.C. App. LEXIS 263 (1999).

Presumptions and burden of proof.

To establish that defendant committed crime of arson, Government had to prove the malicious burning or attempted burning of the dwelling of another person. D.C. Code 1981, § 22-401. *Gilmore v. United States*, 742 A.2d 862, 1999 D.C. App. LEXIS 263 (1999).

Review.

Where record on appeal from convictions for housebreaking, arson, and malicious destruction of personal property failed to show that defendant's absence during trial, after trial had commenced in his presence, constituted deliberate failure to appear without reason that might bear on court's latitude to have continued trial, case would be remanded for development of such issue including circumstances in which defendant was taken into custody after trial. D.C. Code §§ 22-401, 22-403, 22-1801; Fed. Rules Crim. Proc. rule 43, 18 U.S.C.; U.S. Const. Amend. 5. *Cureton v. U.S.*, 396 F.2d 671, 1968 U.S. App. LEXIS 7275 (C.A.D.C. 1968).

Where prosecution had already established beyond reasonable doubt defendant's factual culpability on charges of murder and arson and error in denying appointment of private psychiatrist to assist defendant in determining whether proper basis for insanity defense existed did not contaminate jury finding of factual issue, it was unnecessary to retry defendant on remand on other than insanity question. D.C. Code §§ 22-401, 22-2403, 22-3202. *Gaither v. United States*, 391 A.2d 1364, 1978 D.C. App. LEXIS 311 (1978).

Speedy trial.

Government delay of 15 months, due to administrative constraints, in bringing accused to trial on arson charge after he was arrested did not warrant dismissal of indictment, in light of fact that accused failed to assert his right to speedy trial during course of the 15-month

delay and in view of fact that accused failed to take steps to preserve memory of defense witness who was unable to remember when the events pertaining to accused's alibi occurred and who was unable to identify accused. D.C. Code § 22-401. *Smith v. United States*, 379 A.2d 1166, 1977 D.C. App. LEXIS 272 (1977).

Weight and sufficiency of evidence.

Evidence was not sufficient to support convictions for arson, second-degree burglary while armed with a Molotov cocktail and possession of a Molotov cocktail. D.C. Code §§ 22-401, 22-1801(b), 22-3202, 22-3215a. *United States v. Carter*, 522 F.2d 666, 1975 U.S. App. LEXIS 13956 (C.A.D.C. 1975).

Evidence was insufficient to show that defendant acted with a conscious disregard of a substantial risk to human life when setting fire, as necessary to establish mens rea of malice in arson prosecution, where defendant used gasoline to set fire to stabbing victim's body in a vacant home next to, but detached from, other vacant homes. *Lewis v. United States*, 10 A.3d 646, 2010 D.C. App. LEXIS 739 (2010).

There was sufficient evidence that juvenile acted in conscious disregard of a known and substantial risk that his actions would endanger the school's occupants, when he set fire in school, as required to support finding that juvenile had committed arson, and that the charge should be treated as a felony, as opposed to misdemeanor, destruction of property; juvenile wondered aloud what would happen if he tried to set the school on fire, he started the fire with a cigarette lighter, he continued to try to set the fire despite another juvenile's attempts to extinguish the blaze, and juvenile did not

notify anyone about the fire. *In re D.M.*, 993 A.2d 535, 2010 D.C. App. LEXIS 202 (2010).

Evidence was sufficient to support convictions for malicious destruction of property and arson; defendant, who admitted to police that he started the fire in the apartment, was seen in the burning apartment, and, immediately thereafter, calmly walked away without alerting anyone to the danger, defendant had been arguing with his mother prior to the fire and made statements that he would burn it again, and next time he would "do it right," and evidence was introduced establishing that the cost of the damage exceeded \$25,000. *Phenis v. United States*, 909 A.2d 138, 2006 D.C. App. LEXIS 539 (2006).

Defendant's conviction for arson was supported by evidence that defendant lit wick of Molotov cocktail and attempted to throw it at house, that bottle slipped out of defendant's hand to the grass and landed, still lit, 15 to 20 feet from house, and that defendant repeatedly threatened to burn down house. D.C. Code 1981, § 22-401. *Gilmore v. United States*, 742 A.2d 862, 1999 D.C. App. LEXIS 263 (1999).

Convictions of arson and of malicious burning of defendant's own property with intent to defraud were sustained by evidence including evidence with respect to access to premises, alibi evidence found by trial court to be incredible, evidence that fire occurred shortly before time for expiration of insurance policy for which continuance had not been arranged and evidence concerning cigarette match bomb and gasoline. D.C. Code §§ 22-401, 22-402. *Chaconas v. United States*, 326 A.2d 792, 1974 D.C. App. LEXIS 284 (1974).

§ 22-302. Burning one's own property with intent to defraud or injure another.

Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years.

(Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 821.)

Cross references. — Fraud, see § 22-3221. Murder in the first degree, description, see § 22-2101.

Section references. — This section is referred to in §§ 22-2101 and 23-546.

Prior Codifications. — 1981 Ed., § 22-402. 1973 Ed., § 22-402.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Weight and sufficiency of evidence.

Admissibility of evidence.

Where fire inspectors, after fire, entered premises occupied by defendant, without objection by defendant, and defendant consented to removal of various items, items were not subject to suppression as evidence. D.C. Code §§ 22-401, 22-402; U.S. Const. Amend. 4. *Chaconas v. United States*, 326 A.2d 792, 1974 D.C. App. LEXIS 284 (1974).

Weight and sufficiency of evidence.

Convictions of arson and of malicious burn-

ing of defendant's own property with intent to defraud were sustained by evidence including evidence with respect to access to premises, alibi evidence found by trial court to be incredible, evidence that fire occurred shortly before time for expiration of insurance policy for which continuance had not been arranged and evidence concerning cigarette match bomb and gasoline. D.C. Code §§ 22-401, 22-402. *Chaconas v. United States*, 326 A.2d 792, 1974 D.C. App. LEXIS 284 (1974).

§ 22-303. Malicious burning, destruction, or injury of another's property.

Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own, of the value of \$1,000 or more, shall be fined not more than \$5,000 or shall be imprisoned for not more than 10 years, or both, and if the property has some value shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

(Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 848; Aug. 12, 1937, 50 Stat. 629, ch. 599; Nov. 8, 1965, 79 Stat. 1307, Pub. L. 89-347, § 1; May 21, 1994, D.C. Law 10-119, § 2(e), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(c), 41 DCR 2608; June 3, 2011, D.C. Law 18-377, § 7, 58 DCR 1174.)

Section references. — This section is referred to in § 23-546.

Prior Codifications. — 1981 Ed., § 22-403. 1973 Ed., § 22-403.

Effect of amendments. — D.C. Law 18-377 substituted "value of \$1,000 or more" for "value of \$200 or more"; and substituted "if the property has some value" for "if the value of the property be less than \$ 200".

Emergency legislation. — For temporary amendment of section, see § 105(c) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 507 of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 507 of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Lan-

guage Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 18-377. — Law 18-377, the "Criminal Code Amendment Act of 2010", was introduced in Council and assigned

Bill No. 18-963, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on December 7, 2010, and December 21, 2010, respectively. Signed by the Mayor on

February 2, 2011, it was assigned Act No. 18-722 and transmitted to both Houses of Congress for its review. D.C. Law 18-377 became effective on June 3, 2011.

CASE NOTES

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Admissibility of evidence.
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Admissibility of evidence.

In prosecution for malicious burning of another's property, record sustained trial court's ruling that defendant had failed to prove unnecessary delay in presentment to committing magistrate or that unnecessary delay had induced confession, and confession was properly admitted. D.C. Code 1981, § 22-403. Tillotson v. U.S., 231 F.2d 736, 1956 U.S. App. LEXIS 3460 (C.A.D.C. 1956).

Evidence that defendant sold drugs to victim for years, that defendant supplied crack cocaine to victim and roommate two days before fire, and had threatened to burn down apartment building if victim did not pay him for recent drug sale was admissible in prosecution for arson and murder to put arson in context, and as direct and substantial proof of crimes charged. D.C. Code 1981, §§ 22-401, 22-403, 22-2401, 22-2403. Bonhart v. United States, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Photographs of restaurant were properly admitted in prosecution for malicious destruction of property to depict restaurant's window where manager, who had not seen photographs before trial, testified that they were all photographs of restaurant and were a fair and accurate representation of way window looked. D.C. Code 1981, § 22-403. Henderson v. United States, 527 A.2d 1262, 1987 D.C. App. LEXIS 373 (1987).

Court would take judicial notice of fact that liquor store, which was the "store" referred to in indictment charging malicious destruction of property of a value of \$200 or more, had a value exceeding \$200. D.C. Code § 22-403. Nichols v. United States, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

Testimony as to ownership of damaged vending machine, purportedly based on witness' own knowledge, was not hearsay and was sufficient to prove ownership as alleged in information charging malicious injuring of property and attempted petit larceny. D.C. Code §§ 22-103, 22-403, 22-2202. Killens v. United States, 263 A.2d 44, 1970 D.C. App. LEXIS 236 (App. 1970).

Arguments and conduct of counsel.

On central issue of malice, jury in prosecution for malicious destruction of property should have been told, when prosecutor argued the "reasonable person" test and the defense objected, that ultimate issue was defendant's state of mind, and that what a reasonable man would have foreseen, while relevant, was not conclusive. D.C. Code 1981, § 22-403. Thomas v. United States, 557 A.2d 1296, 1989 D.C. App. LEXIS 64 (1989).

Trial judge's failure in prosecution for malicious destruction of property to counteract in some effective fashion prosecutor's critical misstatement of the law on element of malice required reversal, considering that prosecutor's incorrect characterization went to the only real question in the case and implied that the most important part of defendant's testimony was irrelevant. D.C. Code 1981, § 22-403. Thomas v. United States, 557 A.2d 1296, 1989 D.C. App. LEXIS 64 (1989).

In proceeding in which defendant was convicted of second-degree burglary and destruction of private property and in which jury was instructed that arguments of counsel were not evidence and was repeatedly reminded that they were the sole judges of believability of witnesses, prosecution's improper comments, which were made during rebuttal argument and which were directed again and again at veracity of defendant's witnesses, constituted such prejudicial misconduct as to require new trial, in light of certain circumstances including fact that the matter for jury consideration consisted entirely of deciding whether to believe police officer or defense witnesses. D.C. Code

§§ 22-403, 22-1801. *Dyson v. United States*, 418 A.2d 127, 1980 D.C. App. LEXIS 334 (1980).

Defendant's failure to object to trial court's failure to strike, *sua sponte*, government's allegedly self-vouching statements during its cross-examination of defendant's wife about whether law enforcement, during its investigation, had asked her whether she had any information that would help defendant rendered the issue subject to review for plain error on appeal, in prosecution for assault with intent to kill while armed, aggravated assault while armed, possession of a firearm during a crime of violence, carrying a pistol without a license, and malicious destruction of property. *Shelton v. United States*, 26 A.3d 216, 2009 D.C. App. LEXIS 752 (2011).

Arrest.

Without warrant, police officer may arrest for misdemeanor of destroying private property only when that crime is committed, or attempt is made to commit it, in his presence or view. D.C. Code § 4-140, 22-403. *Smith v. United States*, 247 A.2d 293, 1968 D.C. App. LEXIS 219 (App. 1968).

Officer who arrested defendant who had been observed tearing back seat of automobile which he admitted was not his had probable cause to arrest defendant on charge of destroying private property. D.C. Code §§ 4-140, 22-403. *Smith v. United States*, 247 A.2d 293, 1968 D.C. App. LEXIS 219 (App. 1968).

Collateral civil proceedings.

Defendant's conviction for misdemeanor destruction of property could be used in any subsequent civil action for damages which owner of property might bring against defendant, since conviction would be conclusive evidence of defendant's guilt. D.C. Code 1981, § 22-403. *Davidson v. United States*, 467 A.2d 1282, 1983 D.C. App. LEXIS 511 (1983).

Defenses.

Trial court did not plainly error in failing to raise *sua sponte* the issue of whether defendant had been adequately provoked, as justification defense in prosecution for malicious destruction of property; defendant specifically testified that when he got into police transport van, a door of which he was accused of denting, he was no longer mad, defendant also claimed that he actually did nothing at all to the van, and given these confusing positions before the trial court, it was difficult to conclude that the error was clear or obvious, and that the trial court should have *sua sponte* raised provocation. *Brannon v. United States*, 43 A.3d 936, 2012 D.C. App. LEXIS 162 (2012).

Provocation is a proper defense to charge of malicious destruction of property. D.C. Code

1981, § 22-403. *Brown v. United States*, 584 A.2d 537, 1990 D.C. App. LEXIS 158 (1990).

Examination of witnesses.

Misdemeanor conviction for malicious destruction of property was impeachable conviction within meaning of statute allowing Government to impeach defendant's testimony with prior misdemeanor convictions involving dishonesty or false statement. D.C. Code 1981, § 22-403; § 22-2201 (repealed). *Ross v. United States*, 520 A.2d 1064, 1987 D.C. App. LEXIS 285 (1987).

Indictment or information.

Trial court, in permitting jury to consider felony grade of offense of destruction of property, erroneously permitted constructive amendment of indictment allowing defendant to be convicted of offense for which he was not charged, in violation of the Fifth Amendment, as indictment charging defendant with destruction of property failed to specify the value of damage to victim's vehicle, and the offense included statutory distinction between felony and misdemeanor grade of the crime predicated on a fixed value. *Peay v. United States*, 924 A.2d 1023, 2007 D.C. App. LEXIS 255 (2007).

Even if variance existed between facts contained in indictment charging defendant with felony destruction of property and facts adduced at trial, which facts reflected two automobile collisions, defendant failed to demonstrate any prejudice that would warrant reversal; initial criminal complaint referenced both collisions, such that defendant was on notice that the government intended to adduce evidence of both collisions, and there was nothing to suggest that defendant would be placed at risk of another prosecution. *Peay v. United States*, 924 A.2d 1023, 2007 D.C. App. LEXIS 255 (2007).

Fact that evidence at trial reflected two automobile collisions and jury was instructed with respect to both collisions by way of a special unanimity instruction did not result in "constructive amendment" of indictment charging defendant with felony destruction of property; indictment included only a general reference to nature of the destruction of property involved, it did not allege that damage stemmed from a specific collision or a specific location, and indictment simply reflected grand jury's assessment that defendant had damaged a particular car on a particular date. *Peay v. United States*, 924 A.2d 1023, 2007 D.C. App. LEXIS 255 (2007).

Misjoinder of robbery counts with burglary counts in violation of rule was not harmless error in that it was likely that misjoinder prejudiced defendants' chances of acquittal on each charge because juxtaposition of the weaker burglary defense of innocent presence

with comparatively stronger robbery defense of temporary voluntary exchange may well have damaged defendants. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-2901; Criminal Rules 8, 8(a, b). *Ray v. United States*, 472 A.2d 854, 1984 D.C. App. LEXIS 319 (1984).

Robbery counts should not have been tried jointly with burglary counts, and joinder of those counts was violative of rule governing joinder of defendants, where offenses were not directed toward the common goal of obtaining property from others, no evidence was produced that the robbery necessarily led to or caused the burglary, and proof of one did not necessarily overlap substantially upon the other since one crime was stealing coats from acquaintances and other crime was breaking into an empty gas station. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-2901; Criminal Rules 8, 8(a, b). *Ray v. United States*, 472 A.2d 854, 1984 D.C. App. LEXIS 319 (1984).

Indictment which charged defendants with maliciously causing injury and destruction to certain property, "causing damage" in excess of \$200 was sufficient to charge defendants with the felony of maliciously destroying property "of the value of \$200 or more." D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

Relative imprecision in phrasing the value of the damaged property in indictment charging malicious destroying of property of a value of \$200 or more was not prejudicial error where defendants could not have been misled in any meaningful way and there was evidence to show that the cost of repair to the damaged store was well over \$200. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

Although it is generally the better practice, the elements of an offense need not always be set forth in *haec verba* in the indictment as indictments must be read to include facts which are necessarily implied by the specific allegations made. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

An indictment need only contain a plain, concise and definite written statement of the essential facts constituting the offense charged. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

Where amendment of information charging attempted second-degree burglary, destroying private property, and petit larceny to reflect that property in question belonged to corporation in care and custody of individual, as opposed to individual alone as charged in original information, conformed to testimony at trial and no prejudice was occasioned by the defense, permitting such amendment was not error. D.C. Code §§ 22-103, 22-403, 22-1801(b), 22-

2202; D.C. Code General Sessions Court Rules, Criminal Division rule 7(e). *King v. United States*, 271 A.2d 556, 1970 D.C. App. LEXIS 365 (App. 1970).

Instructions.

In prosecution for malicious destruction of property stemming from incident in which defendant smashed front windows and door of her mother's home in an effort to get inside and take possession of her runaway son, there was sufficient evidence that defendant was so provoked by her mother's conduct as to create jury issue of provocation, and court's instruction that jury could consider the defense only if they found an actual physical danger to defendant's son improperly restricted that defense. D.C. Code 1981, § 22-403. *Brown v. United States*, 584 A.2d 537, 1990 D.C. App. LEXIS 158 (1990).

Trial court's instruction in prosecution for malicious property destruction that "there is no evidence to show that the window was broken without malice" and that "the only genuine dispute in the case is the one of identity" did not direct partial verdict of guilty on element of malice but was sufficiently authoritative to shift burden of persuasion on element of crime from Government to defendant in violation of due process. D.C. Code 1981, § 22-403; U.S.C. Const. Amend. 14. *Henderson v. United States*, 527 A.2d 1262, 1987 D.C. App. LEXIS 373 (1987).

Trial court's instruction that "there is no evidence to show that the window was broken without malice," though in violation of defendant's due process rights since instruction shifted burden of proof on issue to defendant, was harmless where jury, in order to conclude that window had been broken accidentally, would have had to act irrationally by disregarding only evidence before it. D.C. Code 1981, § 22-403. *Henderson v. United States*, 527 A.2d 1262, 1987 D.C. App. LEXIS 373 (1987).

Juvenile adjudications.

Trial court erred in finding juvenile guilty of malicious burning, since such crime was not included as a charge in delinquency petition and was not a lesser included offense of the offense of arson which was charged in the petition. D.C. Code §§ 22-401, 22-403. *In re W.B.W.*, 397 A.2d 143, 1979 D.C. App. LEXIS 282 (1979).

Lesser included offenses.

Maximum fine for defacing property was greater than maximum fine for malicious destruction of property and, therefore, since their maximum prison term was same, defacing property was not lesser included offense of malicious destruction of property; accordingly, defendant, who was indicted for malicious destruction of property, could not be convicted of

defacing property. D.C. Code 1981, §§ 22-403, 22-3112.1. *Craig v. United States*, 523 A.2d 567, 1987 D.C. App. LEXIS 324 (1987).

Malicious destruction of property cannot be a lesser-included offense of arson, because malicious destruction of property contains an additional element of proof, i.e., that the property was valued either above or below \$200; furthermore, no "inherent" relationship between the two offenses exists so as to warrant consideration of the facts adduced at trial to determine the availability of a jury instruction on the lesser offense, since the statutes defining the offenses protect different interests, and proof of malicious destruction of property is not necessarily presented as part of a showing of arson. D.C. Code 1973, §§ 22-401, 22-403. *Logan v. United States*, 460 A.2d 34, 1983 D.C. App. LEXIS 354 (1983).

Malicious burning is not a lesser included offense of arson, since value is essential element of malicious burning offense. D.C. Code §§ 22-401, 22-403. *In re W.B.W.*, 397 A.2d 143, 1979 D.C. App. LEXIS 282 (1979).

Merger of offenses.

Defendants' two convictions of destroying property were required to be merged into one due to the fact that the convictions were based on one collision that damaged both a stolen car and a post office truck. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Each of defendant's and codefendant's convictions for destroying property, armed carjacking, and unauthorized use of a vehicle did not merge into one crime for double jeopardy purposes; despite fact that crime spree engaged in by defendant and codefendant extended over several hours, many of their crimes occurred after significant breaks in time, changes of location, and opportunities to reformulate criminal intent. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Nature and elements of offenses, generally.

Using black spray paint to inscribe obscenities on exterior wall of cigar bar constituted sufficient injury, as element of felony malicious destruction of property; while no part of wall had to be removed or replaced, splotchy appearance resulting from painting-over the graffiti, without being able to match color of wall, necessarily caused a decrease in building's value. *Baker v. United States*, 891 A.2d 208, 2006 D.C. App. LEXIS 16 (2006).

Statute criminalizing malicious destruction of property applied to individuals who jointly owned property; element requiring defendant to destroy property "not his or her own," did not preclude prosecution of defendant who co-owned property with another. *Jackson v.*

United States, 819 A.2d 963, 2003 D.C. App. LEXIS 146 (2003).

Ultimate issue in prosecution for malicious destruction of property is defendant's subjective state of mind, rather than whether the harm would have been foreseen by a reasonable person. D.C. Code 1981, § 22-403. *Thomas v. United States*, 557 A.2d 1296, 1989 D.C. App. LEXIS 64 (1989).

The elements of malicious destruction of property are that the defendant injured or broke or destroyed or attempted to injure, break or destroy property; that the property was not the defendant's; that the defendant did so maliciously with intent to injure, break or destroy the property and for a bad or evil purpose, and not merely negligently or accidentally; and that the property was of a value of \$200 or more. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

Changing the appearance of someone else's property, without consent, especially by splattering a staining substance such as blood on it, injures that property. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Because redundancy in criminal statutes is permissible, it does not matter that blood stains injure property for the purposes of both this section and § 22-3112.1. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

The misdemeanor charge of destruction of property under this section requires proof of 4 elements: (1) That defendant injured, broke, or destroyed, or attempted to injure, break, or destroy property, (2) that the property was not the defendant's property, (3) that the property was of some value, and (4) that the defendant acted maliciously; that is, either with intent to injure or destroy the property, or with a conscious disregard of a known and substantial risk that injury would result from her actions. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Pleas.

In prosecution for housebreaking, larceny and destruction of property, wherein one defendant was permitted to change his plea in open court and in presence of jury and was asked by trial judge whether he admitted committing offense and replied that he did admit being with "them," there was error which, in view of circumstantial and inconclusive nature of evidence, would require reversal of another defendant's conviction. D.C. Code 1951, §§ 22-403, 22-1801, 22-2201, 22-2202. *Gaynor v. U.S.*, 247 F.2d 583, 1957 U.S. App. LEXIS 3726 (C.A.D.C. 1957).

Defendant intentionally and voluntarily waived right to trial, prior to guilty pleas on charges of first-degree theft and destruction of property, where trial judge carefully and re-

peatedly advised defendant of his rights to trial by jury, to confront witnesses, to testify or not to testify, and his appeal rights if convicted, and record was devoid of any hint that defendant wanted any trial at all, let alone a jury trial. D.C. Code 1981, §§ 22-403, 22-3811, 22-3812(a). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

Trial court did not abuse discretion in denying defendant's motion for withdrawal of guilty pleas to second-degree murder, attempted burglary and destruction of property where, inter alia, reasons given for defendant's change of heart did not amount to a claim of legal innocence, proffered evidence of guilt was overwhelmingly convincing and there was no claim of coercion or incapacity. D.C. Code §§ 22-403, 22-1801(b), 22-2403. *Taylor v. United States*, 366 A.2d 444, 1976 D.C. App. LEXIS 409 (1976).

Presumptions and burden of proof.

Misdemeanor malicious destruction of property requires proof that property destroyed has useful, functional purpose. D.C. Code 1981, § 22-403. *Sterling v. United States*, 691 A.2d 126, 1997 D.C. App. LEXIS 38 (1997), amended by 1997 D.C. App. LEXIS 107 (D.C. May 13, 1997).

While foreseeability of the harm to a reasonable person is relevant to ultimate issue of guilt or innocence in a prosecution for malicious destruction of property, prosecutor must further show, in order to prevail, that defendant was subjectively aware of the risk in question. D.C. Code 1981, § 22-403. *Thomas v. United States*, 557 A.2d 1296, 1989 D.C. App. LEXIS 64 (1989).

Malice in damaging of right front vent of automobile window could be inferred from intentional wrongdoing and value of property could be inferred from evidence respecting its useful, functional purpose. D.C. Code 1961, § 22-403. *Paige v. U.S.*, 183 A.2d 759, 1962 D.C. App. LEXIS 369 (Cr.App. 1962).

Both malice and intent are elements of the malicious destruction of property offense, and more than proof of negligence is required to obtain a conviction. *Gonzalez v. United States*, 859 A.2d 1065, 2004 D.C. App. LEXIS 518 (2004).

To prove an offense under this section, the government need only show that the injured property has some minimum value and is not required to show the precise value of the injury. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Questions of law and fact.

In prosecution for petty larceny and destruction of property, evidence that one defendant had been apprehended in automobile containing three recently stolen items and tools with

which a jury could infer that thefts had been accomplished, together with evidence of common plan and concerted action arising out of inference from defendant's close relationship with his accomplices, one of whom was his brother and codefendant, and from defendant's conduct in connection with a second codefendant on morning of arrest at which time police had observed both men peering through windows of parked automobiles, was sufficient for jury on issue of defendant's culpability. D.C. Code §§ 22-403, 22-2202. *Childress v. United States*, 381 A.2d 614, 1977 D.C. App. LEXIS 299 (1977).

Evidence showing, among things, that defendant, who had had an altercation with tavern owner, was found behind tavern with bottle full of gasoline and a book of matches with the cover torn off was sufficient to present a jury issue as to whether defendant was guilty of attempted destruction of property. D.C. Code § 22-403. *Williams v. United States*, 283 A.2d 212, 1971 D.C. App. LEXIS 230 (1971).

Review.

Trial court's error in permitting constructive amendment of indictment charging defendant with destruction of property, which allowed defendant to be convicted of offense for which he was not charged, i.e., felony destruction of property, did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and, thus, was not plain error, as defendant was on notice, at least from outset of trial, that he was being tried for felony destruction of property, given that preliminary instructions included elements of felony offense, and evidence adduced at trial demonstrated that value of damage exceeded statutorily prescribed amount necessary to charge felony destruction of property. *Peay v. United States*, 924 A.2d 1023, 2007 D.C. App. LEXIS 255 (2007).

Right to jury trial.

Neither assault nor destruction of property were "serious crimes" which entitled defendant to a jury trial under Sixth Amendment, where District of Columbia legislature had reduced the crimes to petty offenses. D.C. Code 1981, §§ 22-403, 22-504(a). *Burgess v. United States*, 681 A.2d 1090, 1996 D.C. App. LEXIS 307 (1996).

Conviction following waiver of jury trial would be upheld despite absence of judicial inquiry made of defendant personally, in detail, to determine whether waiver was voluntary, where it was clear on the record that the waiver was knowledgeable, as there was a written waiver signed by defendant and an oral waiver by counsel, in defendant's presence and acquiesced in by him, as trial proceeded to conclusion without objection by defendant, and as defendant, who had history of mental illness, was

adjudged competent to participate in and to understand the proceedings against him. D.C. Code §§ 16-705(a), 22-403; D.C. Code SCR Criminal Rule 23(a). *Hicks v. United States*, 296 A.2d 615, 1972 D.C. App. LEXIS 280 (1972).

The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Sentence and punishment.

Statutory provision for two-year mandatory minimum sentence for burglary did not operate to prevent prosecution and sentencing for lesser misdemeanors of attempted burglary in second degree, destroying private property, and petit larceny, for which offenses defendant was actually sentenced for one-half year more than two-year felony minimum. D.C. Code §§ 22-103, 22-403, 22-1801(b), 22-2202; D.C. Code General Sessions Court Rules, Criminal Division rule 7(e). *King v. United States*, 271 A.2d 556, 1970 D.C. App. LEXIS 365 (App. 1970).

Action of trial court, taken while appeal was pending, in purportedly granting motion to correct sentence by making one-year sentence for petit larceny and six-month sentence for destroying property run concurrently rather than consecutively was beyond court's power at that time and order purporting to correct sentence would be vacated without prejudice to reentry if subsequently deemed appropriate. D.C. Code General Sessions Court Rules, Criminal Division rule 35; D.C. Code §§ 22-403, 22-2202. *King v. United States*, 271 A.2d 556, 1970 D.C. App. LEXIS 365 (App. 1970).

Value of property.

Using black spray paint to inscribe obscenities on automobile constituted sufficient injury, as element of felony malicious destruction of property; to repair vehicle, paint had to be removed and then replaced with new layer of paint, because otherwise, vehicle would have been significantly devalued. *Baker v. United States*, 891 A.2d 208, 2006 D.C. App. LEXIS 16 (2006).

There are different methods of proving value in prosecutions for theft or destruction of property exceeding a threshold value, and no one method is preferred over others. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

The market value of a chattel may be established by the testimony of its non-expert owner, but the government is still required to introduce evidence sufficient to eliminate the possibility that the jury's verdict was based on surmise or conjecture about the value of the property. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Main difference between former offense of grand larceny, and offense of first-degree theft which superseded it by enactment of the Theft and White Collar Crimes Act of 1982, is that grand larceny was defined as felonious taking of property of the amount or value of \$100 or upward, whereas first-degree theft is theft of property of value of \$250 or more; definition of theft also includes conduct previously characterized as embezzlement, false pretenses, and larceny after trust. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (Repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

In first-degree theft cases, "value" means fair market value of property. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

For first-degree theft cases, proof requirements on issue of value established in series of grand larceny cases under prior law, are applicable, since value of stolen property is essential element of crime to be proved under both old statute and new one. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

Within statute creating the felony maliciously destroying property of a value of \$200 or more, the word "value" refers to the fair market value of the object or entity involved immediately before the crime occurred regardless of whether there is destruction of an entire item of property or only injury which falls short of total destruction. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

When repairable damage or destruction is caused to a portion or portions of a greater whole, the value of the property damaged or destroyed is to be measured by the reasonable cost of the repairs necessitated by the malicious conduct of the defendant charged with malicious destruction of property of the value of \$200 or more. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

When the total value of the entire item of damaged property involved in prosecution for malicious destruction of property is less than \$200 but the cost of repair would be \$200 or more, the maximum value chargeable would be determined by the overall value of the entire item of property before the damage occurred. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

In setting the overall value of the property as the maximum amount which may be charged in a prosecution for malicious destruction of property, there is a divergence from an analogous civil rule of damages which generally sets dim-

inution in value of the property involved as the maximum value. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

Verdict.

Conviction of second-degree burglary was permissible, even if inconsistent with verdict acquitting defendant on charge of destruction of property arising out of same incident. D.C. Code 1981, §§ 22-103, 22-403, 22-1801(b). *Freeman v. United States*, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

Weight and sufficiency of evidence.

Evidence was sufficient to sustain conviction for housebreaking, larceny and destroying movable property. D.C. Code 1951, §§ 22-403, 22-1801, 22-2201, 22-2202. *Braddy v. U.S.*, 225 F.2d 551, 1955 U.S. App. LEXIS 4229 (C.A.D.C. 1955).

There was sufficient evidence that juvenile acted in conscious disregard of a known and substantial risk that his actions would endanger the school's occupants, when he set fire in school, as required to support finding that juvenile had committed arson, and that the charge should be treated as a felony, as opposed to misdemeanor, destruction of property; juvenile wondered aloud what would happen if he tried to set the school on fire, he started the fire with a cigarette lighter, he continued to try to set the fire despite another juvenile's attempts to extinguish the blaze, and juvenile did not notify anyone about the fire. *In re D.M.*, 993 A.2d 535, 2010 D.C. App. LEXIS 202 (2010).

Evidence was sufficient to support trial court's finding of malice in defendants' removal of vehicle boot, which finding was a required element of offense of destruction of Department of Public Works property; notice was prominently displayed on car indicating that boot was government property and retired member of police reserve warned defendants that they were "doing wrong" by attempting to remove boot, yet despite the warnings, defendants continued to strike the boot, remove the lug nuts, jack up the car, remove the wheel with the boot jaw attached and place it in the trunk, and attempt to place a spare tire on the car. *Thomas v. United States*, 985 A.2d 409, 2009 D.C. App. LEXIS 635 (2009).

Evidence was sufficient to support trial court's finding that defendant injured or destroyed vehicle boot thereby causing damage to Department of Public Works property; disassembly of boot was a significant detriment to the device's use in traffic and parking law enforcement, and as a result of defendant's actions the arm and attached plate of boot disappeared, putting the boot out of service. *Thomas v. United States*, 985 A.2d 409, 2009 D.C. App. LEXIS 635 (2009).

Evidence was sufficient to establish identity of defendant as perpetrator of assault with a dangerous weapon and malicious destruction of property, even though defendant argued that victim did not recall giving a description of assailant as having facial hair, while defendant had a mustache, and that there were discrepancies between testimonies of victim and eyewitness; victim had ample time to observe defendant's face as they approached each other while making near-continuous eye contact and while it was daylight, victim made a positive show-up identification of defendant a few minutes later and identified him at trial, and victim's identification was corroborated by eyewitness. *Lewis v. United States*, 930 A.2d 1003, 2007 D.C. App. LEXIS 550 (2007).

Evidence was insufficient to support malicious destruction of property conviction; nothing indicated that, prior to defendant colliding with officer's bicycle, defendant had the intent to injury or destroy officer's bicycle, and even if an intent to destroy could be inferred when defendant drove off in his vehicle with officer's bicycle still attached, no evidence was introduced establishing beyond a reasonable doubt that the destruction of the bicycle occurred during after defendant's collision with bicycle rather than immediately upon impact. *Gonzalez v. United States*, 859 A.2d 1065, 2004 D.C. App. LEXIS 518 (2004).

Evidence was insufficient to support a finding beyond a reasonable doubt that defendant acted with the requisite malice when he broke or attempted to break fish tank, and thus evidence did not support conviction for malicious destruction of property; evidence merely showed that the fish tank fell and broke during defendant's fight with victim. *Guzman v. United States*, 821 A.2d 895, 2003 D.C. App. LEXIS 221 (2003).

Sufficient evidence supported conviction for malicious destruction of property, where defendant's estranged wife, co-owner of property, testified that defendant kicked door to property and caused substantial damage to it; although defendant presented different version of events, fact-finder was entitled to believe either version of how much force defendant used when opening locked door and how much damage resulted from use of that force. *Jackson v. United States*, 819 A.2d 963, 2003 D.C. App. LEXIS 146 (2003).

Defendant's possession of the recently-stolen vehicle, combined with the owner's testimony that the damage had not been present immediately prior to its theft, established that defendant had caused the damage to the vehicle, as element of destruction of property. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

The testimony of stolen vehicle's rightful owner that the vehicle was operable when sto-

len and that his insurance company "totaled" the vehicle and reimbursed him \$2,800 for the loss of the vehicle established that the vehicle's value exceeded the \$200 threshold for destruction of property valued at or greater than \$200. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Government need only present enough evidence from which jury could infer that property defendant destroyed had useful, functional purpose, to obtain conviction for destruction of property. D.C. Code 1981, § 22-403. *Macklin v. United States*, 733 A.2d 962, 1999 D.C. App. LEXIS 149 (1999).

Evidence that defendant started fire that destroyed hardwood floor was sufficient to support conviction for destruction of property. D.C. Code 1981, § 22-403. *Macklin v. United States*, 733 A.2d 962, 1999 D.C. App. LEXIS 149 (1999).

Victim's testimony about \$21,000 price she paid for five-year-old minivan when new, "good working" condition of minivan when stolen, \$1700 repair estimate revealing items of value in minivan, and new purchaser's ability to drive minivan away was sufficient to prove that minivan's value was at least \$250 at time of offense, so as to support convictions for first-degree theft, receiving stolen property, and destruction of property. D.C. Code 1981, §§ 22-403, 22-3811, 22-3812(a), 22-3832(a), (c)(1). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

Sufficient evidence existed to support convictions of defendants for misdemeanor malicious destruction of property, where car had to be towed away after defendants crashed window and destroyed headlights, and, although vehicle had been in recent collision, car's owner had driven vehicle following that accident. D.C. Code 1981, § 22-403. *Sterling v. United States*, 691 A.2d 126, 1997 D.C. App. LEXIS 38 (1997), amended by 1997 D.C. App. LEXIS 107 (D.C. May 13, 1997).

Evidence establishing defendant's proximity to scene of crime and stolen television set, his flight and attempt to hide from police, and when discovered, his statement to officer that he did not go in house but was with friend who did, supported conviction, as aider and abetter, of first-degree burglary, second-degree theft, and misdemeanor destruction of property. D.C. Code 1981, §§ 22-403, 22-1801(a), 22-3811, 22-3812. *Garrett v. United States*, 642 A.2d 1312, 1994 D.C. App. LEXIS 88 (1994).

Burglary, destruction of property, and theft convictions were supported by evidence of defendant's unauthorized presence in building where crimes occurred shortly after police responded to burglary alarm, footprints, burglary tools, damage done, and evasive actions of defendant upon seeing police. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-3811, 22-3812(b).

Wright v. United States, 637 A.2d 95, 1994 D.C. App. LEXIS 11 (1994).

Evidence supported conviction for malicious destruction of property that occurred when stolen van was driven recklessly and did not stop after hitting truck. D.C. Code 1981, § 22-403. *Simms v. United States*, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

Convictions for second-degree burglary, first-degree theft, second-degree theft, and destruction of property valued at \$200 or more, on aiding and abetting theory, were supported by evidence that police officers had seen defendant standing in front of burglarized premises near time of burglary holding stolen bird bath. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-3811, 22-3812(a, b). *Wright v. United States*, 508 A.2d 915, 1986 D.C. App. LEXIS 321 (1986).

Evidence that, in attempting to escape following unlawful entry, defendant jumped through victim's front porch screen was sufficient to sustain conviction for malicious destruction of property. D.C. Code 1981, § 22-403. *Shelton v. United States*, 505 A.2d 767, 1986 D.C. App. LEXIS 283 (1986).

Evidence from which jury could infer that destroyed property had useful, functional purpose is sufficient to support conviction for malicious destruction of property. D.C. Code § 22-403. *Jenkins v. United States*, 374 A.2d 581, 1977 D.C. App. LEXIS 324 (1977), writ of certiorari denied by 434 U.S. 894, 98 S. Ct. 274, 54 L. Ed. 2d 182, 1977 U.S. LEXIS 3594 (1977).

Evidence that broken window, which defendant removed from door, had useful and functional purpose sustained conviction for malicious destruction of property. D.C. Code § 22-403. *Jenkins v. United States*, 374 A.2d 581, 1977 D.C. App. LEXIS 324 (1977), writ of certiorari denied by 434 U.S. 894, 98 S. Ct. 274, 54 L. Ed. 2d 182, 1977 U.S. LEXIS 3594 (1977).

Testimony of liquor store's manager that repairs to the store cost \$425 was sufficient to prove that the value of the property damaged was \$200 or more and was sufficient to support conviction for malicious destruction of property of a value of \$200 or more. D.C. Code § 22-403. *Nichols v. United States*, 343 A.2d 336, 1975 D.C. App. LEXIS 230 (1975).

Defendant's convictions of first-degree burglary, grand larceny, and malicious destruction of property were not supported by sufficient evidence, where, despite the complainant's testimony that he was able to identify defendant at showup because the image of defendant's face was implanted on his mind, the complainant was unable to identify defendant at trial, where his opportunity to observe the burglars was brief, where he saw them at night under artificial light, where his nearest observation of them was when they were running and 17 feet away, and where there was a significant discrepancy in almost all respects between the

description given by complainant to the police and defendant's actual description, both physically and in respect to clothing. D.C. Code §§ 22-403, 22-1801, 22-2201. *Crawley v. United States*, 320 A.2d 309, 1974 D.C. App. LEXIS 224 (1974).

Where evidence in prosecution for destruction of window in apartment showed that apartment was rented and that defendant had merely been an overnight guest in apartment on a few occasions, defendant was properly convicted of destroying property despite his contention of lack of proof of ownership or possession of property. D.C. Code § 22-403. *Gurley v. United States*, 308 A.2d 785, 1973 D.C. App. LEXIS 340 (1973).

Evidence that defendant and his companion were the only people in hall near apartment when witness alighted from elevator after hearing suspicious noises, that door to witness' apartment had large hole in it and that defendant's companion dropped screwdriver while being followed was sufficient to support conclusion of guilt beyond reasonable doubt of attempted burglary II and destruction of property. D.C. Code §§ 22-103, 22-403, 22-1801(b). *Hopkins v. United States*, 274 A.2d 418, 1971 D.C. App. LEXIS 281 (1971).

Evidence including testimony identifying defendant as one of two men attempting to pry open window with crowbar was sufficient to sustain convictions for attempted second-degree burglary, destroying property and attempted petit larceny. D.C. Code §§ 22-103, 22-403, 22-1801(b). *Manning v. United States*, 270 A.2d 504, 1970 D.C. App. LEXIS 357 (App. 1970).

Defendant's possession of stolen television set, in alley at rear of store which was broken into and from which television set was taken, within a few minutes after the breaking of window and theft was sufficient evidence from which the trial court could infer breaking of the window as predicate for conviction for destroying property. D.C. Code § 22-403. *Green v. United States*, 251 A.2d 652, 1969 D.C. App. LEXIS 221 (App. 1969).

Evidence that fingerprints of defendant appeared on glass surface, which had once been outside surface of drugstore entrance was insufficient to sustain conviction of attempted housebreaking, destroying property, and petit larceny. D.C. Code §§ 22-103, 22-403, 22-2202. *Townsley v. United States*, 236 A.2d 63, 1967 D.C. App. LEXIS 212 (App. 1967).

§ 22-304. Malicious burning of fences, woods, crops. [Repealed].

Repealed.

(Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 822; Apr. 29, 2004, D.C. Law 15-154, § 3(c), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-404. 1973 Ed., § 22-404.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

CHAPTER 4. ASSAULT; MAYHEM; THREATS.

Sec.

- 22-401. Assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse.
- 22-402. Assault with intent to commit mayhem or with dangerous weapon.
- 22-403. Assault with intent to commit any other offense.
- 22-404. Assault or threatened assault in a menacing manner; stalking.

Sec.

- 22-404.01. Aggravated assault.
- 22-405. Assault on member of police force, campus or university special police, or fire department.
- 22-406. Mayhem or maliciously disfiguring.
- 22-407. Threats to do bodily harm.
- 22-408. [Repealed].

§ 22-401. Assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse.

Every person convicted of any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than 2 years or more than 15 years.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 803; Dec. 27, 1967, 81 Stat. 736, Pub. L. 90-226, title VI, § 601; May 23, 1995, D.C. Law 10-257, § 401(b)(2), 42 DCR 53.)

Cross references. — Additional penalty for possession of firearm, see § 22-4502.

Consent defense to sexual abuse, see § 22-3007.

Indeterminate sentences, minimum sentences, specific crimes, see § 24-403.

Minimum sentence when previously convicted of crime of violence, see § 24-403.

Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000, see § 24-403.01.

Sexually violent offense defined, see § 22-4101.

Section references. — This section is referred to in § 22-3007.

Prior Codifications. — 1981 Ed., § 22-501. 1973 Ed., § 22-501.

Legislative history of Law 10-257. — Law 10-257, the “Anti-Sexual Abuse Act of 1994,” was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

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Adequacy of representation by counsel.

If counsel had been present and had advised defendant, validly arrested on probable cause for assault with intent to commit rape, against submitting to benzidine test to determine presence of blood on penis, such advice would have been futile, since police were entitled to make such test which was one of the preparatory steps excluded from Sixth Amendment right to counsel. D.C. Code§ 22-501; U.S. Const. Amend. 6. *United States v. Smith*, 470 F.2d 377, 1972 U.S. App. LEXIS 7418 (C.A.D.C. 1972).

Decision by trial counsel, for defendant who was not identified by female eyewitness as one of the attackers, to not call witnesses who could allegedly impeach testimony of the eyewitness, did not prejudice defendant as required in order to establish ineffective assistance of counsel claim in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; defendant contended that impeaching eyewitness's account that she saw the attackers would also undermine the credibility of her testimony that the day after the assaults defendant threatened to kill her if she cooperated with police, but eyewitness was impeached for bias because her boyfriend cooperated with the prosecution and for her delay in reporting defendant's threat, jury believed eyewitness despite such impeachment, and it was unlikely that calling additional witnesses to impeach eyewitness would have swayed the jury otherwise. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Decision by trial counsel, for defendant who was not identified by female eyewitness as one of the attackers, to not call witnesses who could allegedly impeach the eyewitness, was a reasonable trial strategy and thus did not constitute deficient performance, as required in order to establish an ineffective assistance of counsel

claim in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; defendant contended that impeaching eyewitness's account that she saw the attackers would also undermine the credibility of eyewitness's testimony that the day after the assaults defendant threatened to kill her if she cooperated in police investigation, but defendant's counsel and the attorneys for the other defendants concluded after interviewing the witnesses that such witnesses would not be credible and would likely hurt the defendants more than help. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Even if counsel's performance was deficient in pressing codefendant on cross-examination on whether he had seen his client attack passerby, which resulted in testimony that client hit passerby in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, counsel's client was not prejudiced as required for an ineffective assistance claim, as counsel quickly recovered by impeaching codefendant with grand jury testimony in which codefendant did not identify client as one of the attackers, and two other government witnesses had identified client as participating in the attack on passerby. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Risk that defense counsel took during cross-examination of codefendant by pressing codefendant on whether counsel's client was present at scene of attack, which resulted in codefendant testifying that he saw client hit passerby who subsequently died from stab wounds, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, fell within the range of reasonable conduct and thus did not constitute deficient performance as required for an ineffective assistance claim; codefendant had not identified counsel's client as one of the attackers in codefendant's grand jury testimony, codefendant had not identified counsel's client as one of the attackers in his trial testimony until counsel's cross-examination, and it was not unreasonable for counsel to suspect that codefendant had not seen client attack passerby and take calculated risk in pressing codefendant. *Perez v. United States*,

968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Trial counsel's decision not to call witnesses who allegedly would have provided exculpatory testimony for his client was a reasonable strategic choice and thus did not constitute ineffective assistance, in trial of five defendants including counsel's client arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, where counsel interviewed the witnesses, proffered testimony of two witnesses who were interviewed more than once repeatedly changed with one witnesses parroting the other, proffered testimony of such two witnesses even if true would have placed defendant at the scene of the assaults, and two other witnesses, who would have allegedly impeached testimony of government witness, had provided inconsistent statements to the police, and calling such witness posed the risk of making government witness more credible. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Defense counsel's failure to call fingerprint expert, in prosecution for child sexual abuse, did not prejudice defendant, and thus could not constitute ineffective assistance; other evidence supported conviction. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Defense counsel's failure to move to suppress tangible evidence and to introduce complainant's 911 call did not prejudice defendant, in prosecution for child sexual abuse, and thus could not constitute ineffective assistance; motion, if filed, would not have been successful. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Trial court erred in denying defendant's motion for new trial without evidentiary hearing, following convictions for kidnapping while armed, armed robbery, assault with intent to commit rape while armed, and possession of firearm during crime of violence, basis of which motion was ineffective assistance of counsel, where court made credibility determination that defendant had not provided names of exculpatory witnesses without hearing testimony from anyone who had any direct knowledge regarding this disputed fact, as trial attorney never denied or admitted that defendant had provided names, investigator did not testify,

and defendant was not permitted to be present. *Arrington v. United States*, 804 A.2d 1068, 2002 D.C. App. LEXIS 483 (2002).

Counsel's failure to impeach complainant with complainant's alleged statement to defense investigator effectively acknowledging that defendant's entry into her home was consensual did not prejudice defendant, with respect to convictions for robbery and assault with intent to rape, and thus, defendant was not entitled to hearing on motion to vacate convictions which was based on counsel's alleged ineffective assistance, where complainant's account of robbery and assault offenses was consistent and essentially uncontradicted, and complainant reported assault and robbery to daughter a week or so after the fact. *U.S. Const. Amend. 6*; D.C. Code 1981, §§ 22-501, 22-2901. *Williams v. United States*, 725 A.2d 455, 1999 D.C. App. LEXIS 14 (1999).

Admissibility of evidence.

— Assault with intent to sexually abuse, admissibility of evidence.

In prosecution for assault with intent to have carnal knowledge on particular date, testimony of examination of daughter made at considerably later date held not error. *Miller v. U.S.*, 19 F.2d 702, 1927 U.S. App. LEXIS 2311 (1927).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, in view of threat made against child so that she feared reprisal, there was explanation for delay in her report of occurrence, and thus fact of complaint was admissible, but not details of occurrence, testimony being offered only to bolster credibility of complainant, and thus testimony should be limited to fact that complaint was made, without details, and jury was to be instructed that such evidence was to be considered solely for purpose of corroboration of testimony of complainant. D.C. Code 1973, §§ 22-501, 22-3501(a, b). *Fitzgerald v. United States*, 443 A.2d 1295, 1982 D.C. App. LEXIS 313 (1982).

In rape prosecution, fact of accusation by prosecutrix tends to corroborate truth of charge, and failure to make prompt complaint casts doubt upon truth of charge. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, in view of threat made against child so that she feared reprisal, there was explanation for delay in her report of occurrence, and thus fact of complaint was admissible, but not details of occurrence, testimony being offered only to bolster credibility of complainant, and thus testimony should be limited to fact that complaint was made,

without details, and jury was to be instructed that such evidence was to be considered solely for purpose of corroboration of testimony of complainant. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

— Documentary evidence, admissibility of evidence.

Audio recording of assault victim's grand jury testimony was admissible to impeach the victim, in prosecution for assault with intent to kill while armed, where prosecution confronted victim with his grand jury testimony, gave him an opportunity to explain or deny his prior inconsistent statements, and afforded defendant the opportunity to cross-examine the victim. *McConaughy v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

In prosecution for sodomy and assault with intent to commit rape, fact that the lighting revealed in several photographs of general scene of the assault differed from lighting on night in question did not render admission of photographs an abuse of discretion, in light of fact that complainant provided minutely detailed explanation of differences in lighting conditions and trial court properly cautioned jury concerning the variance. D.C. Code §§ 22-501, 22-3502. *March v. United States*, 362 A.2d 691, 1976 D.C. App. LEXIS 324 (1976).

— Evidence founded on hearsay, admissibility of evidence.

Admission of unredacted portion of out-of-court statement made by driver/defendant who drove two of the other defendants and two additional passengers who were not defendants in the trial to location where passerby was stabbed to death and another passerby assaulted, during prosecution's cross-examination of driver/defendant in order to impeach driver/defendant's trial testimony that he did not know that passengers in his car had knives, did not violate the Sixth Amendment confrontation right of passenger/defendant who claimed he was not carrying a knife, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, as the unredacted portion of the statement was used only after driver/defendant had taken the stand to testify in his own defense, and driver/defendant was available for cross-examination by passenger/defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Admission of redacted videotaped hearsay statement made by defendant who drove two of the other defendants and two additional passengers to location where passerby was stabbed to death and another passerby assaulted, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, in order to establish that the driver/defendant was a willing participant in the assaults because he knew that some his passengers, two of whom were not defendants at the trial, were armed with knives when they entered his car, did not violate the Sixth Amendment confrontation right of passenger/defendant who claimed he was not carrying a knife, as the statement as redacted did not implicate passenger/defendant, and trial court instructed jury that the statement could only constitute evidence against driver/defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Any error in admitting under the "report of rape" exception to hearsay rule the testimony of police officer concerning alleged victim's statements to him was harmless in prosecution for assault with intent to commit first-degree rape and threatening to injure a person; other evidence strongly supported alleged victim's testimony, and she remained firm in her account of what happened when tested on cross-examination. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Testimony of police officer recounting pretrial identification, by victim of assault with intent to commit armed robbery, of handgun that officer had found on day following the attempted robbery near site of defendant's apprehension, even though technically hearsay, was admissible, where there were circumstantial guarantees of trustworthiness and reliability surrounding the testimony in that both victim and police officer testified at trial and were available for cross-examination on details surrounding the pretrial identification of the gun, and where police officer's testimony merely corroborated evidence already adduced from the victim by the prosecutor. D.C. Code 1981, §§ 22-501, 22-3202. *Harley v. United States*, 471 A.2d 1013, 1984 D.C. App. LEXIS 307 (1984).

— Expert testimony, admissibility of evidence.

Probative value of doctor's testimony regarding victim's injuries and treatment to prove

intent to kill, as essential element of assault with intent to kill while armed, outweighed any prejudicial effect, where doctor used medical terminology and his testimony did not have emotional impact of bloody photograph. D.C. Code 1981, §§ 22-501, 22-3202. *Getters v. United States*, 684 A.2d 1266, 1996 D.C. App. LEXIS 226 (1996), writ of certiorari denied by 520 U.S. 1180, 117 S. Ct. 1458, 137 L. Ed. 2d 562, 1997 U.S. LEXIS 2437, 65 U.S.L.W. 3693 (1997).

— Identity of persons or things, admissibility of evidence.

Ruling, in prosecution for assault with intent to commit carnal knowledge, that two impermissible identifications of defendant by complainant did not preclude complainant from making independent in-court identification based upon her observation of attacker at time of assault, was not error where complainant was in close proximity to attacker for about 15 minutes on public street in broad daylight and in well-lighted room and where complainant gave police consistent description of attacker and had not waived in her identification at any stage of proceeding. D.C. Code § 22-501. *United States v. Terry*, 422 F.2d 704, 1970 U.S. App. LEXIS 11218 (C.A.D.C. 1970).

Assault victim's identification of defendant was reliable, though the police showed victim only two photographs and victim was told who the photographs were of, where victim had known defendant since they were 12 or 13 years old and they had grown up in the same apartment complex, on the night of the crime defendant had acknowledged victim and had mentioned to his companion that she was the sister of his friend, and victim made in-court identification without hesitation or doubt. *West v. United States*, 866 A.2d 74, 2005 D.C. App. LEXIS 9 (2005).

Evidence that assault victim had, on two prior occasions, seen defendant in possession of .32 caliber chrome-colored automatic pistol with black or brown handle was sufficiently linked to both defendant and the crimes charged to be admissible in prosecution for second-degree murder while armed and assault with intent to kill while armed, though no murder weapon was recovered and the sightings occurred as much as 11 months before the murder and assault; testimony established that bullets used to kill murder victim came from .32 caliber semi-automatic pistol, other evidence established that .32 caliber bullets and shell casings were recovered from areas where both murder victim and assault victim were shot, holster and box of .32 caliber ammunition of same make as shell casings were discovered in bedroom used mainly by defendant, and witness testified that the day after the shootings, she saw a silver gun hidden in

the basement of the house where defendant lived. *McConnaughey v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

— **Nature and source of evidence, admissibility of evidence.**

Trial court's error, in allowing jury to view defendant's car during deliberations of assault prosecution, was not harmless; since it was undisputed that a shooting originated from defendant's car, it was logical to infer that the jury was still questioning whether someone else could have actually fired the shots from the backseat, and although deadlocked before viewing the car, jury was able to reach a verdict rather quickly after the viewing. *Barron v. United States*, 818 A.2d 987, 2003 D.C. App. LEXIS 141 (2003).

Witness' testimony that she overheard someone tell defendant that he had just shot victims was at least conditionally relevant when first proffered in assault prosecution, and was improperly excluded on competency grounds due to witness' inability to identify speaker; witness' description of what speaker said was "connected up," and any defect based on lack of competency was cured, when defendant testified that he was present and identified speaker. *Ford v. United States*, 616 A.2d 1245, 1992 D.C. App. LEXIS 297 (1992).

Defendant's failure to object to trial court's failure to strike, *sua sponte*, government's allegedly self-vouching statements during its cross-examination of defendant's wife about whether law enforcement, during its investigation, had asked her whether she had any information that would help defendant rendered the issue subject to review for plain error on appeal, in prosecution for assault with intent to kill while armed, aggravated assault while armed, possession of a firearm during a crime of violence, carrying a pistol without a license, and malicious destruction of property. *Shelton v. United States*, 26 A.3d 216, 2009 D.C. App. LEXIS 752 (2011).

— **Other offenses, admissibility of evidence.**

Permitting introduction of theft conviction and attempted larceny by trick conviction as to defendant who had been convicted on some 7 prior occasions and permitting introduction of evidence of narcotics conviction as to defendant who acknowledged some 17 earlier convictions was not error in prosecution in which both defendants elected not to testify. D.C. Code § 22-501; Fed. Rules Crim. Proc. rules 30, 52(a), 18 U.S.C. *Payne v. United States*, 392 F.2d 820, 1968 U.S. App. LEXIS 7867 (C.A.D.C. 1968).

That defendant attempted to obtain a deal that would dismiss charge of assault with intent to kill while armed, for which he was represented by counsel, in exchange for aiding

police in murder investigation did not create an exception to rule that right to counsel attached upon commencement of prosecution, and thus, interrogation regarding the murder was not precluded on Sixth Amendment grounds, though defendant was charged with the murder after the interrogation, where there was no known relationship between the assault and the murder at the time of questioning. *Sweet v. United States*, 756 A.2d 366, 2000 D.C. App. LEXIS 118 (2000).

Witness's reference to prior drug dealings with defendant was admissible to show defendant's motive for committing the crimes, his intent in entering house, and his knowledge of where to find the hidden safe, in prosecution arising from double murder during a residential robbery. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

At trial for second incident of assault with intent to commit rape and second-degree burglary, evidence from trial of first incident involving similar crimes against another victim was relevant on the issues of identity and intent and was not precluded by prior ruling severing the first and second incidents for trial, since trial judge demonstrated an appropriate and continuing concern with the prejudicial impact of such evidence by circumscribing its introduction and use by way of stipulation. *Moreno v. United States*, 482 A.2d 1233, 1984 D.C. App. LEXIS 494 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1093, 53 U.S.L.W. 3599 (1985).

Partial acquittal on charges of assault with intent to commit rape and second-degree burglary arising from first incident did not preclude the admission of stipulated proffer of evidence involving such incident on issue of intent at subsequent trial on same charges involving second incident, since defendant was found to have possessed a general criminal intent respecting the first incident in view of his convictions on lesser included offenses of simple assault and unlawful entry, and no preclusive effect could be found from the prior acquittal in view of such convictions. *Moreno v. United States*, 482 A.2d 1233, 1984 D.C. App. LEXIS 494 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1093, 53 U.S.L.W. 3599 (1985).

In prosecution for felony-murder, second-degree murder, assault with intent to commit rape, and first-degree burglary, trial judge did not abuse his discretion in admitting evidence of defendant's prior conviction for assault and robbery where there were significant similarities in *modus operandi* which were probative of defendant's identity as attacker of victim,

where the testimony was probative of defendant's motive and intent, and where eight-year gap between the two incidents did not so reduce probity of the evidence that it should have been excluded. D.C. Code §§ 22-501, 22-1801(a), 22-2401, 22-2403. *Calaway v. United States*, 408 A.2d 1220, 1979 D.C. App. LEXIS 492 (1979).

— **Pre-trial identification, admissibility of evidence.**

Where defendant had been lawfully arrested for assault with intent to commit robbery while armed and was in custody or on bond, no court order was required before he could be viewed at lineup by victims of prior robbery, as long as presentment before magistrate was without undue delay and presence of counsel at lineup was assured. Fed.Rules Crim.Proc. rule 5(a), 18 U.S.C.; U.S. Const. Amend. 4. *United States v. Anderson*, 352 F. Supp. 33, 1972 U.S. Dist. LEXIS 12117 (1972), affirmed by 490 F.2d 785, 160 U.S. App. D.C. 217, 1974 U.S. App. LEXIS 10723 (1974).

One-man showup held shortly after commission of offense was not unjustified because assault victim sustained head injury, where victim was alert and sitting up in hospital bed when confronting accused shortly after attack. U.S. Const. Amend. 5; D.C. Code §§ 22-501, 22-502, 22-3202. *Washington v. United States*, 334 A.2d 185, 1975 D.C. App. LEXIS 338 (1975).

— **Relevancy.**

Admission of audio recording of assault victim's grand jury testimony to impeach the victim, with redactions only of objectionable material and prior consistent statements, was not an abuse of discretion in prosecution for assault with intent to kill while armed; playing the tape line-by-line would have been difficult technically, victim was unable to read the transcript and refused to listen to the recording, and his claim that he had been "forced" to give the grand jury testimony made the context of the prior inconsistent statements relevant. *McConnaughey v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

Trial court abused its discretion in allowing excessive evidence and argument pertaining to defendants' homosexual relationship and one defendant's effeminate characteristics; although defendant's feminine manner of walking after assault was relevant to identity and testimony that defendants lived together was relevant to issue of aiding and abetting, remainder of such evidence, which included 37 references elicited from eyewitnesses and 31 references in government's closing and rebuttal arguments, was prosecutorial overkill and plainly prejudicial. *Jones v. United States*, 625 A.2d 281, 1993 D.C. App. LEXIS 121 (1993).

— **Res gestae, admissibility of evidence.**

The fact that statements by child assault

victim were made in response to an inquiry by her mother was not decisive of the question of spontaneity, in determining admissibility of testimony with respect thereto, although that fact was entitled to consideration. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

In prosecution for assault of 6-year-old child by taxicab driver, testimony of mother that, upon meeting child a few minutes after her arrival at department store and noticing a peculiar expression on her face, the child in response to questioning told mother what had happened in the taxicab was admissible as a "spontaneous utterance." *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

In prosecution of defendant for his alleged assault with attempt to commit rape against second victim, statement by first victim immediately following her assault to the effect that a man had tried to rape her was admissible as an excited utterance; fact that trial judge at trial involving first victim had ordered the statement sanitized to exclude the word "rape" was irrelevant. *Moreno v. United States*, 482 A.2d 1233, 1984 D.C. App. LEXIS 494 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1093, 53 U.S.L.W. 3599 (1985).

Testimony of three government witnesses as to statements made by four-year-old victim were not admissible spontaneous utterances where victim was not disturbed, distraught, in shock or still in the throes of traumatic episode at time she made statements, declarations were not made within reasonably short period of time, and totality of circumstances surrounding declarations did not support finding of spontaneity and sincerity, and since hearsay statements made by victim were the only direct evidence which identified defendant as assailant, their admission was reversible error. D.C. Code 1981, § 22-501. *Alston v. United States*, 462 A.2d 1122, 1983 D.C. App. LEXIS 389 (1983).

Where, of conversations including earliest which took place next day after assault and others taking place after lapse of 10 and 12 days in response to questioning, none took place while child was still in throes of traumatic episode following sex offense, statements were hearsay and not admissible under spontaneous utterance exception for truth of attempted rape itself, but were admissible under "complaint of rape" doctrine, not for truth of matter asserted but for fact that statement was made. D.C. Code 1973, § 22-501. *Fitzgerald v. United States*, 443 A.2d 1295, 1982 D.C. App. LEXIS 313 (1982).

Declaration of complaint by sex crime victim, made shortly after commission of crime, is generally admissible either as spontaneous ut-

terance or as complaint of rape, but declaration even if admitted remains hearsay and thus only bare fact of complaint can be introduced, and only for purposes of corroboration, i.e., after report was made, and not for truth of matter asserted therein. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

If promptness of report of sex crime made by victim, and circumstance of spontaneity, tend to preclude fabrication, testimony falls under "spontaneous utterance" hearsay exception, but if declaration loses character of spontaneous utterance and becomes calm narrative of past event, it will be inadmissible under such exception, and trial judge has discretion to decide when statement about sex crime is spontaneous utterance. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In determining whether declaration loses character of spontaneous utterance and becomes calm narrative of past event, and thus inadmissible, time elapsing between crime and report is not absolutely controlling but is of great significance. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Where, of conversations including earliest which took place next day after assault and others taking place after lapse of 10 and 12 days in response to questioning, none took place while child was still in throes of traumatic episode following sex offense, statements were hearsay and not admissible under spontaneous utterance exception for truth of attempted rape itself, but were admissible under "complaint of rape" doctrine, not for truth of matter asserted but for fact that statement was made. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Arguments and conduct of counsel.

Prosecutor's argument in closing, that victim disavowed his grand jury testimony at trial because he had to sit "not very far away" from men who shot him, was not an improper comment on fear of a witness in prosecution for assault with intent to kill while armed (AWIKWA); prosecutor did not say that victim was afraid of defendants, and prosecutor presented explanation of why victim changed his story by noting that defendants were not present at grand jury and were present at trial. *Appleton v. United States*, 983 A.2d 970, 2009 D.C. App. LEXIS 595 (2009).

Prosecutor's reference to government witnesses by their first names did not mandate reversal in prosecution for assault with the

intent to commit robbery; impropriety was minimal, comments were in no way related to issue of guilt, and trial judge quickly chastised prosecutor, and there is no doubt that government presented compelling evidence of guilt to jury. *Abdus-Price v. United States*, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

Prosecutor who failed to disclose witness' photographic identification of defendant despite trial court's order to disclose all identifications to defense before testimony and who could have informed defendant of photographic identification at bench conference immediately preceding testimony of witness committed misconduct in prosecution for armed robbery, assault with intent to commit robbery while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's misconduct which consisted of failure to disclose witness' photographic identification of defendant before testimony despite trial court's order to disclose all photographic identifications to defendant, which occurred after another witness' identification of defendant's photograph, and which occurred in trial with weak defense to robbery charges and implausible explanation by defendant for possession of stolen property did not substantially prejudice defendant by swaying jury verdict in prosecution for armed robbery, assault with intent to kill and commit robbery while armed assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who called victims of robbery to testify despite knowledge that victims poorly remembered events, who wanted jury to be able to hear from victims named in indictment, who wanted to prevent adverse inference against government that could result from absence of victims' testimony, and who wanted to test witnesses' ability to contribute to truth did not call witnesses for improper motives and did not commit misconduct in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's closing argument, which urged jurors to use "knowledge of the street" to evaluate each witness' testimony and which stated that two victims for reasons of their own repeatedly testified as to inability to recall events, created ambiguity whether prosecutor intended to remind jurors to use common sense

or whether prosecutor was arguing facts not in evidence and suggesting that victims suffered false loss of memory, did not clearly demonstrate prosecutor's intent to argue worst possible meaning, and, therefore, was not misconduct in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who made incomplete missing witness argument after objection was sustained to claim that only girl friend and sister supported defendant's alibi of being at party with several other people acted improperly in prosecution for armed robbery, assault with intent to commit robbery and with intent to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Trial court did not err in refusing to give curative instruction after prosecutor suggested, in closing argument, that defendant may have carried his pistol prior to the incident in question with intent of using it to commit a crime since that statement was a proper rebuttal to defense counsel's argument that defendant had been carrying the gun to defend himself and that the government had failed to show any motive for the shooting and, in addition, court subsequently instructed jury that arguments of counsel are not evidence. D.C. Code §§ 22-501, 22-505, 22-3202, 22-3204. *Fletcher v. United States*, 335 A.2d 248, 1975 D.C. App. LEXIS 357 (1975).

Comments of prosecutor during assault trial to the effect, *inter alia*, that missing witness was too scared to come and testify, that defendants were killers and were dressed like gangsters, that one defendant was a "young buck," that guilty verdict would be a matter of achievement and courage, and that presumption of innocence might not apply as much to defendants as it might to others in less serious cases did not rise to the level of substantial prejudice necessary for reversal, in light of the strength of the Government's case and correcting instructions by the trial court. D.C. Code §§ 22-501, 22-502, 22-3202, 22-3204. *Smith v. United States*, 315 A.2d 163, 1974 D.C. App. LEXIS 371 (1974), writ of certiorari denied by 419 U.S. 896, 95 S. Ct. 174, 42 L. Ed. 2d 139, 1974 U.S. LEXIS 2930 (1974).

Conduct of judge.

In prosecution for assault with intent to kill while armed and carrying dangerous weapon, court's comment, taken in context, was not objectionable as withdrawing from jury any

issue affecting determination of guilt or innocence. 18 U.S.C. § 294(d); D.C. Code §§ 22-501, 22-3202, 22-3204. *United States v. Craven*, 458 F.2d 802, 1972 U.S. App. LEXIS 10987 (C.A.D.C. 1972).

The trial court's act of sending a tape recorder to the deliberating jury, in response to jury's note stating that jurors wanted a tape recorder so jurors could listen again to audio recording of assault victim's prior inconsistent statements during tape-recorded grand jury testimony, was not a "communication" with the jury, for purposes of defendant's right to be informed of all communications with jury. *McConaughy v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

Different offenses in same transaction.

Repeated acts of forced sexual intercourse, if committed in a single course of conduct, will not be converted into separate rapes, under Double Jeopardy Clause. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Conviction on one count of second-degree child sexual abuse while armed and three counts of first-degree child sexual abuse while armed did not violate Double Jeopardy Clause; sexual assaults took two hours, and involved various specific types of sexual activity. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Juvenile defendant's participation in incident in which pedestrian was surrounded by group of young men, punched in face and knocked unconscious, was urinated upon, and had his pockets searched as he lay on street constituted one offense of assault with intent to rob rather than two separate offenses of simple assault and assault with intent to rob, where these events occurred in rapid succession, where nature of defendant's participation remained the same during this time, and where all of the offenders in the group were acting pursuant to a plan to beat up would-be drug buyers; thus, two separate guilty verdicts based on this incident were redundant. D.C. Code 1981, §§ 22-501, 22-504. *In re T.H.B.*, 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Defendant's convictions on two of three assault counts were improper, because his alleged conduct, although directed toward three persons, only constituted single assaultive act. D.C. Code 1981, § 22-501. *Clark v. United States*, 639 A.2d 76, 1993 D.C. App. LEXIS 277 (1993).

Defendant could be convicted of two separate counts of robbery where defendant pointed pistol at two women while accomplices removed cash from cash boxes on counter of store, even though property was not taken from person of either woman, where separate acts of violence were required to prevent women from retaining

control of property for which they were responsible. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

Discovery.

Late disclosure of assault victim's statement to police that shooter had worn a mask was not prejudicial to defendant's right to impeach victim or officer to whom statement was made, where trial court allowed defense counsel to cross-examine both victim and officer outside presence of jury and determine whether he wished to recall them for re-cross-examination, and rather than recall them counsel chose to emphasize in closing argument negative implications of discrepancy between officer's testimony and victim's silence on the stand with respect to mask, as well as government's suppression of victim's prior statement. *Moore v. United States*, 846 A.2d 302, 2004 D.C. App. LEXIS 158 (2004).

Government's late disclosure of assault victim's statement to police that shooter had worn a mask did not impermissibly prejudice defendant's trial preparation, opening statement, or choice of trial strategy, where defendant already had ample incentive to search for eyewitnesses casting doubt on defendant's identity as shooter, and where knowledge of statement at issue would not likely have affected defendant's strategy of imputing bias to government's witnesses and questioning their ability to observe shooting. *Moore v. United States*, 846 A.2d 302, 2004 D.C. App. LEXIS 158 (2004).

Brady claim, arising from government's failure during pretrial discovery in aggravated armed assault prosecution to disclose victim's grand jury testimony purportedly showing that victim did not initially identify defendant with certainty and that police-sponsored showup procedure was suggestive, was effectively subsumed within ineffective assistance claim, where that grand jury testimony was apparently turned over to defense counsel at time of victim's direct examination and thus was disclosed in time for counsel to have moved for a mistrial or for suppression of victim's identification testimony. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

No due process violation occurred under Brady, in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, based on government's failure to disclose records of alleged victim's treatment for depression following charged incident, where records in question were not in government's possession at time of trial, and there was no indication that records would have been material for Brady purposes. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S.

Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Where prosecutor informally produced Jencks Act materials prior to trial without comment in prosecution for assault with intent to commit robbery, he implied that he turned over complete grand jury testimony of officer; prosecutor, by failing to explicitly reserve right to submit to the court such officer's testimony, which was not produced and in which officer referred to accused's statement that he was "con man" and had tried to "con" victim, acted unfairly by thereby preventing judicial determination of any right accused may have had to see undisclosed testimony before he took the stand. 18 U.S.C. §§ 3500, 3500(b, c); D.C. Code § 22-501. *Rosser v. United States*, 381 A.2d 598, 1977 D.C. App. LEXIS 292 (1977).

In proceeding in which accused was convicted of assault with intent to commit robbery and in which officer's grand jury testimony referring to accused's statement that he was "con man" and had tried to "con" victim was admitted to impeach accused, prosecutor's incorrect representation that accused's only statements had been oral and exculpatory, coupled with prosecutor's implied delivery of officer's complete grand jury testimony as part of informal pre-trial surrender of "Jencks material" when in fact officer's testimony in regard to the "con man" statement had not been disclosed was prejudicial error. D.C. Code § 22-501; D.C. Code SCR, Criminal Rule 16(a)(1); 18 U.S.C. §§ 3500, 3500(b, c). *Rosser v. United States*, 381 A.2d 598, 1977 D.C. App. LEXIS 292 (1977).

Where prosecutor, in responding to court's inquiry, at status hearing, as to whether accused, who was charged with assault with intent to commit robbery, had made any statements, incorrectly indicated that his only statements had been oral and exculpatory when in fact officer's grand jury testimony referred to accused's statement that he was "con man" and had tried to "con" victim, accused did not have obligation to request disclosure of accused's recorded statements, but, rather, Government had burden of correcting defense counsel's understanding that all such statements had been oral and exculpatory. D.C. Code SCR, Criminal Rules 16(a)(1), (g); D.C. Code § 22-501. *Rosser v. United States*, 381 A.2d 598, 1977 D.C. App. LEXIS 292 (1977).

Where, in prosecution for sodomy and assault with intent to commit rape, inconsistencies in identification testimony of government witnesses were trivial, were fully explored, and stood dwarfed beside positive and detailed identification testimony, detective's missing notations, which were made during initial interview of complainant and others and which assertedly would have substantiated the alleged inconsistencies, did not rise to level of

materiality contemplated by United States Supreme Court decision that suppression of evidence favorable to accused denies due process if it is material to guilt or punishment. D.C. Code §§ 22-501, 22-3502. *March v. United States*, 362 A.2d 691, 1976 D.C. App. LEXIS 324 (1976).

In proceeding in which accused was convicted of sodomy and assault with intent to commit rape and in which complainant gave positive identification of accused, failure to produce photographs, which were shown to other witnesses during initial investigation and were abandoned following unrelated apprehension of accused, did not deny due process, notwithstanding contention that photographs of person, whom such other witnesses identified as having similarity to perpetrator of offenses, may have revealed image so dissimilar to accused as to discredit such witnesses' identification testimony. D.C. Code §§ 22-501, 22-3502. *March v. United States*, 362 A.2d 691, 1976 D.C. App. LEXIS 324 (1976).

In prosecution for sodomy and assault with intent to commit rape, detective's notations, which were made during initial interviews of complainant and others and assertedly consisted of words "Negro male, 16-25 years of age. Slim build, 5'8" to 5'9". Black leather three-quarter length jacket and dark trousers," were not a "substantially verbatim recital" of a witness' statement within meaning of Jencks Act provision that term "statement" means "a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement. . . ." 18 U.S.C. § 3500(e); D.C. Code §§ 22-501, 22-3502. *March v. United States*, 362 A.2d 691, 1976 D.C. App. LEXIS 324 (1976).

Any error in trial court's decision to prevent defense counsel from arguing to jury that government's failure to disclose exculpatory evidence until eve of second trial could support inference that government, during defendant's first trial, was concerned that exculpatory evidence seriously undermined its case was harmless, in prosecution for assault with intent to kill while armed and other crimes; jury in second trial was presented with exculpatory evidence that victim had not initially identified defendant while hospitalized, jury rejected evidence as not dispositive on issue of identification, and witness, who knew defendant, saw shooting and identified defendant as shooter. *Shelton v. United States*, 26 A.3d 216, 2009 D.C. App. LEXIS 752 (2011).

Double jeopardy.

Prosecution of defendant for violation of civil protection order by assaulting his wife did not preclude subsequent prosecution for assault with intent to kill, as that offense required

proof of the specific intent to kill which simple assault did not require and the contempt of offense required proof of knowledge of the civil protection order which the assault with intent to kill offense did not require. (Per Justice Scalia with one Justice concurring and three Justices concurring in the judgment.) U.S.C. Const.Amend. 5; D.C. Code 1981, § 22-501. *U.S. v. Dixon*, 113 S.Ct. 2849, 1993 U.S. LEXIS 4405 (U.S. Dist.Col. 1993).

Defendant could not be convicted for both assault with intent to kill while armed and aggravated assault while armed, under District of Columbia statutes, consistent with Double Jeopardy Clause, even though each statute contained elements other statute did not; both statutes were part of common statutory scheme, and Congress did not intend double penalty for single assaultive act. D.C. Code 1981, §§ 22-501, 22-504.1. *United States v. McLaughlin*, 164 F.3d 1, 1998 U.S. App. LEXIS 31488 (C.A.D.C. 1998), writ of certiorari denied by 526 U.S. 1079, 119 S. Ct. 1485, 143 L. Ed. 2d 567, 1999 U.S. LEXIS 2792, 67 U.S.L.W. 3642 (1999).

Conviction under federal statute criminalizing retaliation against witnesses, victims and informants, and District of Columbia statute criminalizing assault with intent to kill while armed, did not violate Double Jeopardy Clause; retaliation provision required intent to retaliate, not present in assault with intent provision, while assault provision required proof of intent to kill and that offender was armed, not required for retaliation conviction, and there was no indication that Congress intended both provisions to apply. U.S. Const.Amend. 5; 18 U.S.C. § 1513(b); D.C. Code 1981, §§ 22-501, 22-3202. *United States v. McLaughlin*, 164 F.3d 1, 1998 U.S. App. LEXIS 31488 (C.A.D.C. 1998), writ of certiorari denied by 526 U.S. 1079, 119 S. Ct. 1485, 143 L. Ed. 2d 567, 1999 U.S. LEXIS 2792, 67 U.S.L.W. 3642 (1999).

Defendant's convictions for aggravated assault while armed (AAWA) and assault with intent to kill while armed (AWIKWA), arising from shooting of occupant of vehicle, did not merge under Blockburger test prohibiting duplicative prosecution for same offense pursuant to double jeopardy principles, where elements of proof and underlying facts were not the same for AAWA and AWIKWA. U.S. Const.Amend. 5; D.C. Code 1981, §§ 22-501, 22-504.1, 22-3202. *Nixon v. United States*, 730 A.2d 145, 1999 D.C. App. LEXIS 88 (1999), writ of certiorari denied by 528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

Double jeopardy did not bar subsequent prosecution for second-degree murder of defendant who had been acquitted of assault with intent to kill while armed arising from same incident and involving same victim, where victim had

not died at time defendant was prosecuted for assault, and jury at first trial was not presented with question of malice. D.C. Code 1981, §§ 22-501, 22-502, 22-2403, 22-3202; U.S. Const. Amend. 5. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Offenses of assault with intent to kill and malicious disfigurement are governed by separate statutes and each statutory provision requires proof of element which other does not. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Trial court's imposition of two separate and concurrent sentences for defendant's conviction of assault with intent to commit rape and conviction of assault with intent to commit sodomy did not violate double jeopardy clause, even though assaults were committed against one complainant within short period of time and in confined area, where first assault ended when attempt at forced sodomy failed and assault with intent to commit rape was result of fresh impulse. D.C. Code 1981, §§ 22-501, 22-503, 22-3502; U.S. Const. Amend. 5. *Robinson v. United States*, 501 A.2d 1273, 1985 D.C. App. LEXIS 538 (1985).

Shooting of victim following attempted robbery of victim invaded separate interest and therefore was separate offense, and thus, imposition of consecutive sentences for convictions of assault with intent to commit robbery while armed and assault with dangerous weapon was permissible under double jeopardy clause. D.C. Code 1981, §§ 22-501, 22-502, 22-3202, 23-112; U.S. Const. Amend. 5. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

Double jeopardy clause does not insulate defendant from standing trial again after he has successfully invoked statutory right of appeal to upset his first conviction, on any ground other than insufficiency of evidence to support the verdict, and criminal defendant who was successful in having his conviction set aside on grounds of trial error, though he had served sentence imposed, was not placed in double jeopardy by second trial on same indictment. U.S. Const. Amends. 5, 6; D.C. Code 1981, §§ 14-305, 22-104, 22-104(a), 22-501, 22-3202(a)(2), 22-3203(a)(2), 22-3501(a, b), 23-1322(a)(1, 2), 23-1331(3)(D), (4), 24-203(b). *Fitzgerald v. United States*, 472 A.2d 52, 1984 D.C. App. LEXIS 314 (1984).

Where counts of original indictment on which defendant was convicted failed properly to charge offense of assault with intent to commit forcible rape, right to be free of double jeopardy did not bar retrial on new indictment properly charging such offense. D.C. Code §§ 22-501, 22-2801; U.S. Const. Amend. 5. *Hutchinson v.*

United States, 339 A.2d 381, 1975 D.C. App. LEXIS 401 (1975).

Examination of witnesses.

— Competency, examination of witnesses.

Trial court, which denied a defense motion during trial to have key prosecution witness, who was a chronic alcoholic, subjected to a psychiatric examination with respect to his competency, did not abuse its discretion in refusing to treat the witness as a person of actual or potential incompetency, notwithstanding the claims of defendants, in support of their motion, that the testimony given by the witness was highly confusing and that hospital records indicated he had a clinical history which rendered him wholly unreliable. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Refusal, in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, to allow cross-examination of alleged victim concerning mental breakdown three years after charged incident that resulted in hospitalization and treatment with psychotropic medication was not abuse of discretion; such evidence was not relevant to alleged victim's perception of events at time of assault, there was no evidence she had mental illness at time of her testimony that would have affected her credibility, and she was not on any medication at time of trial. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Prosecutor who called robbery victims to testify despite victims' expressed inability to recall events was entitled to continue questioning victims in order to probe memory and test recollection in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

— Confrontation rights, examination of witnesses.

Defendant failed to sufficiently raise at assault trial, and thus waived consideration on appeal, issue of whether defendant had a confrontation right to cross-examine shooting victim as to involvement of prosecutor in one of victim's juvenile cases; defendant did not raise the issue until filing memorandum just prior to victim's testimony, and defense counsel stated that the memorandum was being filed "just for the record" and failed to respond to trial court's inquiry whether he wished to raise any issues

orally regarding issue. *McClary v. United States*, 3 A.3d 346, 2010 D.C. App. LEXIS 503 (2010), substituted opinion at 28 A.3d 502, 2010 D.C. App. LEXIS 786 (D.C. 2010), amended by 2011 D.C. App. LEXIS 506 (D.C. Aug. 18, 2011).

Defendant sufficiently raised at assault trial, and thus did not waive appellate review of issue of whether defendant had a confrontation right to cross-examine shooting victim as to victim's probationary status at time of shooting and victim's arrest subsequent to shooting; at pretrial hearing, defense counsel asked trial court to consider whether victim could be cross-examined as to his probationary status and significance of victim's recent arrest, and trial court denied defendant's request to cross-examine victim about his juvenile cases and denied defendant's motion for reconsideration. *McClary v. United States*, 3 A.3d 346, 2010 D.C. App. LEXIS 503 (2010), substituted opinion at 28 A.3d 502, 2010 D.C. App. LEXIS 786 (D.C. 2010), amended by 2011 D.C. App. LEXIS 506 (D.C. Aug. 18, 2011).

Robbery is not a lesser included offense of assault with intent to rob; robbery requires proof of a fact that is not an element of the other offense, namely, a taking of something of value from someone else's possession. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Restriction on cross-examination of alleged victim in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, barring inquiry into apparently delusional statements by alleged victim to her doctors three years after charged incident that she thought her pastor and his wife were trying to kill her, did not violate Confrontation Clause and was not abuse of discretion; accusations bore little relationship to alleged victim's willingness to lie under oath, and danger of unfair prejudice outweighed probative value. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Prosecutor's leading questions which were asked despite victims' inability to recall events, but which did not constitute only direct evidence against defendant, did not violate defendant's Sixth Amendment right to confront witnesses in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; U.S. Const. Amends. 5, 6.

Arnold v. United States, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

— Credibility and impeachment, examination of witnesses.

Where defendant took stand and admitted his presence at scene of crime, but he denied participation, and prosecutor then cross-examined him as to certain admissions he purportedly had made to police officer at receiving home for juveniles, and defendant denied making any admissions, and government on rebuttal called police officer who testified as to alleged admissions, defense objections to those parts of officer's testimony involving indispensable elements of crime charged should have been sustained. D.C. Code 1961, §§ 11-914, 22-501. *Brown v. United States*, 338 F.2d 543, 1964 U.S. App. LEXIS 4153 (C.A.D.C. 1964).

Government could impeach its own witness in prosecution for assault with intent to kill while armed with her prior inconsistent grand jury statements identifying defendant as assailant, as it had been taken by surprise by witness' recantation of her previous sworn testimony. D.C. Code 1981, §§ 22-501, 22-3202. *Price v. United States*, 545 A.2d 1219, 1988 D.C. App. LEXIS 106 (1988).

Question concerning defendant's prior armed rape conviction asked by prosecutor after defendant denied trying to rape complainant impermissibly suggested to the jury that, because defendant had been convicted of rape before, he was guilty of assault with intent to rape charge, notwithstanding the prosecutor's short pause before asking the question and trial court's cautionary instructions. D.C. Code 1981, § 22-501. *Bailey v. United States*, 447 A.2d 779, 1982 D.C. App. LEXIS 402 (1982).

— In general.

Government could cross-examine defendant charged with assault with a dangerous weapon about defendant's belief that victim was part of a continuing conspiracy against him and that it was necessary to act against victim; testimony bore on reasonableness of defendant's apprehension of need to resort to self-defense under circumstances surrounding incident. D.C. Code 1981, § 22-501. *Mathews v. United States*, 539 A.2d 1092, 1988 D.C. App. LEXIS 27 (1988).

Prosecutor who asked detective open-ended question leading to testimony as to identification made by witness that had not testified about identification and whose open-ended question led to detective's testimony in violation of court order was not sufficiently cautious and injected error into trial for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901,

22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's eight leading questions which were put to victims despite victims' inability to recall events of robbery were improper in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Indictment and information.

— Assault with intent to kill, indictment and information.

Under Code, § 803, D.C. Code 1929, T. 6, § 26, providing that every person convicted of any assault with intent to kill or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or willfully putting poison in a well, spring, or stream of water, shall be sentenced to imprisonment for not more than 15 years, an indictment for an assault with intent to kill, which charges the offense in the words of the statute, is sufficient without setting forth the means or instrument used in attempting to perpetrate the crime, unless the killing was attempted by poisoning, drowning, etc., in violation of the statute, in which event it is necessary to allege the means to bring the offense within the statutory definition. *Coratola v. U.S.*, 24 App.D.C. 229, 1904 U.S. App. LEXIS 5321 (1904).

Where a form of indictment for assault with intent to kill has been in use for 70 years, and has received frequent judicial approval, nothing short of an apparent danger that it might operate to the prejudice of the accused would justify a disturbance of the settled practice in drafting such indictments. *Davis v. U.S.*, 16 App.D.C. 442, 1900 U.S. App. LEXIS 5310 (1900).

Though the offense charged in an indictment for an assault with intent to kill, under Rev.St.D.C. §§ 1144, 1150, is not a felony, but a misdemeanor only, the fact that the indictment charges the accused with having feloniously made the assault will not vitiate the indictment. *Davis v. U.S.*, 16 App.D.C. 442, 1900 U.S. App. LEXIS 5310 (1900).

An indictment for an assault with intent to kill, under Rev.St.D.C. §§ 1144, 1150, is not bad because it fails to set forth the means or instrument with which the killing was attempted to be perpetrated; the means employed in the attempt to kill being matter of proof. *Davis v. U.S.*, 16 App.D.C. 442, 1900 U.S. App. LEXIS 5310 (1900).

An indictment, under the penitentiary act for the District of Columbia, 4 Stat. 448, for assault and battery with intent to kill, need not show

that the crime would have been murder had death ensued. *U.S. v. Tharp*, 28 F.Cas. 47, 1838 U.S. App. LEXIS 423 (1838).

An indictment under the penitentiary act for assault and battery with intent to kill need not aver it to be done feloniously, maliciously, or with malice aforethought. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

An indictment under the penitentiary act for assault and battery with intent to kill need not aver it to be done with any other evil intent than the intent to kill. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

An indictment under the penitentiary act for assault and battery with intent to kill need not aver it to be done feloniously, maliciously, or with malice aforethought. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

It is only necessary to describe the assault and battery as at common law, with the addition of the words charging the intent to kill in the terms required by the statute. It is not necessary to charge the assault to be felonious, nor malicious, nor to be with malice prepense, nor to state any other circumstance to show that, if death had ensued, it would have been murder. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

An indictment, under the penitentiary act for the District of Columbia, 4 Stat. 448, for assault and battery with intent to kill, need not show that the crime would have been murder had death ensued. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

In an indictment for assault and battery with intent to kill, it is not necessary to state the manner and extent of the assault and battery nor the particular weapon used. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

An indictment for assault with intent to kill need not state the particular weapon used. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

District of Columbia Court of Appeals retains the inherent power to alter or amend the common law. *Newby v. United States*, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

"Malice," state of mind required for murder, need not entail specific intent to cause death nor does it necessarily exist in every case in which a person acts with specific intent to kill; malice is wanton disregard for human life and the safety of others and may be found when conduct is reckless and wanton and a gross deviation from a reasonable standard of care of such nature that jury is warranted in inferring that defendant was aware of serious risk of death or serious bodily harm; malice may also exist when defendant actually intended or foresaw the death or serious bodily harm from his acts. D.C. Code 1981, § 22-501. *Logan v. United*

States, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Malice necessary for murder may be mitigated, even though defendant acts for purpose, and with the specific intent, of causing a death, when killer has been provoked or is acting in the heat of passion and may also be mitigated when excessive force is used in self-defense or in defense of another and killing is committed in the mistaken belief that one may be in mortal danger, making defendant in each of these situations guilty of voluntary manslaughter not murder. D.C. Code 1981, § 22-501; Act March 2, 1831, § 1 et seq., 4 Stat. 448. Logan v. United States, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

An indictment alleging that defendant did feloniously assault one T. with intent him feloniously to kill, sufficiently charges an assault with intent to commit a felonious homicide, under Rev.St.D.C. s 1150, punishing an assault with intent to kill by imprisonment, etc. U.S. v. Angney, 17 D.C. 66 (D.C.Sup. 1887).

— Assault with intent to sexually abuse, indictment and information.

Where assault with intent to rape committed against two women and purse snatching committed against third woman occurred within short time of each other and in approximately the same location but were not otherwise related, the mere temporal and spacial proximity could not justify characterization of the assault and robbery as different parts of the same series of acts or transactions and joinder of the robbery count with the other charges was improper and conferred upon the district court no jurisdiction over the alleged D.C. Code offense of robbery. 26 U.S.C. (I.R.C.1954) § 5861(d, i); D.C. Code §§ 22-501, 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 8, 8(b), 14, 18 U.S.C.; 18 U.S.C. § 5010(b). United States v. Jackson, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

Counts of indictment charging defendant with assaulting female persons with intent to carnally know and abuse such persons did not charge offenses under District of Columbia law where victims were females over 16 years of age. D.C. Code §§ 22-501, 22-2801. United States v. Hutchinson, 478 F.2d 997, 1973 U.S. App. LEXIS 9991 (C.A.D.C. 1973).

Where rape and robbery victims were prostitutes who were abducted or induced into getting into defendant's car in very early hours of morning, and each victim described the car, in varying degrees of particularity consistent with defendant's as a dark blue 1970 Thunderbird, and where circumstances of crime were similar but each crime was separate and distinct, joinder of counts against defendant did not work any prejudice. D.C. Code §§ 22-501, 22-2401, 22-2801, 22-2901, 22-3202, 22-3502. Bowyer v.

United States, 422 A.2d 973, 1980 D.C. App. LEXIS 385 (1980).

— Assault with intent to rob, indictment and information.

It was not necessary to allege identity of person sought to be robbed where defendant was charged with assault to commit robbery, and such information, if desired by defendant, should have been sought by motion for a bill of particulars. D.C. Code 1951, § 22-501; Fed.Rules Crim.Proc. rule 7(c, f), 18 U.S.C. Young v. U.S., 288 F.2d 398, 1961 U.S. App. LEXIS 5087 (C.A.D.C. 1961).

Trial court's omission of the word "maliciously" from its instruction on arson charge was proper, where such instruction had potential to confuse jurors, and trial court's instruction comported with the suggested definition of malice. Phenix v. United States, 909 A.2d 138, 2006 D.C. App. LEXIS 539 (2006).

Allowing defendant to plead guilty to robbery rather than assault with intent to rob was improper "constructive amendment" of indictment. Johnson v. United States, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

— In general.

Charge in indictment that offense was committed "with force and arms" was insufficient to charge that defendant had been "armed with pistol or other firearm", to bring him within purview of statute imposing additional penalty for aggravated offense. D.C. Code 1951, §§ 22-501, 22-3202. Jordan v. U.S. District Court for District of Columbia, 233 F.2d 362, 1956 U.S. App. LEXIS 3159 (C.A.D.C. 1956).

Trial court did not abuse its discretion by permitting government to change indictment before trial without resubmitting its evidence to grand jury, so as to substitute lesser included offense of assault with dangerous weapon for armed robbery and assault with intent to commit armed robbery, as indictment was narrowed, rather than broadened, where, from time they were indicted, defendants were on notice that they needed to defend against all lesser included offenses of armed robbery and of assault with intent to commit robbery. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202; U.S. Const.Amend. 5. Williams v. United States, 641 A.2d 479, 1994 D.C. App. LEXIS 68 (1994).

Instructions.

— Assault with intent to kill, instructions.

Pre-deliberation jury instruction in assault prosecution, stating that jurors should not announce a decision prior to deliberation and that jurors would make a definite contribution to efficient administration by arriving at a just

and proper verdict, did not impermissibly direct jurors to disregard their own opinions in favor of judicial efficiency and reaching a verdict; instruction merely cautioned against a juror's escalation of commitment to his or her original opinion as deliberations got underway. *McClary v. United States*, 3 A.3d 346, 2010 D.C. App. LEXIS 503 (2010), substituted opinion at 28 A.3d 502, 2010 D.C. App. LEXIS 786 (D.C. 2010), amended by 2011 D.C. App. LEXIS 506 (D.C. Aug. 18, 2011).

Trial court's jury instruction on aiding and abetting was proper in prosecution for assault with intent to kill while armed (AWIKWA); instruction did not contain "natural and probable consequences" language, and jury was instructed that to convict defendant for aiding and abetting, they had to find that he knowingly associated himself with the commission of the crime, that he participated in the crime as something he wished to bring about, and that he intended by his actions to make it succeed. *Appleton v. United States*, 983 A.2d 970, 2009 D.C. App. LEXIS 595 (2009).

Defendant charged with armed assault with intent to kill and armed mayhem was entitled to charge that jury could consider assault with dangerous weapon as lesser included offense for both of charged offenses; evidence indicated that, after victim had argued with defendant in convenience store and defendant threatened to kill him, defendant left store, and that when victim left store, defendant produced handgun and fired gun, striking victim in right hip. *Hayward v. United States*, 612 A.2d 224, 1992 D.C. App. LEXIS 221 (1992).

Instructions to jury that separate incidents involving one defendant's initial attempt to push victim out of a fifth floor window and two defendants' subsequent throwing of victim into river constituted a continuing offense were erroneous in that they permitted a conviction even if some of the jurors were convinced beyond a reasonable doubt that window incident constituted an assault with intent to kill while harboring reasonable doubts as to river incident and if remaining jurors were convinced beyond a reasonable doubt that river incident constituted an assault with intent to kill while harboring reasonable doubts as to window incident. D.C. Code SCR, Criminal Rule 31(a); D.C. Code §§ 22-501, 22-3202; U.S. Const. Amend. 6. *Johnson v. United States*, 398 A.2d 354, 1979 D.C. App. LEXIS 329 (1979).

— Assault with intent to sexually abuse, instructions.

The phrase "specific intent to have sexual intercourse" in charge on essential elements of assault with intent to commit rape was sufficiently meaningful to jury to avoid condemnation as plain error; the term without the word "specific" was clear enough, and addition of

"specific" connoted a requirement of definiteness of intention which was the essence of the matter. D.C. Code§ 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Where defendant was charged with assault on female under age of 16 with intent to commit carnal knowledge and with taking immoral, improper and indecent liberties with female under age of 16, in violation of Miller Act, court should have given requested instruction that jury should consider count based on Miller Act only if they acquitted on the other count and, although failure to so instruct did not impair verdict under Miller Act, conviction for other offense must be set aside. D.C. Code §§ 22-501, 22-3501. *Dozier v. United States*, 382 F.2d 482, 1967 U.S. App. LEXIS 5640 (C.A.D.C. 1967).

Where defendant was charged with offense of assault upon female child with intent to commit carnal knowledge, trial court properly instructed jury that if it found defendant not guilty on count as charged, jury should then consider lesser included offense of taking improper and indecent liberties with a child. D.C. Code 1951, §§ 22-501, 22-3501(a). *Younger v. U.S.*, 263 F.2d 735, 1959 U.S. App. LEXIS 5032 (C.A.D.C. 1959).

Trial court's failure to give, sua sponte, a limiting instruction to the jury on proper use of testimony by police officer that was admitted under "report of rape" hearsay exception was not plain error in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Trial court could instruct jury on armed assault with intent to rape as lesser included offense of armed rape, in that jury could rationally have found that penetration was not proven, despite unequivocal testimony of penetration by alleged victim, while at the same time finding that sexual acts were nonconsensual, given examining doctor's equivocal testimony as to whether forced sexual intercourse had occurred and forensic evidence that, although alleged victim was menstruating, no blood was found on floor, which supported reasonable doubt as to whether there had been penetration. *Bragdon v. United States*, 668 A.2d 403, 1995 D.C. App. LEXIS 239 (1995).

In future, no instruction directed specifically to credibility of any mature female victim of rape or its lesser included offenses and necessity for corroboration of her testimony shall be required or given in trial of any such case in District of Columbia court system. D.C. Code §§ 11-721(e), 22-2801, 49-301; U.S. Const. art.

3, § 3. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

— **Assault with intent to rob, instructions.**

Trial court in prosecution for assault with intent to commit robbery did not err in defining assault as an attempt or effort with force or violence to do injury to person of another, coupled with the “apparent present ability” to carry out such attempt or effort. D.C. Code § 22-501. *Anthony v. United States*, 361 A.2d 202, 1976 D.C. App. LEXIS 334 (1976).

— **In general.**

In its context and under all the circumstances of criminal case, trial judge’s statement, in course of his response to jury’s note of their inability to agree on verdict, that “You have got to reach a decision in this case” was coercive. D.C. Code 1961, §§ 22-501, 22-2901. *Jenkins v. U.S.*, 85 S.Ct. 1059, 1965 U.S. LEXIS 1484 (U.S. Dist. Col. 1965).

Viewed in context of whole charge, trial court’s statements refusing to accept note that jury was deadlocked after only two hours deliberation and that jury should resume deliberations the next day were not coercive or an improper comment upon the evidence to jury which found defendant guilty on robbery count and not guilty on count charging assault with intent to commit robbery. D.C. Code 1961, §§ 22-501, 22-2901. *Jenkins v. United States*, 330 F.2d 220, 1964 U.S. App. LEXIS 6405 (C.A.D.C. 1964), reversed by 380 U.S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957, 1965 U.S. LEXIS 1484 (1965).

Aiding and abetting instruction was warranted, in homicide and assault prosecution arising from shooting into automobile; there was sufficient evidence to convict defendant as principal or as aider and abettor, and jury could properly return general verdict against defendant without specifying whether he was principal or aider and abettor. D.C. Code 1981, §§ 22-501, 22-2401, 22-3202. *Payne v. United States*, 697 A.2d 1229, 1997 D.C. App. LEXIS 163 (1997).

Trial court did not err in instructing jury on theory of aiding and abetting where instruction explained that each participant in joint criminal venture could be held accountable as principal, even though defendant did not personally commit each act constituting armed robbery offenses. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

In prosecution for second-degree murder, attempted robbery, assault with intent to kill while armed, carrying a pistol without a license, assault with intent to kill while armed, and obstruction of justice, court’s refusal to give limiting instruction as to use jury might make of evidence of one crime in determination of the

other crimes was not error given the fact that jury was instructed on need to keep overlapping evidence of each crime charged separate in its deliberations. D.C. Code 1981, §§ 22-501, 22-703, 22-2902, 22-3202, 22-3204. *Smith v. United States*, 470 A.2d 315, 1983 D.C. App. LEXIS 550 (1983), writ of certiorari denied by 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344, 1985 U.S. LEXIS 988, 53 U.S.L.W. 3598 (1985).

In prosecution for second degree murder, attempted robbery, assault with intent to kill while armed, carrying of pistol without a license, assault with intent to kill while armed, and obstruction of justice, defendant was not denied a fair trial when court admitted evidence concerning threats he had uttered to witnesses but failed to instruct jurors that their consideration of such threats was to be limited only to its showing of defendant’s consciousness of guilt. D.C. Code 1981, §§ 22-501, 22-703, 22-2902, 22-3202, 22-3204. *Smith v. United States*, 470 A.2d 315, 1983 D.C. App. LEXIS 550 (1983), writ of certiorari denied by 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344, 1985 U.S. LEXIS 988, 53 U.S.L.W. 3598 (1985).

In view of fact that defendant’s companion could not justifiably return the fire of a security guard who was attempting to prevent a felony and who had been fired on first, defendant likewise had no right to shoot and, therefore, defendant charged with assault with intent to kill while armed was not entitled to an instruction of the defense of another based on theory that he drew his own gun and shot at security guard only after his companion fell to the ground and the security guard continued to fire. D.C. Code §§ 22-501, 22-502, 22-3202. *Taylor v. United States*, 380 A.2d 989, 1977 D.C. App. LEXIS 284 (1977).

Where evidence introduced at trial on charges of first-degree burglary while armed, murder, and assault with intent to commit rape while armed supported a multiple-offense charge, trial court did not err in requiring jury to make a separate determination of defendant’s sanity on each count for which he had been found guilty. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202. *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

— **Lesser included offenses, instructions.**

Instruction on lesser included offense of simple assault was adequate in prosecution for assault with intent to commit robbery. D.C. Code 1961, § 22-501. *Prather v. United States*, 338 F.2d 551, 1964 U.S. App. LEXIS 4048 (C.A.D.C. 1964).

Instruction on assault with dangerous weapon as lesser-included offense of assault

with intent to kill while armed was appropriate, given evidence of assault on defendant's sister-in-law in kitchen resulting on gunshot wound. D.C. Code 1981, §§ 22-501, 22-502. *Alexander v. United States*, 718 A.2d 137, 1998 D.C. App. LEXIS 184 (1998).

Defendant convicted of assault with intent to kill while armed was not entitled to instruction on alleged lesser included offense of assault with dangerous weapon where evidence did not warrant such instruction, and there was no legitimate factual dispute in evidence as to any of elements of crime charged. D.C. Code 1981, § 22-501. *White v. United States*, 451 A.2d 848, 1982 D.C. App. LEXIS 450 (1982).

In proceeding in which defendant was convicted of assault with intent to rape, evidence on issue whether there was a lack of intent to rape was insufficient to warrant an instruction on assault as a lesser included offense. D.C. Code § 22-501. *Robinson v. United States*, 388 A.2d 1210, 1978 D.C. App. LEXIS 541 (1978).

Trial judge in prosecution for assault with intent to commit robbery did not err in denying defendant's request for instructions to jury on lesser included offense of simple assault where there was no showing that evidence was such that jury might rationally acquit defendant of greater charge and convict him of lesser charge and where element of intent to commit robbery was not sufficiently in dispute. D.C. Code § 22-501. *Brown v. United States*, 349 A.2d 467, 1975 D.C. App. LEXIS 295 (1975).

Joint or separate trial of charges or parties.

In prosecution of defendants on murder and rape charges, trial court did not abuse its discretion in denying motion of defendant brothers for a severance from codefendant, who had fatally stabbed the victim, notwithstanding defendants' claim that the evidence against the codefendant was much stronger than the evidence against them. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Defendant was not entitled to severance of his trial for assault with intent to kill while armed (AWIKWA) and other offenses from codefendant's trial for the same offenses, even though codefendant, who was a member of defendant's group, raised a defense of duress based on defendant's threat to punish anyone who did not participate in a revenge venture; there was ample independent evidence of defendant's guilt, and any potential prejudice was tempered by a jury instruction that the government had to prove the guilt of each defendant beyond a reasonable doubt. *McCrae v. United States*, 980 A.2d 1082, 2009 D.C. App. LEXIS 449 (2009).

Convictions for assault with intent to kill while armed (AWIKWA) and aggravated assault while armed (AAWA), which both arose from same incident with one victim, did not merge under Blockburger test for merger based on principles of double jeopardy; each offense required proof of a fact that other one did not, in that AAWA required showing of facts that proved serious bodily injury while AWIKWA did not, and AWIKWA required proof of facts showing specific intent to kill while AAWA did not. *Tolbert v. United States*, 905 A.2d 186, 2006 D.C. App. LEXIS 435 (2006).

Joint trial of defendant for second-degree murder while armed and assault with a deadly weapon with codefendant charged with second-degree murder while armed did not cause jury to be inflamed against defendant by evidence of murder; it was undisputed that defendant cut victim on the wrist prior to his being stabbed by codefendant in the chest, and jury acquitted each of defendants for murder, convicting defendant instead of assault with deadly weapon and codefendant of assault with intent to kill while armed. D.C. Code 1981, §§ 22-501, 22-502, 22-2403, 22-3202, 23-311. *Jackson v. United States*, 650 A.2d 659, 1994 D.C. App. LEXIS 218 (1994).

Two robbery incidents prosecuted against defendant in same trial, which were proved by prosecution's use of four witnesses testifying as to first robbery and then use of nine witnesses testifying as to second robbery, which were defended by claim of misidentification as to first robbery and denial of commission of any crime as to second robbery, which prosecutor argued as distinct offenses, which led trial court to instruct jury at beginning and end of trial to view robberies as separate and distinct incidents, involved sufficiently distinct and separate evidence as to each robbery, were not confused in mind of jury to prejudice of defendant, and, therefore, did not need to be severed. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Defendant's statement that defendant would become embarrassed and confounded by having to present separate defenses to robbery charges for two separate incidents and that defendant would testify as to one case but not other, but which did not reveal content of defendant's testimony, was not convincing showing that defendant had both important testimony to give concerning one count and strong need to refrain from testifying on other robbery count and, therefore, did not establish prejudice to defendant which would justify severance of prosecutions. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In prosecution for second-degree murder, attempted robbery, assault with intent to kill while armed, carrying a pistol without a license, assault with intent to kill while armed, and obstruction of justice, court's refusal to sever charges relating to death by strangling from shooting charges was not abuse of discretion since grant of severance during trial is left to court's discretion and under particular circumstances evidence of each crime was admissible in proof of others. D.C. Code 1981, §§ 22-501, 22-703, 22-2902, 22-3202, 22-3204. *Smith v. United States*, 470 A.2d 315, 1983 D.C. App. LEXIS 550 (1983), writ of certiorari denied by 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344, 1985 U.S. LEXIS 988, 53 U.S.L.W. 3598 (1985).

In prosecutions for murder, kidnapping, etc., arising out of the so-called "Hanafi" take-overs of three buildings, the trial court did not abuse its discretion in refusing to sever that count of the indictment charging assault with a deadly weapon. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Jurisdiction.

Even if joinder of D.C. Code offense of robbery with charges of possession of unregistered firearm, possession of firearm not identified by serial number, assault with intent to commit rape while armed and assault with a dangerous weapon was proper under rule pertaining to joinder of defendants, district court divested itself of jurisdiction over the robbery count when it granted defendants' pretrial motion to sever the robbery charge in order to avoid the possibly prejudicial atmosphere of a single trial. 26 U.S.C. (I.R.C.1954)s 5861(d, i); D.C. Code §§ 22-501, 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 8, 8(b), 14, 18 U.S.C.; 18 U.S.C. § 5010(b). *United States v. Jackson*, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

Juvenile defendants and proceedings.

Juvenile defendant was required to demonstrate plain error, for purposes of reversal of guilty verdict for assault with intent to commit robbery stemming from group attack upon pedestrian, in trial court's admission of testimony relating to earlier assault that same evening on another, unknown pedestrian, where defendant failed to object to that evidence at trial. D.C. Code 1981, § 22-501. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Appropriate disposition of defendant's appeal of two delinquency adjudications, one for simple assault and one for assault with intent to commit robbery, after Court of Appeals found

that simple assault merged into assault to commit robbery, was simply to affirm unvacated portion of judgment, where defendant, tried as a juvenile, had not received separate sentence for each offense but rather a single judgment of delinquency, where period of time for which defendant had been committed to Department of Human Services had expired, and where defendant at time of appeal was 21-years old and thus no longer subject to jurisdiction of juvenile court. D.C. Code 1981, §§ 16-2303, 16-2320(c), 22-501, 22-504; Juvenile Rule 32(b). In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Juvenile court was authorized to find juvenile defendant guilty of assault with intent to rob, as lesser included offense of armed robbery for which he was charged; such a finding was not, and could not have been, dependent on defense request that "instruction" on lesser included offense be given, given absence of juries at juvenile proceedings. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202; Juvenile Rule 31(c). In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Where juvenile was adjudicated delinquent, as aider and abettor in assault with intent to rob based on his participation in group that surrounded and attacked pedestrian, sufficiency of evidence on intent element depended not on evidence of defendant's specific intent, but the intent of the principal offender, who was another member of group. D.C. Code 1981, § 22-501. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Where pedestrian was surrounded by group of young men and knocked unconscious, intent of juvenile group member to rob him could be inferred from that member's acts of putting his hands into victim's pockets at least once while victim lay unconscious on ground, removing object from victim's pocket, and placing it into his own pocket, though he did not say in so many words that he intended to rob victim. D.C. Code 1981, § 22-501. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Delinquency adjudications of juvenile defendant for assault and assault with intent to commit robbery, stemming from his participation in gang attack upon pedestrian who was knocked unconscious and whose pockets were searched as he lay unconscious, were both based solely on first count of two-count petition that charged him, first, with armed robbery and second, with armed assault with intent to kill; second charge could only have referred to shooting of victim by another gang member that occurred a brief but appreciable time after group attack, and given lack of evidence that defendant was involved in that shooting at all, and failure of trial court to mention shooting in its findings of fact, adjudication of delinquency against defendant was not based on that inci-

dent. D.C. Code 1981, §§ 22-501, 22-504, 22-2901, 22-3202. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Juvenile who participated in group that surrounded and attacked pedestrian was guilty of aiding and abetting an assault with intent to commit robbery, and not merely simple assault, though he may not himself have intended to rob victim, where defendant stood in close proximity as another group member put his hands into unconscious victim's pockets, removed item, and placed it in his own pockets, and where defendant subsequently participated in process of trying to remove victim from street, not as humane gesture but as part of his contribution to overall criminal scheme. D.C. Code 1981, §§ 22-501, 22-504. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Trial court did not err, at juvenile defendant's trial on assault and robbery charges stemming from group attack on pedestrian, by admitting testimony about group's assault on another, unknown pedestrian earlier the same evening; earlier attack occurred after gang had agreed to attack any would-be drug buyers and thus was relevant to explain the circumstances surrounding the charged offenses. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

"Attempt to commit murder" as used in statute allowing 16 and 17-year-olds so charged to be tried as adults without judicial transfer from family court to criminal division does not include "assault with intent to kill." D.C. Code 1981, §§ 16-2301(3)(A), 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

"Child" as used in the statute to determine whether individual should be tried as an adult in criminal court without judicial transfer excludes juvenile when he or she is charged with assault with intent to commit murder, but not when he or she is charged with assault with intent to kill. D.C. Code 1981, §§ 16-2301(3), (3)(A), 16-2307, 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Defendant who was charged with assault with intent to kill who was 17 years old could not be charged as an adult under statute permitting individuals aged 16 or 17 to be charged as adults for murder or attempted murder without judicial transfer. D.C. Code 1981, §§ 16-2301(3), (3)(A), 16-2307, 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Defendant did not waive his right to appeal determination of government to charge him as an adult, even though he pleaded guilty to an adult charge, where he informed trial court of his concerns about propriety of the charge before jeopardy attached, judgment was not entered, there was no attempt to deceive, and he

pled after he had been assured by prosecutor and defense counsel that any challenge based on his status as a child could be raised at a later date. D.C. Code 1981, §§ 16-2301(3)(A), 16-2302, 22-501, 22-3202. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

In delinquency proceeding, evidence that victim was shot during juvenile's robbery of another victim in same car, together with juvenile's confession, was sufficient to support finding of juvenile's involvement in offense and adjudication as delinquent. D.C. Code 1981, §§ 16-2317, 16-2319, 22-501, 22-2401, 22-2901, 22-3202. In re C.L.W., 467 A.2d 706, 1983 D.C. App. LEXIS 460 (1983).

Where trial court clearly did not intend to dispense with corroboration requirement, in prosecution for assault with intent to commit rape, taking indecent liberties with minor and enticing minor child, but pointed to victim's demonstrated maturity throughout proceedings and presence of corroboration and commented that victim was "not immature as a youngster goes," extrinsic evidence of complainant's emotional state tended to support her story and was sufficient corroboration in light of additional factors diminishing risk of accusation, e.g., no motive to fabricate, demeanor at trial, etc., but omission of corroborative instruction was nonetheless error. D.C. Code 1973, §§ 22-501, 22-3501(a, b). *Fitzgerald v. United States*, 443 A.2d 1295, 1982 D.C. App. LEXIS 313 (1982).

It remains rule that when victim of alleged "sex offense" is nonmature conviction may not be had upon uncorroborated testimony of victim, and thus government must introduce corroborative evidence to meet burden of proof and to survive defense motion for judgment of acquittal, and though corroboration is initially matter for trial court, it is jury's function to decide whether standard of corroborative proof has been met and thus case must be submitted to jury with specific instructions requiring finding of independent evidence corroborative of victim's testimony as condition precedent to guilty verdict. D.C. Code §§ 22-501, 22-2801, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Age of victim of "sex offense" remains important factor to be considered in determining sufficiency of corroborative evidence, and trial court could properly take into account child victim's maturity in assessing need for corroboration. D.C. Code §§ 22-501, 22-2801, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

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In prosecution for "sex offense" against nonmature victim, corroboration is required, as general rule as to both corpus delicti and identity of assailant. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In delinquency proceeding relating to juvenile who was accused of attempted rape and robbery, fact that trial court acted in violation of pretrial suppression order when it permitted complainant to make an in-court identification of the juvenile did not provide a basis for reversal where the identification, which occurred during the government's redirect examination of the complainant and during questioning by the court, elicited no evidence that had not already been brought out by the juvenile, whose counsel twice elicited testimony from the complainant that she was positive of her lineup identification of her assailant; under such circumstances, the juvenile was responsible for the first in-court identification and thus, could not complain about the second and third. D.C. Code §§ 22-501, 22-2901. *In re F.*, 407 A.2d 1062, 1979 D.C. App. LEXIS 466 (1979).

Where prosecution of juvenile in juvenile court proceeded before judge without jury, court did not commit reversible error when it refused to grant juvenile separate trial after hearing witness testify that juvenile's correspondent had implicated him in correspondent's statements about burglary for which juvenile was being tried. D.C. Code §§ 22-501, 22-1801, 22-2901. *In re W.*, 370 A.2d 1333, 1977 D.C. App. LEXIS 430 (1977).

Lesser included offenses, generally.

Assault with a dangerous weapon is a lesser included offense of assault with intent to commit robbery while armed, and thus defendant could not be convicted of the lesser as well as the greater offense. U.S. Const. Amend. 6; D.C. Code §§ 22-501, 22-502, 22-3202. *United States v. Alston*, 483 F.2d 1264, 1973 U.S. App. LEXIS 8807 (C.A.D.C. 1973).

Assault with dangerous weapon is lesser included offense of assault with intent to rob while armed. D.C. Code §§ 22-501, 22-502, 22-3202, 22-3204. *United States v. Chavis*, 476

F.2d 1137, 1973 U.S. App. LEXIS 10719 (C.A.D.C. 1973).

Assault is a lesser included offense under assault with intent to commit rape. D.C. Code § 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Crime of taking indecent liberties is lesser included offense of assault with intent to commit carnal knowledge. D.C. Code §§ 22-501, 22-3501(a). *Allison v. United States*, 409 F.2d 445, 1969 U.S. App. LEXIS 8900 (C.A.D.C. 1969).

Conviction of defendant of the federal offense of obstructing justice in assaulting with intent to kill a federal witness, and of District of Columbia offense of assault with intent to kill while armed, did not violate double jeopardy. *United States v. Vargas*, 39 Fed.Appx. 612, 2002 U.S. App. LEXIS 11464 (C.A.D.C. 2002), writ of certiorari denied by 537 U.S. 1038, 123 S. Ct. 573, 154 L. Ed. 2d 459, 2002 U.S. LEXIS 8611, 71 U.S.L.W. 3352 (2002).

Taking indecent liberties with minor is lesser included offense of assault with intent to commit carnal knowledge. D.C. Code 1981, § 22-501; § 22-3501(a) (repealed). *Spain v. United States*, 665 A.2d 658, 1995 D.C. App. LEXIS 199 (1995).

Double jeopardy precluded defendant's sentencing for both statutory rape and assault with intent to commit common-law rape, based on single act upon 15-year-old girl; statutory rape and common-law rape were merely different means of committing same offense, and thus assault charge, which was lesser-included offense of common-law rape, was also lesser-included offense of statutory rape. D.C. Code 1981, § 22-2801; U.S. Const. Amend. 5. *Brown v. United States*, 576 A.2d 731, 1990 D.C. App. LEXIS 147 (1990).

Because assault with intent to commit sodomy has element of force or violence not necessarily present in criminal act of sodomy, and thus does not necessarily consist entirely of some but not all of elements of conviction for sodomy, it is not necessarily lesser included offense of sodomy. D.C. Code 1981, §§ 22-501, 22-3502. *Brake v. United States*, 494 A.2d 646, 1985 D.C. App. LEXIS 405 (1985).

Where defendant was charged with entry into the dwelling of another person, with armed robbery of that person, assault with intent to commit robbery while armed as to the person's companion, and with assault with a dangerous weapon against each of two eyewitnesses to the crime, none of the crimes was a lesser included offense. D.C. Code §§ 22-501, 22-1801(a), 22-2901, 22-3202. *Brown v. United States*, 388 A.2d 451, 1978 D.C. App. LEXIS 527 (1978).

Counts of assault with a dangerous weapon were lesser included offenses of offenses of assault with attempt to commit robbery and

armed robbery and, therefore, defendant could not be convicted of the former offenses in addition to the latter. D.C. Code §§ 22-501, 22-502, 22-3202. *Quick v. United States*, 316 A.2d 875, 1974 D.C. App. LEXIS 386 (1974).

Merger of offenses.

Where charges of assault with intent to commit rape while armed and charges of assault with a dangerous weapon arose from the same act or transaction, the latter charge, requiring proof of two of the three elements constituting former offense, merged with and became a lesser offense to the charge of assault with intent to commit rape while armed, barring conviction on the lesser offense. D.C. Code §§ 22-501, 22-502, 22-3202. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Convictions for two counts of possession of firearm during crime of violence (PFCV) merged, for sentencing purposes, where only one gun was used and the incidents were not separated by time and location; the incidents occurred at an outdoor cookout, at which defendant, while armed with one gun, shot an unintended victim and shot and killed the intended victim. *West v. United States*, 866 A.2d 74, 2005 D.C. App. LEXIS 9 (2005).

Defendant's convictions for armed mayhem and assault with intent to kill while armed (AWIKWA) did not merge, even though they arose from single shooting. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Green v. United States*, 718 A.2d 1042, 1998 D.C. App. LEXIS 161 (1998), writ of certiorari denied by 526 U.S. 1011, 119 S. Ct. 1156, 143 L. Ed. 2d 222, 1999 U.S. LEXIS 1836, 67 U.S.L.W. 3560 (1999).

Convictions on mayhem while armed and assault with dangerous weapon merged into one offense. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Sterling v. United States*, 691 A.2d 126, 1997 D.C. App. LEXIS 38 (1997), amended by 1997 D.C. App. LEXIS 107 (D.C. May 13, 1997).

Assault with intent to commit carnal knowledge and lesser offense of taking indecent liberties with minor child did not merge into one crime where defendant initially pulled child's pants down and fondled her, and later, after a brief interval which gave defendant a moment to decide whether to retreat or invade another interest, attempted to have sexual intercourse with her. D.C. Code 1981, § 22-501; § 22-3501(a) (repealed). *Spain v. United States*, 665 A.2d 658, 1995 D.C. App. LEXIS 199 (1995).

Conviction for possession of firearm during crime of violence did not merge with predicate convictions for armed robbery, burglary while armed, and assault with intent to commit robbery while armed. D.C. Code 1981, § 22-3204(b). *Poole v. United States*, 630 A.2d 1109, 1993 D.C. App. LEXIS 212 (1993), writ of

certiorari denied by 513 U.S. 855, 115 S. Ct. 160, 130 L. Ed. 2d 98, 1994 U.S. LEXIS 6092, 63 U.S.L.W. 3261 (1994), writ of certiorari denied by 513 U.S. 858, 115 S. Ct. 166, 130 L. Ed. 2d 103, 1994 U.S. LEXIS 6136, 63 U.S.L.W. 3261 (1994).

Conviction for kidnapping did not merge with convictions for assault with intent to rape while armed, mayhem while armed, and assault with a deadly weapon; assault-related convictions required proof that defendant was armed, and kidnapping conviction required proof of asportation or confinement. D.C. Code 1981, §§ 22-501, 22-506, 22-2101, 22-3202. *Whitaker v. United States*, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

Assault with dangerous weapon was lesser included offense of armed robbery because all elements of assault with dangerous weapon were included in armed robbery and assault was committed to effect robbery; therefore, conviction for assault with dangerous weapon merged into conviction for armed robbery and double jeopardy clause precluded punishment for both defenses. U.S. Const. Amend. 5; D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Norris v. United States*, 585 A.2d 1372, 1991 D.C. App. LEXIS 26 (1991).

As long as assault was committed for purposes of effecting robbery, conviction for assault with dangerous weapon merges into conviction for armed robbery and absent intent to kill, degree of assault is irrelevant. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Norris v. United States*, 585 A.2d 1372, 1991 D.C. App. LEXIS 26 (1991).

Armed assault with intent to rob victim did not merge with armed robbery of assault victim's husband where victim was frightened into abandoning control of property upon sighting armed man so that assault was complete before husband appeared to assert his control over property. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

Convictions for assault with a dangerous weapon were not subject to being reversed on ground that they merged with convictions for malicious disfigurement while armed where it was clear that the jury found defendants guilty of assault with a dangerous weapon as a lesser included offense of either the assault with intent to kill while armed count or the assault with intent to commit robbery while armed count and that, by specific request, the lesser included offense charge was limited to either of those counts. D.C. Code 1973, §§ 22-401, 22-501, 22-502, 22-506, 22-3202, 22-3502. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

Doctrine of merger did not apply to charge of assault with intent to kill while armed and charge of mayhem while armed, although of-

fenses arose from single occurrence, since elements of proof of two crimes were different, statutes proscribing crimes protected different societal interests, and infliction of permanent injury, which is required for finding of mayhem, is not integral part of every assault. D.C. Code §§ 22-501, 22-506. *Bridgeford v. United States*, 411 A.2d 633, 1980 D.C. App. LEXIS 230 (1980).

In prosecution for murder, kidnapping, and assault arising out of the "Hanafi" take-overs of three buildings, the kidnapping convictions of defendants did not merge with the other offenses. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Seizure and asportation, which consisted of fact that defendant, without a weapon, had dragged victim approximately 63 paces before throwing her to ground and attempting to rape her, was an integral element of the assault with intent to rape offense, and, thus, the seizure and asportation merged into such offense and was not a separate kidnapping offense. D.C. Code §§ 22-501, 22-2101. *Robinson v. United States*, 388 A.2d 1210, 1978 D.C. App. LEXIS 541 (1978).

Assault with a dangerous weapon committed by one defendant who, while armed with shotgun, threatened and warned robbery victims to return to apartment building when victims attempted to follow robbers, was separate and distinct from assault with intent to commit robbery while armed committed immediately previous to warning not to follow by defendant and other robbers in hallway of apartment building, and thus former offense did not merge into latter. D.C. Code §§ 22-501, 22-502, 22-3202. *Heiligh v. United States*, 379 A.2d 689, 1977 D.C. App. LEXIS 252 (1977).

Nature and elements of offenses.

— Assault with intent to sexually abuse.

Statute dispensing with element of "forcibly" in cases involving rape of child under 16 years of age would be read to apply in prosecution for assault with intent to rape where victim although 27 years of age had mind of child of about 7 years old. D.C. Code §§ 22-501, 22-2801. *United States v. Medley*, 452 F.2d 1325, 1971 U.S. App. LEXIS 6916 (C.A.D.C. 1971).

Assault with intent to rape is established by use of and intent to use some physical force for purpose of achieving sexual gratification, but requires an intent to persist in such force even in face of and for purpose of overcoming victim's resistance. D.C. Code § 22-2801. *United States v. Huff*, 442 F.2d 885, 1971 U.S. App. LEXIS 11498 (C.A.D.C. 1971).

A man who handles a lady vigorously and with some force (against her will) is guilty of an indecent assault; but he does not have an intent to commit rape if his actions are taken in hope or expectation of thereby awakening desire, and with further intention of desisting if his approach does not arouse desire or lead to acquiescence, but rather encounters continued resistance. D.C. Code § 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Essential elements of offense of assault with intent to commit rape, each of which government must prove beyond reasonable doubt, are: (1) that defendant made an assault upon complainant; (2) that he did so with specific intent to have intercourse with the complainant; and (3) that he intended to achieve penetration of complainant's sexual organ against her will and by using such force or threat of force as might be necessary to overcome resistance or make further resistance useless. D.C. Code § 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Unless there is an element of intended force, an assault with intent to have sexual intercourse is not an assault with intent to commit rape. D.C. Code § 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

When a defendant intends to use the kind of "force" that is enough in his mind to test existence or persistence of complainant's true intentions, but not enough to achieve sexual intercourse if she "really" rejects him, there is no intent to commit rape. D.C. Code § 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Material elements of an assault with intent to commit rape are an assault, an intent to have carnal knowledge of a female, and a purpose to carry into effect this intent with force and against consent of the female unless intended victim is child under age of 16, in which case intent to use force need not be alleged or proved. D.C. Code § 22-501. *Allison v. United States*, 409 F.2d 445, 1969 U.S. App. LEXIS 8900 (C.A.D.C. 1969).

An assault with intent to commit carnal knowledge on a child is certainly the taking of indecent liberties with a child, but with intent of going beyond the liberties referred to in statute, and intent to commit carnal knowledge is to take indecent liberties plus an intent much more vicious, violent or aggravated. D.C. Code 1951, §§ 22-501, 22-3501(a). *Younger v. U.S.*, 263 F.2d 735, 1959 U.S. App. LEXIS 5032 (C.A.D.C. 1959).

In order to constitute offense of "assault to commit rape" not only must the assault disclose the purpose of the accused but there must be an overt act in addition to the intent. *Fountain v.*

U.S., 236 F.2d 684, 1956 U.S. App. LEXIS 2817 (C.A.D.C. 1956).

In prosecution for assault with intent to rape, it was immaterial that defendant was so unsuccessful that neither rape nor even an attempt to rape was committed. *Lynn v. U.S.*, 172 F.2d 764, 1949 U.S. App. LEXIS 2770 (C.A.D.C. 1949).

Where taxicab driver exposed a private part of his body and requested child passenger to hold it, which child did, fearing that if she refused she would not be taken to her mother as driver had been directed, offense of assault was not the less complete because it was hand of child which touched body of accused rather than the reverse. D.C. Code 1929, T. 6, § 29. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

Sex Offender Registration Act (SORA) was codified law of District of Columbia that qualified as practice, policy, or custom of District for which District could be sued directly under §§ 1983 for monetary, declaratory, or injunctive relief. *Anderson v. Holder*, 691 F.Supp.2d 57, 2010 U.S. Dist. LEXIS 19983 (2010), affirmed by 647 F.3d 1165, 396 U.S. App. D.C. 281, 2011 U.S. App. LEXIS 16856 (2011).

District of Columbia courts look to common law of Maryland for guidance when their own precedent is not dispositive. *Newby v. United States*, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

In prosecutions for assault with intent to commit rape while armed, the assault with dangerous weapon need not occur simultaneously with events from which jury could reasonably infer specific intent to rape. D.C. Code 1981, §§ 22-501, 22-3202. *Glascoe v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

Essential elements of "assault with intent to rape" are that defendant made assault upon complainant with specific intent to have sexual intercourse by force, with intent to achieve penetration of complainant's sexual organs against complainant's will and by such force or threat of force as might be necessary to overcome resistance or make further resistance useless. D.C. Code 1981, § 22-501. *Robinson v. United States*, 501 A.2d 1273, 1985 D.C. App. LEXIS 538 (1985).

— Assault with dangerous or deadly weapon, nature and elements of offenses.

Fact that statute relating to assault with a dangerous weapon is grouped with other crimes which all require particular intent does not mean that assault with a dangerous weapon, unlike simple assault, should be viewed as requiring a similar intent where the statute was silent as to any requirement of intent, although in all other offenses to which reference was made the requirement was explicit.

D.C. Code 1961, §§ 22-501 to 22-504. *Parker v. United States*, 359 F.2d 1009, 1966 U.S. App. LEXIS 6529 (C.A.D.C. 1966).

There is no statutory requirement for either robbery or assault with a dangerous weapon, that there be a specific intent to commit the other. D.C. Code 1961, §§ 22-501, 22-502, 22-1801, 22-2901, 22-3102, 22-3202. *United States v. Suggs*, 269 F. Supp. 732, 1967 U.S. Dist. LEXIS 8793 (D.D.C.1967).

Assault with a dangerous weapon requires proof that the weapon actually was used in assault while malicious disfigurement, with the punishment enhancement element of being armed, requires only proof that the accused was armed or had a dangerous weapon readily available; malicious disfigurement while armed requires proof of specific intent and permanent disfigurement while assault with a dangerous weapon does not require proof of either fact. D.C. Code 1973, §§ 22-401, 22-501, 22-502, 22-506, 22-3202, 22-3502. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

— Assault with intent to rob, nature and elements of offenses.

Elements of assault with intent to commit robbery are (1) that defendant assaulted complainant and (2) at the time of the assault, the defendant acted with specific intent to commit the offense of robbery upon the complainant. *Carter v. United States*, 957 A.2d 9, 2008 D.C. App. LEXIS 397 (2008).

District of Columbia's robbery statute was unambiguously designed to protect persons. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

Elements of assault with intent to commit robbery are that defendant assaulted complainant and that, at time of assault, defendant had specific intent to commit robbery. D.C. Code 1981, § 22-501. *Singleton v. United States*, 488 A.2d 1365, 1985 D.C. App. LEXIS 338 (1985).

Assault which comprises an essential element of offense of assault with intent to commit robbery is common-law assault. D.C. Code § 22-501. *Anthony v. United States*, 361 A.2d 202, 1976 D.C. App. LEXIS 334 (1976).

— Assault with intent to kill, nature and elements of offenses.

Assault with intent to kill while armed is a crime requiring specific intent. *United States v. Martin*, 475 F.2d 943, 1973 U.S. App. LEXIS 12008 (C.A.D.C. 1973).

Defendant's conclusory statement that he had been intoxicated did not negate his specific intent to commit the crime of assault with intent to kill while armed; defendant could not remember how much alcohol he had consumed, and there was no evidence that defendant was

incapacitated by his intoxication. *Riddick v. United States*, 806 A.2d 631, 2002 D.C. App. LEXIS 529 (2002).

Assault with intent to murder (AWIM) requires the absence of mitigating circumstances but intent may be supplied by the existence of malice, while assault with intent to kill (AWIK) requires a specific intent to kill but does not require absence of mitigating circumstances. *Thomas v. United States*, 748 A.2d 931, 2000 D.C. App. LEXIS 84 (2000), writ of certiorari denied by 534 U.S. 917, 122 S. Ct. 263, 151 L. Ed. 2d 192, 2001 U.S. LEXIS 6953, 70 U.S.L.W. 3242 (2001), writ of certiorari denied by 540 U.S. 920, 124 S. Ct. 321, 157 L. Ed. 2d 217, 2003 U.S. LEXIS 7049, 72 U.S.L.W. 3244 (2003).

If jury finds absence of mitigating circumstances element of assault with intent to murder while armed has not been proved beyond reasonable doubt, jury may not convict of assault with intent to murder while armed, and may find guilt only of lesser offense, assault with intent to kill while armed. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Evidence of provocation that will be adequate for mitigating malice requirement for assault with intent to murder while armed, and thereby reduce the degree of criminality, need not be enough to justify self-defense instruction that would justify killing altogether; evidence of provocation need only be enough to justify jury's reasonable belief that defendant was guilty of the lesser offense, as defendant's actions had been provoked by conduct that would cause ordinary reasonable person in heat of moment to lose his self-control and act on impulse and without reflection. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Theory of concurrent intent was properly used to sustain assault with intent to kill while armed (AWIKWA) conviction arising from injury of unintended victim by bullets fired at intended victim, even though defendant was convicted of AWIKWA against intended victim; evidence permitted finding concurrent intent to kill everyone in path of bullets fired at intended victim. D.C. Code 1981, §§ 22-501, 22-3202. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

Specific intent to kill, as required under statute prohibiting assault with intent to kill, exists when a person acts with the purpose or conscious intention of causing the death of another. D.C. Code 1981, § 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Person may be convicted of assault with intent to kill even though state of mind at time of the crime was not sufficient to constitute murder; person who commits an assault with

specific intent to kill but who acts with adequate provocation, justification or excuse may be charged and convicted despite the fact that, had the victim of the assault died, charge of manslaughter not murder would have been appropriate. D.C. Code 1981, §§ 22-501, 22-2405. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

New trial.

Evidence in proceeding on motion for new trial, or alternatively, dismissal of indictment, supported trial court's findings that the statements and testimony of witnesses whose statements were allegedly wrongfully withheld from the defense did not include evidence that was relevant or material or that would be helpful to the defense or tend to exculpate accused and that the disclosure to accused prior to trial of the statements would not have led to evidence that was relevant or material or that would tend to be exculpatory of murder and assault with intent to rob charges. D.C. Code §§ 22-501, 22-2401. *United States v. Bowles*, 488 F.2d 1307, 1973 U.S. App. LEXIS 7108 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 991, 94 S. Ct. 1591, 39 L. Ed. 2d 888, 1974 U.S. LEXIS 778 (1974).

In prosecution for assault with intent to kill and possession of a rifle with intent to use it unlawfully against another, where the court found the defendant not guilty by reason of insanity and it did not appear that defendant actually understood and acquiesced that the question of his guilt was being tried in that it did not appear that he understood and acquiesced in what was being accomplished without witnesses or evidence and he protested promptly a few days after the verdict, the defendant was entitled to a new trial. D.C. Code 1951, §§ 22-501, 22-3214(b), 24-301. *Rucker v. U.S.*, 280 F.2d 623, 1960 U.S. App. LEXIS 4479 (C.A.D.C. 1960).

Where newly discovered evidence designed to show that defendant may have been suffering a psychiatric condition at time of conviction of assault with intent to commit robbery, was within knowledge of defendant at time of his trial, and was not such as would probably lead to acquittal on second trial, new trial was properly denied. D.C. Code 1940, §§ 22-501, 22-2204. *Saunders v. U.S.*, 197 F.2d 685, 1952 U.S. App. LEXIS 2673 (C.A.D.C. 1952).

Any Brady violation resulting from prosecution's failure to disclose to defendant prior to trial, in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, that there was a pending neglect proceeding against government eyewitness, did not prejudice defendant, as required in order for such defendant to obtain a new trial, as witness's testimony did not incriminate such defendant.

Perez v. United States, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Evidence was sufficient to establish, at Brady violation hearing, that even if the government violated Brady, in prosecution of defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by not disclosing that eyewitness made false statements regarding her illegal immigration status when she was being considered for a witness protection program prior to trial, such violation did not prejudice defendants, as required in order for defendants to obtain a new trial; witness had been living in the country since she was nine, there was evidence that witness's status only became an issue after she had provided a statement to the police and testified before grand jury and that witness did not seek to use her statement or grand jury testimony to secure her immigration status, and other witnesses corroborated almost all of such witness's trial testimony. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Any Brady violation by the prosecution in failing to disclose to defense counsel witnesses who could allegedly impeach testimony of government eyewitness by testifying that eyewitness had drunk a large amount of alcohol and left nightclub before incident occurred, in prosecution of defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, did not prejudice defendants, as required in order for defendants to obtain a new trial, as one of such witnesses nonetheless testified during the trial, such witnesses had provided inconsistent statements to police, and testimony of the eyewitness was almost completely corroborated by other government witnesses, with the exception of eyewitness's testimony that one of the defendants threatened and assaulted her following the incident. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Prosecution's violation of Brady, in trial of defendants arising out of beating of homeless man and murder and assaults of passersby who

tried to intervene, by disclosing just before eyewitness testified the grand jury transcript of witness's testimony and information indicating that witness met with prosecution multiple times before acknowledging he had a memory of the incident, did not prejudice defendants, as required in order for defendants to obtain a new trial, as defense counsel were still able to conduct an effective cross-examination, counsel exploited many other available grounds to attack witness's credibility, prosecution on redirect brought out witness's prior statements that he had no memory, it was obvious that witness had resisted prosecution's persistent questions regarding his knowledge of the incident, and the jury was made aware through other witnesses that the government's investigation of the incident had been heavy-handed. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Trial court erred in denying defendant's motion for new trial, following convictions for kidnapping while armed, armed robbery, assault with intent to commit rape while armed, and possession of firearm during crime of violence, which motion was based on newly discovered evidence consisting of handwritten affidavit from alleged participant in crimes, who stated that defendant did not participate, where government conceded its one ground for opposing motion, that is, untimeliness, and trial court's remaining reasons for denying motion without evidentiary hearing were not asserted by government in trial court and were unpersuasive. *Arrington v. United States*, 804 A.2d 1068, 2002 D.C. App. LEXIS 483 (2002).

Defendant, who had been convicted of assault with intent to commit robbery and armed robbery, was not entitled to new trial on ground of newly discovered evidence consisting of his posttrial information that an attempt had been made on his life by the "real" robber, whom defendant and another witness could identify, and that defendant had not given his attorney the information prior to trial because of fear for his life, as defendant had been apprehended on strength of positive identifications and it was unlikely that the additional testimony, which would merely have been cumulative of defense of innocent presence, would have produced a different result. D.C. Code §§ 22-501, 22-3202. *Quick v. United States*, 316 A.2d 875, 1974 D.C. App. LEXIS 386 (1974).

Persons liable.

Juvenile may be charged with assault to commit murder under statute which provides for imprisonment of defendant convicted of as-

saulting another with intent to commit any offense not enumerated in either of two other assault statutes, and offense of assault with intent to commit murder falls within provision authorizing automatic transfer of juvenile offenders for prosecution as adults. D.C. Code 1981, §§ 16-2301(3)(A), 22-501 to 22-503. *United States v. Hobbs*, 594 A.2d 66, 1991 D.C. App. LEXIS 193 (1991).

Powers and duties of prosecutors.

When government is aware that suspect claims there are mitigating circumstances regarding his state of mind at time of homicide, prosecutor should not bring or maintain charges involving malice unless he or she has sufficient admissible evidence to persuade jury that suspect indeed acted with intent to kill and without adequate provocation, justification or excuse. D.C. Code 1981, §§ 22-501, 22-2405; Code of Prof.Resp., DR7-103(A). *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Presumptions and burden of proof.

— Assault with intent to sexually abuse.

On charge of assault with intent to commit rape, defendant's intent may be inferred from conduct. D.C. Code § 22-501. *Higgins v. United States*, 401 F.2d 396, 1968 U.S. App. LEXIS 6310 (C.A.D.C. 1968).

To make out a case of "assault with intent to commit rape", the evidence must show beyond a reasonable doubt (1) an assault, (2) an intent to have carnal knowledge of female, and (3) a purpose to carry into effect such intent with force and against consent of the female. D.C. Code 1961, § 22-501. *Baber v. United States*, 324 F.2d 390, 1963 U.S. App. LEXIS 4816 (C.A.D.C. 1963), writ of certiorari denied by 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86, 1964 U.S. LEXIS 1524 (1964).

The evidence must show beyond reasonable doubt an assault, an intent to have carnal knowledge of a female, and a purpose to carry out the intent with force and against the will of the female, to make out a case of "assault with intent to commit rape". *Robinson v. U.S.*, 136 F.2d 283, 1943 U.S. App. LEXIS 3011 (1943).

To make out a case of "assault with intent to commit rape", the evidence must show beyond a reasonable doubt an assault, and an intent to have carnal knowledge of the female and a purpose to carry into effect the intent with force and against the consent of the female. *Hammond v. U.S.*, 127 F.2d 752, 1942 U.S. App. LEXIS 3967 (1942).

Proof of force, in prosecution for assault with intent to commit rape while armed, may be unnecessary if there is evidence that the victim reasonably believed resistance would lead to death or serious bodily harm; such evidence is sufficient to prove defendant's intent to over-

come resistance by force and victim's lack of consent. D.C. Code 1981, §§ 22-501, 22-3202. *Glascow v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

— Assault with intent to kill, presumptions and burden of proof.

Under the concurrent intent doctrine, a specific intent to kill each individual may be imputed to a defendant who fires multiple shots at two or more persons at close range. *Walls v. United States*, 773 A.2d 424, 2001 D.C. App. LEXIS 120 (2001), writ of certiorari denied by 534 U.S. 1149, 122 S. Ct. 1112, 151 L. Ed. 2d 1006, 2002 U.S. LEXIS 1111, 70 U.S.L.W. 3516 (2002).

To prove crimes of first-degree premeditated murder and assault with intent to kill on an aiding and abetting theory, there must be evidence from which a reasonable jury can find that defendant was involved in criminal activity to extent that he in some sort associated himself with venture, that he participated in it as in something that he wished to bring about, that he sought by his action to make it succeed. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

To prove specific intent to kill necessary for conviction for assault with intent to kill while armed (AWIKWA), government is not required to show that accused actually wounded victim. D.C. Code 1981, §§ 22-501, 22-3202. *Nixon v. United States*, 730 A.2d 145, 1999 D.C. App. LEXIS 88 (1999), writ of certiorari denied by 528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

To convict defendant of assault with intent to murder while armed, government must prove beyond reasonable doubt that: (1) defendant assaulted complainant; (2) defendant did so with specific intent to kill complainant; (3) there were no mitigating circumstances, in cases where there is sufficient evidence of provocation; and (4) at time of commission of offense, defendant was armed. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

To convict defendant of assault with intent to murder, government must prove that defendant acted with malice. *Howard v. United*

States, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

To prove assault with intent to kill, lethal intent can be demonstrated without showing that assailant succeeded in wounding intended victim. *Bedney v. United States*, 471 A.2d 1022, 1984 D.C. App. LEXIS 320 (1984).

Questions of law and fact.

Competency of mentally retarded 18-year-old prosecutrix to testify in prosecution for assault with intent to commit rape while armed, assault with a dangerous weapon and carrying a dangerous weapon, was a threshold question of law committed to the trial court's discretion; it remained for the jury, however, to assess credibility of the witness and the weight to be given her testimony. D.C. Code §§ 22-501, 22-502, 22-3202, 22-3204. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Whether defendant, who armed himself with a pistol following discovery of theft of tape deck from his automobile, who attempted to retrieve deck when companion discovered deck in service station and who shot and seriously wounded service station attendant following argument, had acted in self-defense was for jury. D.C. Code §§ 22-501, 22-3202, 22-3204. *United States v. McCrae*, 459 F.2d 1140, 1972 U.S. App. LEXIS 11221 (C.A.D.C. 1972).

Complainant's testimony, in combination with other evidence, was sufficient to warrant submission of assault with intent to commit rape case to jury. D.C. Code § 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

In order to withstand motion for judgment of acquittal of charge of assault with intent to have carnal knowledge, evidence need not exclude every reasonable hypothesis other than intent to have intercourse. D.C. Code § 22-501. *Allison v. United States*, 409 F.2d 445, 1969 U.S. App. LEXIS 8900 (C.A.D.C. 1969).

In prosecution for assault with intent to rape, defendant was entitled to directed verdict because of lack of evidence of purpose to carry into effect the intent to commit rape with force and against consent of victim. D.C. Code 1961, § 22-501. *Baber v. United States*, 324 F.2d 390, 1963 U.S. App. LEXIS 4816 (C.A.D.C. 1963), writ of certiorari denied by 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86, 1964 U.S. LEXIS 1524 (1964).

In prosecution for assault with intent to commit rape, evidence was sufficient for jury. *Robinson v. U.S.*, 136 F.2d 283, 1943 U.S. App. LEXIS 3011 (1943).

In prosecution for assault with intent to commit rape while armed, Government did not have to negate every reasonable hypothesis other than intent to have sexual intercourse, and case could only be removed from jury when

there was no evidence upon which reasonable mind could infer guilt. D.C. Code 1981, §§ 22-501, 22-3202. *Glascoe v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

Assuming that trial court had authority to direct verdict for defendant on insanity question, evidence presented jury question as to whether defendant had been insane at time of alleged assault with intent to commit rape. D.C. Code§ 22-501. *Gilbert v. United States*, 395 A.2d 1, 1978 D.C. App. LEXIS 361 (1978).

In prosecution for assault with intent to rape, issue of consent was for the jury. D.C. Code § 22-501. *Harley v. United States*, 373 A.2d 898, 1977 D.C. App. LEXIS 320 (1977).

Question whether defendants who each had his hand in pocket with protruding bulges aimed at victim's midsection and who attempted to rob victim were guilty of assault with intent to commit robbery was for jury. D.C. Code § 22-501. *Anthony v. United States*, 361 A.2d 202, 1976 D.C. App. LEXIS 334 (1976).

Review.

— Determination and disposition, review.

Where prosecutor's improper closing and rebuttal arguments were so highly prejudicial as to require reversal of conviction of defendant who relied upon insanity as a defense and was convicted of first-degree murder and assault with intent to kill while armed, judgment of conviction of codefendant, who was charged as an aider and abettor, asserted lack of intent to commit murder, and was convicted of second-degree murder, would also be nullified. D.C. Code §§ 22-105, 22-501, 22-502, 22-2401, 22-2403, 22-3202. *United States v. Hawkins*, 480 F.2d 1151, 1973 U.S. App. LEXIS 9498 (C.A.D.C. 1973).

Facts of case in which defendant convicted of assault with intent to kill and two counts of assault with dangerous weapon received general sentence of five to fifteen years, which was maximum permitted for assault with intent to kill, but more than maximum limits in respect to other two counts of indictment, presented especially appealing case for careful and precise sentencing, and, though conviction was affirmed, sentence was vacated and case was remanded for resentencing. D.C. Code §§ 22-501, 22-502. *United States v. Straite*, 425 F.2d 594, 1970 U.S. App. LEXIS 10026 (C.A.D.C. 1970).

On record of appeal from conviction for assault with intent to kill and assault with dangerous weapon, waiver of jury trial was not shown to be involuntary, however, passive nature of role played by trial court in inquiry as to defendant's understanding was subject to criticism on appeal. Fed.Rules Crim.Proc. rules 11, 23(a), 18 U.S.C.; D.C. Code §§ 22-501, 22-502.

United States v. Straite, 425 F.2d 594, 1970 U.S. App. LEXIS 10026 (C.A.D.C. 1970).

Where conviction for assault with intent to commit rape must be reversed for failure to instruct on need for corroboration of testimony of victim on elements of offense, trial judge correctly instructed jury on elements of assault, and evidence was sufficient to sustain conviction for assault, it was in interest of justice to avoid automatic requirement of new trial because of erroneous charge, and case would be remanded to district court with instructions either to grant new trial, or if prosecutor consented and court considered it in interest of justice, to enter judgment of assault. D.C. Code § 22-501. United States v. Bryant, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Where jury was specifically prohibited from considering charge of taking indecent liberties with minor child if defendant were to be found guilty of assault with intent to commit carnal knowledge, and defendant was found guilty of the latter charge, jury's verdict of not guilty of the former charge was a nullity and did not clothe defendant with former jeopardy protection or preclude reviewing court from directing entry of judgment of guilty on indecent liberties charge upon finding evidence insufficient to sustain conviction for assault with intent to commit carnal knowledge. D.C. Code §§ 22-501, 22-3501(a); 18 U.S.C. § 2106. Allison v. United States, 409 F.2d 445, 1969 U.S. App. LEXIS 8900 (C.A.D.C. 1969).

Where evidence would not sustain conviction of assault with intent to commit carnal knowledge but was sufficient to establish all elements of taking indecent liberties with minor child, reviewing court in remanding with directions to enter judgment of guilty of taking indecent liberties would accord permission to trial judge to grant new trial if he should deem it to be in the best interest of justice. D.C. Code §§ 22-501, 22-3501(a); 18 U.S.C. § 2106.9. Allison v. United States, 409 F.2d 445, 1969 U.S. App. LEXIS 8900 (C.A.D.C. 1969).

Remand was necessary in prosecution for armed aggravated assault with intent to rob, for consideration of whether defense counsel was ineffective in failing to move for mistrial or seek suppression of victim's identification testimony upon receiving victim's grand jury testimony purportedly showing that victim did not initially identify defendant with certainty and that police-sponsored showup procedure was suggestive, where trial court had not considered suppression issue because defense strategy at trial was to present victim as aggressor and defendant as victim, rather than to challenge reliability of identification. Perry v. United States, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Reduction of convictions to assault with dangerous weapon, rather than dismissal, would be appropriate remedy for failure to prove assault with intent to commit robbery of two victims as charged in indictment, despite constructive amendment to indictment. D.C. Code 1981, §§ 22-501, 22-502, 22-3202. Long v. United States, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

— Harmless or reversible error, review.

Defendant's conviction was not required to be set aside because of admissibility of testimony as to benzidine test which showed presence of blood on penis shortly after alleged assault with intent to commit rape even if test would yield a positive response to substances other than blood, where defendant admitted at trial that there was blood on penis and attempted to attribute its presence to another source. D.C. Code § 22-501. United States v. Smith, 470 F.2d 377, 1972 U.S. App. LEXIS 7418 (C.A.D.C. 1972).

In view of concurrent sentences imposed upon convictions for assault with intent to kill while armed and assault with a dangerous weapon, the mildness of the punishment adjudged, the trial judge's recommendation for psychiatric treatment and the necessity for conserving judicial resources, the Court of Appeals would not reach question as to whether the crime of assault with dangerous weapon merged into crime of assault with intent to kill while armed with a dangerous weapon, but would vacate the convictions on the four counts which charged assault with a dangerous weapon. D.C. Code §§ 22-501, 22-502, 22-3202. United States v. Smith, 470 F.2d 377, 1972 U.S. App. LEXIS 7418 (C.A.D.C. 1972).

In prosecution for assault with intent to kill while armed and carrying dangerous weapon, in view of overwhelming direct evidence timely placing defendant at scene of crime and equivocal and unsupported nature of his own testimony concerning his whereabouts at time of offense, any emphasis by court or his counsel upon his more general defenses and any other claimed error were harmless beyond reasonable doubt. 18 U.S.C. § 294(d); D.C. Code §§ 22-501, 22-3202, 22-3204. United States v. Craven, 458 F.2d 802, 1972 U.S. App. LEXIS 10987 (C.A.D.C. 1972).

Where independent corroboration evidence was minimal rather than strong, plain error in failing to instruct jury on its responsibility to determine whether there was corroborative evidence, which it credited, of all elements of sex offense of assault with intent to commit rape was prejudicial, and required reversal. D.C. Code § 22-501. United States v. Bryant, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Failure of court to instruct on simple assault as lesser offense under court charging taking immoral, improper, and indecent liberties with female under age of 16 furnished no basis for reversal, where jury was instructed on simple assault as lesser offense under court charging assault on female under age of 16 with intent to commit carnal knowledge. D.C. Code §§ 22-501, 22-3501. *Dozier v. United States*, 382 F.2d 482, 1967 U.S. App. LEXIS 5640 (C.A.D.C. 1967).

Prosecutor's comments during rebuttal, addressing whether perpetrators had an intent to rob, did not mandate reversal in prosecution for assault with the intent to commit robbery; comments addressed what had been central issue of case, use of rhetoric was a means to point out serious logical gaps in defense's argument that there was no robbery because nothing was taken by perpetrators, jurors heard from six eyewitnesses, all of whom testified as to assault of victims by four youths, and viewing the evidence presented at trial as a whole, jury's verdict was not likely swayed by prosecutors' comments. *Abdus-Price v. United States*, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

Prosecutor's reference to witnesses who provided assistance as "two heroes" did not mandate reversal in prosecution for assault with the intent to commit robbery; when weighed against strong evidence of defendants' guilt, there was no reason to reverse because of single comment. *Abdus-Price v. United States*, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

Trial court's erroneous submission of instruction to jury on greater offense of assault with intent to commit robbery while armed was not reversible error in prosecution for assault with intent to commit robbery, where defendants were not convicted of committing the assault "while armed," lesser offense of which defendants were ultimately convicted was supported by evidence, and there was nothing in record to raise concern about a compromised verdict. *Abdus-Price v. United States*, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

Trial court's issuance of limiting instruction with regard to witness's statement to police identifying defendant as being on scene of altercation, but failing to identify defendant's specific role in altercation, rather than sua sponte admitting statement as substantive evidence, was not plain error, in prosecution for assault with the intent to commit robbery; witness's statement that she did not know what defendant "did" would not likely have contributed to creating a reasonable doubt in jury's mind that he might not have participated in robbery, when other witnesses testified without contradiction that four men, including defendant, participated in attack. *Abdus-Price v.*

United States, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

Any error in giving instruction on transferred intent, in prosecution for assault with intent to kill while armed (AWIKWA), was not plain error, though unintended victim was not killed, where unintended victim's proximity to intended victim, which proximity was known to defendant, exposed unintended victim to harm when defendant began to fire at intended victim, and such fact would have supported an instruction and finding on concurrent intent. *West v. United States*, 866 A.2d 74, 2005 D.C. App. LEXIS 9 (2005).

Erroneous admission of out-of-court videotaped admissions and plea statement of non-testifying codefendants reasonably contributed to guilty verdict for defendant on charges of murder, assault, and possession of a firearm, and thus, was not harmless; prosecution stated that jury should consider deciding conspiracy count first, because if defendant was guilty of conspiracy, then he was guilty of substantive offenses, defendant's membership in conspiracy was established by videotape and plea statements, and prosecution used statements to establish motive for defendant's commission of substantive offenses. *Williams v. United States*, 858 A.2d 978, 2004 D.C. App. LEXIS 455 (2004).

Assuming that trial court barred additional cross-examination of eyewitnesses to shooting following late disclosure of victim's statement to police that shooter had worn a mask, any error in doing so did not prejudice defendant and was harmless, where each eyewitness had known defendant for five years or more, each testified to having observed defendant's actions before and during shooting, and none was shown to have substantial motive to accuse defendant falsely, and where other evidence, including another witness' testimony that defendant admitted to shooting, was unaffected by victim's late-disclosed statement. *Moore v. United States*, 846 A.2d 302, 2004 D.C. App. LEXIS 158 (2004).

Trial court's error, in allowing jury to view defendant's car during deliberations of assault prosecution, was not harmless; since it was undisputed that a shooting originated from defendant's car, it was logical to infer that the jury was still questioning whether someone else could have actually fired the shots from the backseat, and although deadlocked before viewing the car, jury was able to reach a verdict rather quickly after the viewing. *Barron v. United States*, 818 A.2d 987, 2003 D.C. App. LEXIS 141 (2003).

Defendant was not prejudiced by constructive amendment to indictment that occurred when he entered guilty plea to robbery rather than charged offense of assault with intent to rob, and thus that constructive amendment

was not "plain error"; penalties for the two offenses were identical, defendant received maximum sentence available under either statute, and defendant's version of charged incident admitted conduct that constituted assault with intent to commit robbery as an aider or abettor. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Defendant was not substantially prejudiced, in prosecution for assault, by prosecutor's reference in rebuttal to victim's medical records and gesture by prosecutor in pointing his hand and finger at victim as if he had a gun; prosecutor was explaining intent element of assault with intent to kill while armed. D.C. Code 1981, §§ 22-501, 22-3202. *Freeman v. United States*, 689 A.2d 575, 1997 D.C. App. LEXIS 21 (1997).

Failure to explicitly address materiality of defendant's life experiences and background when supplementally instructing jury, in response to question posed by juror, on defendant's reasonable belief of the need to resort to self-defense was harmless error in prosecution for assault with a dangerous weapon. D.C. Code 1981, § 22-501. *Mathews v. United States*, 539 A.2d 1092, 1988 D.C. App. LEXIS 27 (1988).

Prosecutor's improper, incomplete missing witness argument which claimed that only defendant's sister and girl friend supported alibi defense of being at party with several other potential witnesses, which trial court ordered prosecutor to abandon, and which was made in context of strong evidence against defendant did not substantially sway jury and did not prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Error, as result of prosecutor's open-ended question leading detective to violate court order not to mention photographic identification made by witnesses who had not given identification testimony, did not prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license, where detective did not testify that witness had made identification, and defense did not rest on claim of misidentification. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's improper use of eight leading questions which were put to robbery victims who could not recall events, which asked

whether property was taken from victims and whether victims remembered identifying defendant to police, which put before jury a fact not otherwise known, which was directly relevant to main issue in case, but which asked for cumulative evidence and were not answered, did not substantially prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, reviewing court could not say that absence of corroboration instruction was not so clearly prejudicial to substantial rights as to jeopardize very fairness and integrity of trial, and, instruction being vital to case because corroborative evidence was marginal although legally sufficient, it could not be said that error was harmless. D.C. Code 1973, §§ 22-501, 22-3501(a, b). *Fitzgerald v. United States*, 443 A.2d 1295, 1982 D.C. App. LEXIS 313 (1982).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, reviewing court could not say that absence of corroboration instruction was not so clearly prejudicial to substantial rights as to jeopardize very fairness and integrity of trial, and, instruction being vital to case because corroborative evidence was marginal although legally sufficient, it could not be said that error was harmless. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b); D.C. Code SCR, SC Rules 30, 52(b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In prosecution for assault with intent to commit rape while armed and sodomy, refusal to give charge that corroboration of victim's testimony had to be found as a condition for a guilty verdict was harmless error, inasmuch as circumstances provided adequate independent evidence that accusation was not a fabrication given fact that there had been no previous relationship between victim and defendant and thus no occasion to accuse him because of friction between them; moreover, situs of offense was not consistent with ulterior motive and victim reported offenses to a neighbor, to police, and to her husband almost immediately after their occurrence. D.C. Code §§ 11-721(c), 22-501, 22-3202, 22-3502. *Williams v. United States*, 385 A.2d 760, 1978 D.C. App. LEXIS 503 (1978).

In prosecution for sodomy and assault with intent to commit rape, even if partial limitation of cross-examination was error on theory that it restricted accused's ability to impeach certain

witness' in-court identification of accused, such error was not prejudicial, in light of fact that complainant's identification of accused was positive, detailed and unimpeached. D.C. Code §§ 22-501, 22-3502. *March v. United States*, 362 A.2d 691, 1976 D.C. App. LEXIS 324 (1976).

Trial court's use of special verdict form did not confuse jury or prejudice defendant, in prosecution for first-degree burglary, murder, and assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202. *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

No prejudicial error occurred in robbery prosecution where victim, in violation of pretrial suppression order, made in-court identification of defendant, in view of fact that pretrial suppression order, as to which identification testimony was too weak, was itself improper. D.C. Code § 22-501. *Brown v. United States*, 349 A.2d 467, 1975 D.C. App. LEXIS 295 (1975).

— In general.

Even if detective's notations in regard to his initial interviews of complainant and others were within scope of Jencks Act, trial court's refusal to impose any sanctions against Government due to nonavailability of notations was not clearly erroneous in prosecution for sodomy and assault with intent to commit rape, in light of absence of bad faith on part of detective and in view of fact that it appeared that accused would have been convicted even if such notations had been available. D.C. Code §§ 22-501, 22-3502; 18 U.S.C. §§ 3500, 3500(b), (e)(1, 2). *March v. United States*, 362 A.2d 691, 1976 D.C. App. LEXIS 324 (1976).

— Plain error, review.

Prosecutor's gang references were not excessive, and did not violate court order limiting references only to show identity and membership in a conspiracy, in trial of five defendants arising out of beating of homeless man following their eviction from nightclub and murder and assaults of passersby who tried to intervene; prosecutor in opening statement referred to government witness as a gang member and stated that one of the defendants flashed a sign at another group that resulted in a fight in nightclub and defendants' eviction, investigator testified that he was assigned to a gang unit and concentrated on Hispanic gang activities, court sustained objection when prosecutor asked investigator about the informal nature of East coast gangs, and there was evidence that defendants' association with each in a gang was an integral factor in their instant conspiracy to assault homeless man and passersby after they

were evicted from nightclub. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Remarks by prosecutor, in opening statement describing stabbed passerby who intervened in beating of homeless man as a bloody corpse with his guts spilling out who died a premature and tragic death and stating that one of the kicks inflicted on passerby was so hard that second passerby did not believe anyone could survive it, and in closing argument describing the government witnesses' testimony as screaming that defendants were guilty and accusing defendants of intimidating witnesses, to which defendants did not object at trial arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, did not constitute plain error; description of passerby's injuries were supported by the evidence, remarks on witness intimidation was supported by the evidence, prosecutor was not prohibited from expressing reasonable indignation, and prosecution did not improperly vouch for government witnesses. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Error in trial court's inclusion of "natural and probable consequences" language in jury instruction on aiding and abetting was not plain error with respect to conviction for assault with intent to commit robbery while armed (AWIRWA) as aider and abettor; given evidence and jury's findings that defendant was guilty of related other offenses, there was little likelihood that jury found defendant guilty of AWIRWA without finding that he had the requisite mens rea, and, moreover, defendant was not precluded from presenting his case to jury. *Carter v. United States*, 957 A.2d 9, 2008 D.C. App. LEXIS 397 (2008).

— Presentation and reservation of grounds for review.

Issues as to whether trial court erred in permitting prosecutor to impeach defendant with cross-examination respecting prior conviction of assault and in permitting prosecutor to impeach defense witness with cross-examination respecting her chastity would not be noticed for the first time on appeal from conviction for assault with intent to commit robbery. D.C. Code §§ 22-501, 22-2901. *Green v. United*

States, 397 F.2d 643, 1968 U.S. App. LEXIS 7151 (C.A.D.C. 1968).

Driver/defendant preserved for review issue of whether admission of hearsay statement of passenger/driver that he argued with another passenger in driver/defendant's car over who would use knife to stab passerby required severance of driver/defendant's trial, in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, where driver/defendant filed a pre-trial motion to sever based on the possibility that incriminating out-of-court statements by codefendants might be admitted, and at trial driver/defendant objected that passenger/defendant's hearsay statement would incriminate him. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Conviction of assault to kill while armed, an offense not charged in indictment, did not constitute plain error; defendant was indicted for second-degree murder while armed and requested a lesser included offense instruction of simple assault, defendant's counsel accepted trial court's proposal to instruct on assault to kill while armed as tactical decision, and defendant had ample notice that he had to defend against evidence of malice aforethought. D.C. Code 1981, §§ 22-501, 22-2403, 22-3202. *Jackson v. United States*, 650 A.2d 659, 1994 D.C. App. LEXIS 218 (1994).

Defendant, who specifically objected to first two prosecution witnesses on ground that each witness could not remember anything, preserved for review issue that prosecutor should not have called both witnesses in prosecution for armed robbery, assault with intent to kill while armed, assault with dangerous weapon, assault with intent to commit robbery while armed, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Defendant's failure to raise before trial court in support of motion to sever two robbery prosecutions justified decision of Court of Appeals not to consider arguments. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Trial court's failure to give more particularized unanimity instruction was not plain error in trial for assault with intent to commit robbery and assault with intent to kill while armed, of which assault with dangerous weapon was lesser included offense, where arguments of prosecutor and defense counsel,

taken together with verdict form and jury instructions, made clear to jury that shooting related only to charge of assault with intent to kill while armed. Criminal Rule 31(a); U.S.C. Const.Amend. 6; D.C. Code 1981, §§ 22-501, 22-502, 22-3202. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

— Scope of review.

Where defendant made unsuccessful motion to acquit him of armed robbery, arguing that government had failed to prove that anything of value was taken in gang attack upon victim, entry of a verdict finding him guilty as aider and abettor of lesser included offense of assault with intent to commit robbery accomplished same result; thus, any assertion of error in denial of motion to acquit was moot. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *In re T.H.B.*, 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

In prosecution for sodomy and assault with intent to commit rape, trial court's rulings limiting inquiry into events occurring on day of accused's apprehension were not improper on theory that they restricted his impeachment of certain witness' in-court identification of accused, in light of fact that the limitations were imposed in response to accused's own pretrial motions, that accused was given reasonable opportunity to test witness' in-court identifications and that there was a sufficient inquiry into the matter to provide trier with satisfactory basis for evaluating the truth. D.C. Code §§ 22-501, 22-3502. *March v. United States*, 362 A.2d 691, 1976 D.C. App. LEXIS 324 (1976).

Sanity determinations.

Where pretrial examination had resulted in certification by hospital staff of competency and superior court judge after hearing had reached like result, district judge was not required to direct, sua sponte, further hearing on competency in prosecution for assault with intent to commit rape, and for robbery. D.C. Code §§ 22-501, 22-2801, 22-2901. *United States v. Tremble*, 470 F.2d 1272, 1972 U.S. App. LEXIS 6814 (C.A.D.C. 1972).

After court finds in *Jackson* hearing that defendant is unlikely to become competent in foreseeable future, government must institute civil commitment proceeding, if one is desired, within 30 days, and, while the rule is not inviolable, extension should normally be granted only for extraordinary cause shown. D.C. Code §§ 21-521, 21-523 to 21-525, 21-541, 21-541(a), 21-542 to 21-545, 22-501, 22-507, 22-2307, 24-301(a); U.S. Const. Amend. 14.

Thomas v. United States, 418 A.2d 122, 1980 D.C. App. LEXIS 333 (1980).

Even though defendant under continuing adjudication of insanity at time of offense charged, prosecution does not have burden of proving sanity by preponderance of evidence and most that defendant can hope for would be an instruction that continuing adjudication of insanity is enough to carry defendant's burden to prove insanity, absent government rebuttal, and, if Government presents rebuttal evidence, defendant is entitled to instruction that he has burden of proving insanity by preponderance of evidence and that continuing adjudication of insanity is sufficient for the purpose unless government evidence suffices to raise enough doubt that defendant fails to carry that burden. D.C. Code § 22-501. Gilbert v. United States, 395 A.2d 1, 1978 D.C. App. LEXIS 361 (1978).

Self-defense.

In prosecution for assault with intent to kill, court properly restricted prior bad acts evidence that victim shot his wife and burned down his mother's house to defendant's testimony about his knowledge of alleged events and how they shaped his fears that evening; two prior acts proffered occurred some 13 and 11 years earlier, defense counsel could proffer no further acts of violence by victim in succeeding years, victim was found not guilty of arson, and shooting incident was not prosecuted. Harris v. United States, 618 A.2d 140, 1992 D.C. App. LEXIS 316 (1992).

In prosecution for assault with intent to kill and assault with a dangerous weapon, defendant had no legitimate claim to defense of self-defense, where he voluntarily placed himself in a position which he could reasonably expect would result in violence. D.C. Code §§ 22-501, 22-502. Nowlin v. United States, 382 A.2d 9, 1978 D.C. App. LEXIS 404 (1978).

Sentence and punishment.

Whoever assaults a female child under 16 years of age, with intent carnally to know and abuse her, is guilty of an attempt to commit rape, and is hence punishable under section 803, Code of Law 1901 (D.C. Code 1929, T. 6, § 26), providing "that every person convicted of any assault with intent. .. to commit rape. .. shall be sentenced to imprisonment for not more than 15 years." Sanselo v. U.S., 44 App.D.C. 508, 1916 U.S. App. LEXIS 2637 (1916).

Denial of defense request, in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, for a continuance of sentencing to allow time for defense to try to secure records of alleged victim's mental health treatment for depression following charged incident was not prejudicial; defendant could go forward with sentencing

and still move for a new trial if he ascertained anything helpful from any records located thereafter. Velasquez v. United States, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Sentences of six and two-thirds to 20 years' imprisonment for each of defendant's two convictions as accessory after the fact to assault with intent to kill while armed were permissible; maximum penalty for underlying crime was life imprisonment, and defendant's maximum potential sentence on each count of 20 years' imprisonment was less than 45-year term which has been imposed in other cases in which life imprisonment was possible, and thus was necessarily less than half of maximum sentence to which principal may be sentenced. D.C. Code 1981, §§ 22-106, 22-501, 22-3202. Heard v. United States, 686 A.2d 1026, 1996 D.C. App. LEXIS 274 (1996).

Even if sentencing judge had intended to impose sentence of 5 to 15 months on defendant convicted on three counts of assault with intent to kill while armed, as stated in oral pronouncement of sentence, he would have been required to correct sentence, as mandatory minimum sentence for offense was imprisonment for five years. D.C. Code 1981, §§ 22-501, 22-3202; Criminal Rule 35. Gray v. United States, 585 A.2d 164, 1991 D.C. App. LEXIS 12 (1991).

Rape and carnal knowledge were, for the purpose of sentencing, synonymous and, hence, defendant was properly sentenced to five to fifteen years for assault with intent to commit carnal knowledge. D.C. Code 1981, § 22-501. Scutchings v. United States, 570 A.2d 1197, 1990 D.C. App. LEXIS 46 (1990).

Statute imposing increased penalty for conviction of assault with intent to commit robbery does not require that person assaulted and intended robbery victim be the same. D.C. Code 1981, § 22-501. Moore v. United States, 508 A.2d 924, 1986 D.C. App. LEXIS 319 (1986).

Speedy trial.

Defendant did not show a violation of his Sixth Amendment right to a speedy trial for assault with intent to kill while armed (AWIKWA) and other offenses; delay between defendant's arrest and trial was a little over six months, the delay resulted in large part from two requests by the government for additional time to complete its investigation, defense counsel said at a hearing on the date of the government's request for a second extension that he was satisfied with the government's representations that it needed additional time to complete its investigation, and defendant failed to explain exactly how his defense was allegedly hampered by the delay. Ferguson v.

United States, 977 A.2d 993, 2009 D.C. App. LEXIS 341 (2009).

Verdict.

Trial court which individually polled jurors as to whether they agreed with announced guilty verdict as to last eight counts was not required to individually poll each juror with respect to agreement to each count and did not abuse discretion in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Weight and sufficiency of evidence—Identity of persons or things.

Evidence, including evidence of defendant's in-trial identification and testimonial references to pretrial forerunners, sustained conviction for robbery and assault with dangerous weapon. D.C. Code §§ 22-501, 22-2901. *United States v. McNair*, 433 F.2d 1132, 1970 U.S. App. LEXIS 9919 (C.A.D.C. 1970).

Identification testimony of victim and chief prosecution witness was sufficient to sustain conviction of assault with intent to kill and convictions of assault with a deadly weapon. D.C. Code §§ 22-501, 22-502. *Allen v. United States*, 420 F.2d 223, 1969 U.S. App. LEXIS 9997 (C.A.D.C. 1969).

Victim's identification testimony was corroborated, in prosecution for assault with intent to rob while armed, by medical evidence that pellets from shotgun had entered defendant's hand from the back instead of the palm in a manner consistent with victim's version of events, and by defendant's evasive police interview when questioned at hospital where he was being treated. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

While evidence that assault victim had, on two prior occasions, seen defendant in possession of .32 caliber chrome-colored automatic pistol with black or brown handle established only a reasonable probability, and not a certainty, that defendant had possessed the weapon used in the murder and assault, such lack of certainty went only to the weight of the evidence, not its admissibility, in prosecution for second-degree murder while armed and assault with intent to kill while armed. *McConnaughey v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

Identification evidence was sufficient to support defendants' convictions for assault with dangerous weapon and mayhem while armed, where several witnesses positively identified defendants as assailants who beat victim. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Sterling v. United States*, 691 A.2d 126, 1997 D.C.

App. LEXIS 38 (1997), amended by 1997 D.C. App. LEXIS 107 (D.C. May 13, 1997).

—Age or mental capacity of sexual assault victim, weight and sufficiency of evidence.

Generally, sexual assault charges by mentally abnormal girl should be subjected to great scrutiny. D.C. Code §§ 22-501, 22-2801, 22-3202. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Evidence in prosecution for assault with intent to rape 27-year-old female who had mentality of 7-year-old child and who did not testify was insufficient to sustain conviction on such charge but did sustain conviction for assault. *United States v. Medley*, 452 F.2d 1325, 1971 U.S. App. LEXIS 6916 (C.A.D.C. 1971).

Independent evidence of the prosecutrix that defendant had pulled at her pants coupled with defendant's confession that he had taken indecent liberties with the prosecutrix was sufficient to establish the corpus delicti as to taking indecent liberties with a child, but was insufficient to support conviction for assault to commit rape. *Fountain v. U.S.*, 236 F.2d 684, 1956 U.S. App. LEXIS 2817 (C.A.D.C. 1956).

In prosecution for having carnal knowledge of girl under sixteen years old, girl's testimony that defendant had carnal knowledge of her on date alleged in indictment meant also that he assaulted her on such date with intent to commit carnal knowledge, so as to support conviction of such assault, though she also testified as to assault on her by defendant with such intent on following day, on which prosecutor did not contend that any crime punishable under indictment occurred, as carnal knowledge of child includes assault with intent to commit such knowledge. *Miller v. U.S.*, 207 F.2d 33, 1953 U.S. App. LEXIS 2824 (C.A.D.C. 1953).

In prosecution for rape and assault with intent to rape, facts in each case were sufficient to establish guilt beyond a reasonable doubt. *Crisafi v. United States*, 383 A.2d 1, 1978 D.C. App. LEXIS 418 (1978), writ of certiorari denied by 439 U.S. 931, 99 S. Ct. 322, 58 L. Ed. 2d 326, 1978 U.S. LEXIS 3614 (1978).

Medical evidence of sexual intercourse was not required to sustain conviction of attempted carnal knowledge of female child under 16 years of age. D.C. Code §§ 22-103, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

—Assault with intent to kill, weight and sufficiency of evidence.

Evidence supported finding that defendant assaulted federal officer with intent to commit murder and intent to kill; defendant told his companion that defendant was not going to allow officer to take away defendant's car keys, defendant hit officer over head with board de-

fendant grabbed while pretending to reach for his keys, and defendant struck enough forceful blows to split open officer's skull, shatter his eye socket, knock out three of his teeth, and break his jaw. 18 U.S.C. §§ 113(a), 114. *United States v. Salamanca*, 990 F.2d 629, 1993 U.S. App. LEXIS 7483 (C.A.D.C. 1993), writ of certiorari denied by 510 U.S. 928, 114 S. Ct. 337, 126 L. Ed. 2d 281, 1993 U.S. LEXIS 6549, 62 U.S.L.W. 3274 (1993).

Evidence was sufficient to establish requisite intent to support conviction of assault with intent to kill of defendant, who shot victim from a distance of six feet. D.C. Code § 22-3202. *United States v. Robertson*, 507 F.2d 1148, 1974 U.S. App. LEXIS 6413 (C.A.D.C. 1974).

Evidence was sufficient to support convictions of assault with intent to kill while armed. D.C. Code §§ 22-501, 22-3202. *United States v. Hill*, 470 F.2d 361, 1972 U.S. App. LEXIS 8107 (C.A.D.C. 1972).

Testimony that defendant carried gun while walking over to victim, that he fired at victim and hit her while she was in front of her residence and that defendant left without rendering any aid justified denial of motions for acquittal on charge of assault with intent to kill made at end of government's case and after all of the evidence; and this testimony together with testimony that defendant stated almost simultaneously with firing of gun that he would kill victim was sufficient for jury to find beyond reasonable doubt that defendant was guilty of assault with intent to kill. D.C. Code § 22-501. *United States v. Bridges*, 432 F.2d 692, 1970 U.S. App. LEXIS 7212 (C.A.D.C. 1970).

Evidence was sufficient to permit jury to convict joint defendants of "assault with intent to kill while armed," on theory of co-conspirator liability, even though there was no evidence that the defendants were present at scene of shooting of two victims; one of members of gang to which the joint defendants belonged indicated that he was going "to do something" to victim, that member shot at car in which such victim was seated, and other victim was also in that car, permitting finding of intent transferred intent on part of perpetrator. *Castillo-Campos v. United States*, 987 A.2d 476, 2010 D.C. App. LEXIS 10 (2010), writ of certiorari denied by 131 S. Ct. 1514, 179 L. Ed. 2d 336, 2011 U.S. LEXIS 1556, 79 U.S.L.W. 3477 (U.S. 2011).

Evidence was sufficient to support conviction of defendant on two counts of second-degree murder while armed and assault with intent to kill while armed, at trial of two defendants for murder and other crimes arising out of a retaliatory shooting; two witnesses to the shooting, who both suffered injuries, testified that they saw such defendant shooting at them and the two decedents, the two decedents died from their gunshot wounds, one of such witnesses

was shot in the hand and head, the other such witness was shot in the leg, and another surviving victim was shot in the arm and shoulder. *Mitchell v. United States*, 985 A.2d 1125, 2009 D.C. App. LEXIS 651 (2009), writ of certiorari denied by 131 S. Ct. 226, 178 L. Ed. 2d 150, 2010 U.S. LEXIS 6110, 79 U.S.L.W. 3201 (U.S. 2010).

Evidence was sufficient to support a conviction for assault with intent to kill while armed (AWIKWA) under an aiding and abetting theory of liability with respect to a police officer, even though the officer did not identify an individual shooter; defendant was one of six gunmen who went to the scene with the intent to shoot anyone they saw there. *McCrae v. United States*, 980 A.2d 1082, 2009 D.C. App. LEXIS 449 (2009).

Evidence that defendant left important papers, mail, some clothing, and his car at victim's house after he allegedly assaulted victim and ran from victim's daughter when she saw him at a transit station and called his name was relevant, at a trial for assault with intent to kill while armed (AWIKWA) and other offenses, to show defendant's consciousness of guilt; a jury could have reasonably inferred that defendant would not have left his car or important papers behind unless he feared returning to victim's home because he had attacked her and could have reasonably inferred that defendant fled after seeing the daughter either because he did not want to face victim's relatives or because he feared that they would report him to the police. *Ferguson v. United States*, 977 A.2d 993, 2009 D.C. App. LEXIS 341 (2009).

Evidence was sufficient to support conviction for assault with intent to kill while armed (AWIKWA); victim testified that defendant, a few days before stabbing, had accused him of being involved in killing of defendant's friend, which allowed inference that there was animosity between defendant and victim, and victim also testified that defendant stabbed him with a knife in his abdomen and chest. *Tolbert v. United States*, 905 A.2d 186, 2006 D.C. App. LEXIS 435 (2006).

Reasonable jurors could find beyond a reasonable doubt that defendant attempted to assault victim because he fired a shot at close range, and thus, evidence was sufficient to show that defendant acted with the specific intent to kill so as to support his conviction for assault with the intent to kill while armed; simply by firing in victim's direction, defendant put victim in a "zone of harm." *Di Giovanni v. United States*, 810 A.2d 887, 2002 D.C. App. LEXIS 655 (2002).

Evidence supported conviction for assault with intent to kill while armed; victim described how defendant and co-defendant, both of whom she knew, physically assaulted her,

she clearly identified defendant as the assailant who picked up a wooden rod and began to stab and jab her head and hands, officer identified defendant as person he saw approaching victim, holding a piece of glass in his left hand and attempting to grab her with the other, officer heard defendant say "You're gonna die" on two separate occasions, and defendant's shirt, pants, shoes, and hands had numerous blood stains. *Riddick v. United States*, 806 A.2d 631, 2002 D.C. App. LEXIS 529 (2002).

Evidence established that defendant, at a minimum, aided and abetted the assault with intent to kill while armed and the aggravated assault while armed; victim testified that defendant retrieved the knife that was used against her, that he alternately beat and "stomped" on her, and that he held her arms while the other assailants brutally attacked her, and defendant was smeared with blood when he was arrested. *Riddick v. United States*, 806 A.2d 631, 2002 D.C. App. LEXIS 529 (2002).

Evidence was sufficient to find that defendant intended to kill everyone in the "zone of danger," which he created by firing in the direction of both victims, so as to support conviction for assault with intent to kill, even if defendant might conceivably have intended only to kill one of the victims. *Walls v. United States*, 773 A.2d 424, 2001 D.C. App. LEXIS 120 (2001), writ of certiorari denied by 534 U.S. 1149, 122 S. Ct. 1112, 151 L. Ed. 2d 1006, 2002 U.S. LEXIS 1111, 70 U.S.L.W. 3516 (2002).

Evidence was sufficient to support defendant's convictions for first-degree premeditated murder and assault with intent to kill on an aiding and abetting theory; there was evidence that defendant agreed "in principle" to kill victim, dressed for occasion, and went to place where murder was to occur with people with whom he conspired to engage in the criminal endeavor, defendant stood near scene, and after codefendants started to chase victims, defendant covered his head with hood and had gun in his hand, and there was some evidence that only because his gun jammed did defendant not succeed in personally shooting victim. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Testimony by victim at trial is not required to prove specific intent to kill necessary for con-

viction for assault with intent to kill while armed (AWIKWA), as specific intent may be shown through circumstantial evidence. D.C. Code 1981, §§ 22-501, 22-3202. *Nixon v. United States*, 730 A.2d 145, 1999 D.C. App. LEXIS 88 (1999), writ of certiorari denied by 528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

Evidence was sufficient to support finding of specific intent to kill necessary for convictions of assault with intent to kill while armed (AWIKWA) in connection with defendant's shooting into vehicle in which victims were riding; victims and defendant were having problems, tint on vehicle windows was light enough that defendant could see who occupied vehicle, and, when defendant started to fire at vehicle, defendant placed all occupants in a "zone of harm." D.C. Code 1981, §§ 22-501, 22-3202. *Nixon v. United States*, 730 A.2d 145, 1999 D.C. App. LEXIS 88 (1999), writ of certiorari denied by 528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

Defendants' convictions for premeditated first-degree murder while armed, assault with intent to kill, carrying pistol without license, and possessing firearm during crime of violence were supported by testimony of officer who witnessed shooting, testimony of two surviving victims, and testimony of defendants' acquaintance. D.C. Code 1981, §§ 22-501, 22-2401, 22-3202, 22-3204(a, b). *Payne v. United States*, 697 A.2d 1229, 1997 D.C. App. LEXIS 163 (1997).

Determination that defendant intended to murder victim he shot at was supported by evidence that defendant shot victim because victim was allegedly going to rob defendant and that defendant fired succession of shots at victim from short distance. *Brooks v. United States*, 655 A.2d 844, 1995 D.C. App. LEXIS 46 (1995).

Evidence sustained conviction for assault with intent to kill while armed (AWIKWA), although bullet that injured victim giving rise to AWIKWA charge was same bullet that killed another victim, giving rise to homicide charge; where single assaultive act results in criminal injury of multiple victims, there may be as many offenses as there are victims and, thus, trial court was justified in allowing jury to determine whether defendant was guilty of one or both charges. D.C. Code 1981, §§ 22-501, 22-3202. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

In prosecution for assault with intent to kill while armed with dangerous weapon, evidence was sufficient to prove defendant's intent to kill, including evidence of defendant's comment, "I hope she's dead," after his initial stomping on the victim. D.C. Code 1981, §§ 22-

501, 22-3202. *Arthur v. United States*, 602 A.2d 174, 1992 D.C. App. LEXIS 13 (1992).

In prosecution for assault with intent to kill while armed with a dangerous weapon, evidence was sufficient to find that defendant's sneaker or tennis shoe was a dangerous weapon, despite contention that it was not shown that shoes caused any injury more significant than would have been caused by bare feet; there was evidence that defendant repeatedly stomped on victim's head with the shoe and there was detailed evidence as to the victim's critical, and probably permanent, injuries. D.C. Code 1981, §§ 22-501, 22-3202. *Arthur v. United States*, 602 A.2d 174, 1992 D.C. App. LEXIS 13 (1992).

In prosecution for assault with intent to kill with a dangerous weapon, Government, in proving that shoe was a dangerous weapon, was not required to prove that it caused injury greater than that which could have been inflicted by an unshod foot. D.C. Code 1981, §§ 22-501, 22-3202. *Arthur v. United States*, 602 A.2d 174, 1992 D.C. App. LEXIS 13 (1992).

Strong circumstantial evidence of intent of victim's former boyfriend who broke into apartment and, while holding hatchet, pursued victims established specific intent to kill and supported conviction for assault with intent to kill while armed; boyfriend made comment about desire to kill victim as he fled when police approached. D.C. Code 1981, § 22-501. *Kelly v. United States*, 590 A.2d 1031, 1991 D.C. App. LEXIS 110 (1991).

There was sufficient evidence to sustain defendants' convictions for assault with intent to kill, where victim testified that both defendants told him they were going to kill him and defendants each struck victim repeatedly and forcefully about head using dangerous metal weapons—brass knuckles and metal pole. *Adams v. United States*, 558 A.2d 348, 1989 D.C. App. LEXIS 93 (1989).

Evidence in prosecution for assault with intent to kill, including testimony by defendant's own witness that defendant aimed revolver at victim, and testimony of police officer that gun admittedly in defendant's possession appeared to have been recently fired, was sufficient to support conviction. *Bedney v. United States*, 471 A.2d 1022, 1984 D.C. App. LEXIS 320 (1984).

Defendant's action of firing pistol at close range at victim yet only wounding him twice did not require a finding of not guilty of assault with intent to kill. D.C. Code 1981, §§ 22-501, 22-3202. *Smith v. United States*, 470 A.2d 315, 1983 D.C. App. LEXIS 550 (1983), writ of certiorari denied by 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344, 1985 U.S. LEXIS 988, 53 U.S.L.W. 3598 (1985).

Evidence sustained convictions for assault with intent to kill while armed and assault

with intent to rob while armed. D.C. Code §§ 22-106, 22-501, 22-3202, 22-3214(b). *McBride v. United States*, 393 A.2d 123, 1978 D.C. App. LEXIS 341 (1978), writ of certiorari denied by 440 U.S. 927, 99 S. Ct. 1260, 59 L. Ed. 2d 482, 1979 U.S. LEXIS 938 (1979).

Evidence, in prosecution for assault with intent to kill while armed, supported defendant's conviction. *Allen v. United States*, 383 A.2d 363, 1978 D.C. App. LEXIS 429 (1978).

Evidence that after defendants had taken money from 100-year-old victim the victim was choked with a cable until he lost consciousness was sufficient to support conviction for assault with intent to kill. D.C. Code § 22-501. In re G.O.B., 343 A.2d 567, 1975 D.C. App. LEXIS 234 (1975).

Evidence, including testimony of complainant and others concerning incident, reasonably permitted a finding of guilt on charges of armed kidnapping, armed assault with intent to kill, and carrying a dangerous weapon. D.C. Code §§ 22-501, 22-2101, 22-3202, 22-3204. In re G.O.B., 343 A.2d 567, 1975 D.C. App. LEXIS 234 (1975).

Evidence that defendant fired at police officers at close range before they drew their guns, knowing them to be police officers, would support inference that defendant acted with specific intent to kill. D.C. Code §§ 22-501, 22-3202. *Fletcher v. United States*, 335 A.2d 248, 1975 D.C. App. LEXIS 357 (1975).

— Assault with intent to rob, weight and sufficiency of evidence.

Evidence including testimony showing that defendant walked behind victims and tried to remove wallet from victim's pocket was sufficient to support the implicit finding of verdict that defendant aided and abetted the offense of assault with intent to commit robbery while armed with a dangerous weapon and the offense of assault with a dangerous weapon. D.C. Code §§ 22-105, 22-501 et seq., 22-502. *United States v. Prater*, 462 F.2d 292, 1972 U.S. App. LEXIS 10401 (C.A.D.C. 1972).

Evidence was sufficient to permit convictions under indictment charging robbery and assault with intent to commit robbery. D.C. Code 1961, §§ 501, 2901. *Rogers v. United States*, 318 F.2d 223, 1963 U.S. App. LEXIS 5887 (C.A.D.C. 1963).

Evidence was sufficient to show requisite intent in prosecution for assault with intent to commit robbery. D.C. Code 1951, § 22-501. *Oden v. U.S.*, 295 F.2d 546, 1961 U.S. App. LEXIS 3482 (C.A.D.C. 1961).

Evidence was sufficient to show that defendant knowingly participated in attempted armed robbery of victim by codefendant, so as to support conviction for assault with intent to commit robbery while armed (AWIRWA) as aider and abettor; certain vehicle was parked

on street where codefendant assaulted victim,* defendant was seen driving that vehicle a short time later with codefendant as a passenger, gun that codefendant used in assault was found to left of driver's seat, and, *inter alia*, defendant began to drive erratically and at a high rate of speed when police officers began to follow vehicle with their emergency signals activated. *Carter v. United States*, 957 A.2d 9, 2008 D.C. App. LEXIS 397 (2008).

Evidence was sufficient to show that defendant assaulted victim with intent to rob him, so as to support conviction for assault with intent to commit robbery while armed (AWIRWA) and related conviction for possession of a firearm during a crime of violence or dangerous offense (PFCV); victim dropped personal items while walking, defendant informed victim that he had dropped something, victim retrieved his dropped items, thanked defendant, and continued walking, and defendant uttered, "[W]hat about me?" while drawing a gun. *Carter v. United States*, 957 A.2d 9, 2008 D.C. App. LEXIS 397 (2008).

Finding of intent to rob was supported, in prosecution for assault with intent to rob while armed, by evidence that defendant told victim, "Do you think I'm fucking joking? Empty your pockets," and was not negated by fact that when victim held out the money, defendant did not immediately take it but kept on speaking. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Evidence that assaults of two victims were used to effectuate robbery of third victim could not support convictions for assault with intent to commit robbery of first two victims, as charged in indictment. D.C. Code 1981, §§ 22-501, 22-502, 22-3202. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

Evidence was sufficient to sustain conviction of assault with intent to commit robbery for incident wherein three assailants accosted victim in alley, even though assailants did not specifically indicate that they intended to rob victim, where two assailants were brandishing pistols and confronted victim saying, "this is it," and victim was shot while attempting to escape. D.C. Code 1981, §§ 22-501, 22-3202. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

Testimony by alleged assault victim that defendant was trying to get to his wallet, and corroborating testimony by police officer at the scene, was sufficient to support conviction for assault with intent to commit robbery. D.C. Code 1981, § 22-501. *Singleton v. United States*, 488 A.2d 1365, 1985 D.C. App. LEXIS 338 (1985).

Evidence in prosecution brought against four defendants accused of robbing five victims in hallway of apartment building was sufficient to establish that one defendant, who asserted that he did not appear in hallway of building until victims' property had been taken and did not actually search any of victims, was aider and abettor of crimes charged, and thus was sufficient to support that defendant's conviction for assault with intent to commit robbery while armed. D.C. Code §§ 22-501, 22-3202. *Heiligh v. United States*, 379 A.2d 689, 1977 D.C. App. LEXIS 252 (1977).

Evidence was sufficient to support juvenile court's finding that juvenile participated as an aider and abettor in assault with intent to commit robbery on a school teacher. D.C. Code §§ 11-1551(a)(1)(A), 22-105, 22-501. *In re Reeder*, 264 A.2d 893, 1970 D.C. App. LEXIS 210 (App. 1970).

— Corroboration in sexual abuse, weight and sufficiency of evidence.

In prosecution for assault with intent to rape, corroboration of accused's intent to achieve carnal knowledge with force and against consent of victim may be established by circumstantial evidence when victim is incompetent to testify. D.C. Code § 22-501. *United States v. Medley*, 452 F.2d 1325, 1971 U.S. App. LEXIS 6916 (C.A.D.C. 1971).

Evidence, in prosecution for assault with intent to commit carnal knowledge, sufficiently corroborated complainant's testimony that such offense had been committed. D.C. Code § 22-501. *United States v. Terry*, 422 F.2d 704, 1970 U.S. App. LEXIS 11218 (C.A.D.C. 1970).

Evidence, in prosecution for assault with intent to commit carnal knowledge, sufficiently corroborated identification testimony of complainant. D.C. Code § 22-501. *United States v. Terry*, 422 F.2d 704, 1970 U.S. App. LEXIS 11218 (C.A.D.C. 1970).

In prosecution for assault with intent to commit rape, complainant's dress with torn shoulder strap offered enough independent corroboration of complainant's account to avoid requirement that verdict be directed for accused. D.C. Code § 22-501. *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Absent any corroboration of testimony of eleven-year-old prosecutrix as to defendant's alleged attempts to kiss prosecutrix, his exposure of himself and his attempts to remove her clothing, corpus delicti of assault with intent to commit carnal knowledge was not established. D.C. Code § 22-501. *Allison v. United States*, 409 F.2d 445, 1969 U.S. App. LEXIS 8900 (C.A.D.C. 1969).

Judicially created rule requiring corroboration in prosecution for sex offenses is abolished entirely, regardless of sex or age of victim or

perpetrator. *Gary v. United States*, 499 A.2d 815, 1985 D.C. App. LEXIS 520 (1985), writ of certiorari denied by 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, 1986 U.S. LEXIS 936, 54 U.S.L.W. 3630 (1986), writ of certiorari denied by 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568, 1986 U.S. LEXIS 2180, 54 U.S.L.W. 3840 (1986).

Requirement of corroboration of rape victim's testimony serves no legitimate purpose; victim of rape and other sex-related offenses is not so presumptively lacking in credence that corroboration of her testimony is required to withstand motion for judgment of acquittal. D.C. Code §§ 11-721(e), 22-2801, 49-301; U.S. Const. art. 3, § 3. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

— **Force, nonconsent, and resistance to sexual abuse, weight and sufficiency of evidence.**

Evidence, which included defendant's threatening of victim with gun, dog, and knife, defendant's statement that he was not yet ready to kill victim, and victim's continuing resistance, supported jury conclusion that defendant intended to accomplish penetration by force in prosecution for assault with intent to commit rape while armed. D.C. Code 1981, §§ 22-501, 22-3202. *Glascoe v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

Defendant's contention that jury's verdict of acquittal on kidnapping count meant jury found that victim had consented to her presence in bedroom was based on speculation in prosecution for assault with intent to commit rape while armed, and evidence was sufficient to support jury conclusion that victim did not consent to being in bedroom with defendant. D.C. Code 1981, §§ 22-501, 22-3202. *Glascoe v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

Evidence, which included defendant's repeated and escalating threats, defendant's forcing victim to commit sodomy, victim's ultimate escape, and victim's reactions after escape, supported jury conclusion that victim feared for her life in prosecution for assault with intent to commit rape while armed. D.C. Code 1981, §§ 22-501, 22-3202. *Glascoe v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

Evidence in rape prosecution was sufficient to show that rape victims submitted only after they were threatened with death or serious bodily harm. D.C. Code § 22-2801. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

— **Insanity or other incapacity, weight and sufficiency of evidence.**

Jury was justified in finding that assault with intent to commit robbery and robbery

were not product of alleged mental disease of defendant, where psychiatrist testified that defendant was suffering from low grade mental illness predisposing to psychosis particularly when defendant was under influence of large amounts of alcohol, and evidence indicated that defendant was completely sober at time of alleged offenses. D.C. Code 1961, §§ 22-501, 22-2901. *Hawkins v. U.S.*, 310 F.2d 849, 1962 U.S. App. LEXIS 3772 (C.A.D.C. 1962).

In prosecution for assault with intent to commit robbery, evidence on issue of defendant's sanity at time of commission of crime was sufficient to support conviction. D.C. Code 1951, § 22-501. *Jordan v. U.S.*, 217 F.2d 670, 1954 U.S. App. LEXIS 3184 (C.A.D.C. 1954).

Evidence that, inter alia, defendant suffered from severe personality disorder that caused him on occasion to disassociate when his sexual advances were rejected, and that while defendant was in this state, he did not have capacity for choice or control, was sufficient to allow jury to reasonably infer from all evidence that defendant had necessary mental capacity for first degree burglary when he entered victim's apartment armed with knife but that he did not have capacity for choice or control when he killed victim because of a then dissociative condition. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202, 24-301(j). *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

— **Intent to commit multiple offenses, weight and sufficiency of evidence.**

Evidence, including the testimony of an eyewitness involving all three defendants in the assault upon victim, was sufficient to support verdict of jury finding defendants guilty of felony-murder and assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Evidence was sufficient to support conviction of murder in the first degree by homicide while attempting to perpetrate a robbery and of assault with intent to rob. *Bowles v. United States*, 439 F.2d 536, 1970 U.S. App. LEXIS 6322 (C.A.D.C. 1970), writ of certiorari denied by 401 U.S. 995, 91 S. Ct. 1240, 28 L. Ed. 2d 533, 1971 U.S. LEXIS 2615 (1971).

Evidence sustained conviction on three-count indictment charging housebreaking, robbery and assault with intent to commit robbery. D.C. Code 1961, §§ 22-501, 22-1801, 22-2901. *Martin v. United States*, 314 F.2d 266, 1963 U.S. App. LEXIS 6332 (C.A.D.C. 1963).

Evidence was sufficient to support defendant's convictions for first-degree murder while armed, assault with intent to kill while armed,

armed robbery, conspiracy to commit armed robbery, and first-degree burglary while armed; according to driver of get-away vehicle, defendant struggled to open stolen safe in vehicle following murders and made statement about apparent contents of safe, and other witnesses testified that defendant ran to vehicle from victims' house with codefendant, that defendant helped count out money, drugs, and other items found in safe, and that defendant ultimately took his own share, including a diamond ring which he was seen wearing shortly after the murders. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Evidence supported convictions for assault with intent to kill while armed, arson, destruction of property, and possession of Molotov cocktail, all related to firebombing incident; there was evidence that defendant was extremely attached to his infant child and hostile toward mother/victim's contacts with child, evidence of two conversations linking defendant to potential use of Molotov cocktails, and testimony of witness that he saw someone fitting defendant's description running from scene immediately after arson. *Russell v. United States*, 701 A.2d 1093, 1997 D.C. App. LEXIS 246 (1997).

Although facts strongly suggested desire to complete illegal sale of drugs, there was insufficient evidence for jury to find specific intent to rob, as required for convictions of felony-murder while armed, assault with intent to commit robbery while armed, and attempted robbery while armed. D.C. Code 1981, §§ 22-501, 22-2401, 22-2902, 22-3202. *Jones v. United States*, 516 A.2d 929, 1986 D.C. App. LEXIS 519 (1987), writ of certiorari denied by 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848, 1987 U.S. LEXIS 2179, 55 U.S.L.W. 3776 (1987).

Evidence that defendant grabbed victim and forced her into his car and then drove her three miles from point of abduction to empty lot, where he assaulted her with intent to commit sodomy and assaulted her with intent to commit rape, was sufficient to support separate kidnapping conviction. D.C. Code 1981, §§ 22-501, 22-503, 22-2101, 22-3502. *Robinson v. United States*, 501 A.2d 1273, 1985 D.C. App. LEXIS 538 (1985).

Although primarily circumstantial, the evidence was sufficient to establish beyond a reasonable doubt defendants' guilt of murder, assault, armed robbery, burglary and conspiracy. D.C. Code §§ 22-105a, 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S.

944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

— Intent to sexually abuse, weight and sufficiency of evidence.

Requisite intent to support conviction for assault with intent to commit rape need not be proved by direct evidence, but may be inferred from the totality of the circumstances presented to the jury. D.C. Code §§ 22-501, 22-3202. *United States v. Jackson*, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

Evidence was sufficient for jury to infer beyond a reasonable doubt that defendant possessed the intent necessary to sustain conviction for assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-3202. *United States v. Jackson*, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

Evidence in prosecution for assault with intent to commit rape was insufficient to establish that defendant intended to achieve sexual intercourse by force and violence and against will of prosecutrix. D.C. Code §§ 22-2801, 22-2901. *United States v. Tremble*, 470 F.2d 1272, 1972 U.S. App. LEXIS 6814 (C.A.D.C. 1972).

Evidence authorized conviction of assault with intent to rape. *Lynn v. U.S.*, 172 F.2d 764, 1949 U.S. App. LEXIS 2770 (C.A.D.C. 1949).

Evidence that defendant went to the home of his mother-in-law, with whom his wife and baby were living went to the bedroom of his 17-year-old sister-in-law, pulled off the covers and touched her private parts with his hand, that she awakened and screamed, and that defendant ran from the house was insufficient to sustain conviction for "assault with intent to commit rape". *Hammond v. U.S.*, 127 F.2d 752, 1942 U.S. App. LEXIS 3967 (1942).

Although victim could not recall actual assault, evidence that defendant told victim he wanted to have sex, that he used a knife to unbutton her blouse, and that the next day victim was found with her pantyhose at her ankles, her bra and t-shirt around her neck and her panties stained with semen supported conviction for assault with intent to rape. D.C. Code 1981, § 22-501. *Whitaker v. United States*, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

Conviction for assault with intent to commit rape was sufficiently supported by complainant's testimony and corroborating physical evidence. *Langley v. United States*, 515 A.2d 729, 1986 D.C. App. LEXIS 448 (1986).

Evidence supported jury conclusion that defendant assaulted victim in his house with specific intent to have sexual intercourse through vaginal penetration, even though defendant was successful in forcing victim to

commit sodomy with him, even though defendant's most explicit verbal demand was only that victim "make love" to defendant, and even though circumstances only allowed defendant to get as far as attempting to remove victim's shirt. D.C. Code 1981, §§ 22-501, 22-3202. *Glascoe v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

To obtain conviction for assault with intent to commit rape while armed, government must prove beyond reasonable doubt that defendant, while armed, assaulted the victim with specific intent to have sexual intercourse by force and without consent. D.C. Code 1981, §§ 22-501, 22-3202. *Glascoe v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

In prosecution for attempted carnal knowledge of female child under 16 years of age, determination that charged offense had actually been committed was supported by numerous circumstantial details in addition to complainant's testimony, including cuts on complainant's foot and hand, disheveled appearance, prompt report to police, complainant's ability to point out light string in room where incident allegedly took place and discovery in that room of girdle which complainant had left behind after incident. D.C. Code §§ 22-103, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

§ 22-402. Assault with intent to commit mayhem or with dangerous weapon.

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 804.)

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Prior Codifications. — 1981 Ed., § 22-502. 1973 Ed., § 22-502.

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Adequacy of representation.

Counsel provided effective pretrial assistance in prosecution for assault with dangerous weapon, where counsel devoted time during two-year period to preparation of the case and none of the witnesses who counsel failed to contact would have testified that defendant did not commit, or could not have committed, the acts with which he was charged. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

Defendant was not prejudiced by any deficient performance of trial counsel with regard to damaging hearsay evidence from deceased victim, in prosecution for assault with dangerous weapon, where victim had specifically identified defendant as his attacker on three occasions and defendant was unable to present any witnesses to corroborate his alibi defense. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

Defendant was not entitled to a hearing on his second motion to vacate sentence, which collaterally attacked his conviction for assault with dangerous weapon, where defendant provided no affidavit or other credible proffer to support his allegations of ineffective assistance of counsel. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

Trial counsel's failure to request discovery and to file suppression motion with respect to identification by victim's neighbor of assault defendant at crime scene was not ineffective assistance of counsel; defendant offered no reason why neighbor's identification should have been suppressed, other than to suggest possibility of "police suggestivity" at time neighbor was located, and victim gave unequivocal testimony that defendant was outside her window and at her back door. *U.S.C. Const. Amend. 6*; *D.C. Code* 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

To claim prejudice necessary for successful ineffective assistance of counsel claim, assault defendant was required to show reasonable probability that he would have pled guilty instead of proceeding to trial if his attorney had properly presented government's offer. U.S. Const. Amend. 6; D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

Trial counsel provided assault defendant with effective assistance of counsel, with respect to provision of plea information; counsel notified defendant of plea agreement and advised him that guilty plea would violate conditions of his probation, and defendant did not claim that had he learned of plea offer earlier, he would have accepted it. U.S. Const. Amend. 6; D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

Trial counsel provided assault defendant with effective assistance of counsel, with respect to investigation of case, including investigation of potential alibi witness. U.S. Const. Amend. 6; D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

Assault defendant suffered no prejudice from trial counsel's alleged deficiency in preparing alibi witness for cross-examination, and thus, alleged deficiency did not constitute ineffective assistance of counsel; though counsel was apparently surprised by calendar produced at trial by witness, which became subject of government's cross-examination, witness remained a very credible witness, even after cross-examination. U.S. Const. Amend. 6; D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

Trial counsel was not ineffective with respect to issue of discrediting assault victim's testimony as biased; counsel attempted to impeach victim's testimony as vindictive, referring to her unhappiness that defendant was going out with another woman and her action in seeking civil protection order against defendant, and, although defendant claimed that counsel failed to consult him before trial about reasons for victim's bias, defendant failed to point out how any additional information he would have provided on subject would have led counsel to address bias issue differently. U.S. Const. Amend. 6; D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

Defense counsel's performance in prosecution for assault on police officer with dangerous weapon, assault with dangerous weapon and carrying pistol without license, including incidents at suppression hearing, opening and closing statements at trial, examination of witnesses and arguments at sentencing hearing,

constituted gross incompetence for purposes of determining whether defendant was denied effective assistance of counsel. D.C. Code §§ 22-502, 22-505(a, b), 22-3204; U.S. Const. Amend. 6. *Oesby v. United States*, 398 A.2d 1, 1979 D.C. App. LEXIS 332 (1979).

Accused, who was convicted of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon and who asserted that there had been inadequate preparation by his trial counsel, was not denied his right to effective assistance of counsel, absent any indication of any substantial defense which accused might have advanced and which was excluded as result of such alleged lack of preparation. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a); U.S. Const. Amend. 6. *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Failure to preserve, for appeal, the issue whether trial court erred in allowing in-court identifications of accused, who were convicted of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon, did not deny effective assistance of counsel where sole ground advanced for suppression of in-court identifications was the failure of government to conduct pretrial lineups and there was no indication that on-scene confrontations between accused and government witnesses were tainted by any impermissible police procedure. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a); U.S. Const. Amendments. 5, 6; D.C. Code SCR, Criminal Rule 12(b)(3). *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Admissibility of evidence.

— Cumulative evidence, admissibility of evidence.

In prosecution against juvenile who killed his father, wherein several witnesses had testified to juvenile's fear of his father, exclusion of testimony of juvenile's probation officer that the juvenile had come to officer several days before the shooting in order to seek his advice concerning the violent outbreaks of the father and that at that time officer had told juvenile to contact police whenever such outbreaks occurred was not an abuse of discretion and was not prejudicial since proffered evidence was cumulative and more remote than the evidence already admitted which dealt with juvenile's state of mind on the day in question. D.C. Code §§ 22-502, 22-2403. *In re Bumphus*, 254 A.2d 400, 1969 D.C. App. LEXIS 267 (App. 1969).

— Declarations by accused, admissibility of evidence.

Testimony of circumstances surrounding defendant's arrest by officers pursuant to a war-

rant for his arrest, not for the robberies and murder for which he was being tried, but for armed assault on police officer, offered as indicating consciousness of guilt or resistance to arrest, was admissible in context in which case was tried. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

Evidence of oral statements, one of which was of injurious character as to defendant's claim of self-defense with respect to charge of assault with dangerous weapon, was admissible, where statements had been made within a few minutes after defendant's arrest and promptly in response to routine inquiries as to what had happened. D.C. Code 1961, § 22-502. *Ramey v. United States*, 336 F.2d 743, 1964 U.S. App. LEXIS 4910 (C.A.D.C. 1964), writ of certiorari denied by 379 U.S. 840, 85 S. Ct. 79, 13 L. Ed. 2d 47, 1964 U.S. LEXIS 587 (1964).

Error, under the Confrontation Clause, in admitting victim's hearsay testimonial statements to police officers at fire station and hospital after the stabbing was not harmless beyond a reasonable doubt, in prosecution for assault, though it was undisputed that defendant had stabbed the victim; defendant claimed that he stabbed the victim in self-defense after grabbing knife from victim, but victim's hearsay statements to police indicated that the stabbing was without provocation and a witness testified that it was defendant, not victim, who was armed with a knife, and two notes from jury asked whether ownership of knife was relevant to assault charges, suggesting that at least one juror might have thought defendant was not armed. *Zanders v. United States*, 999 A.2d 149, 2010 D.C. App. LEXIS 408 (2010).

— Demonstrative or documentary evidence, admissibility of evidence.

Where robbery victim testified that shotgun found in defendant's apartment was similar to the shotgun which one of the robbers had, informant testified that the shotgun belonged to defendant and that defendant had it when he left the apartment with another person to commit the robbery, the shotgun was properly admitted into evidence in prosecution for armed robbery. D.C. Code §§ 22-502, 22-2901, 22-3202(a). *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

Gun did not pose a risk of undue prejudice that substantially outweighed its probative value in trial for assault with a dangerous weapon so as to preclude its admissibility; firearms were routinely admitted into evidence in criminal trials and defendant provided no evidence that the jury was so inflamed by the sight of a gun that they disregarded the trial court's instructions to decide the case without

prejudice. *Stewart v. United States*, 881 A.2d 1100, 2005 D.C. App. LEXIS 468 (2005), writ of certiorari denied by 547 U.S. 1174, 126 S. Ct. 2348, 164 L. Ed. 2d 859, 2006 U.S. LEXIS 4305, 74 U.S.L.W. 3669 (2006).

There was a reasonable probability that bullet recovered from victim's van was fired from gun that was found in car with defendant's boot camp certificate so as to make gun and bullet admissible in trial for assault with a dangerous weapon, even though the bullet was recovered nearly three months after the shooting and one month after the gun was seized, where the gun matched the description given by victim, and expert testimony established that the gun was capable of firing the recovered bullet. *Stewart v. United States*, 881 A.2d 1100, 2005 D.C. App. LEXIS 468 (2005), writ of certiorari denied by 547 U.S. 1174, 126 S. Ct. 2348, 164 L. Ed. 2d 859, 2006 U.S. LEXIS 4305, 74 U.S.L.W. 3669 (2006).

In simple assault prosecution, medical entries as to complainant's condition, his appearance, physical signs such as pulse, respiration, etc., and resulting diagnosis constituted a record admissible under business records exception. D.C. Code SCR, Civil Rule 43-I(a); D.C. Code § 22-502. *Sullivan v. United States*, 404 A.2d 153, 1979 D.C. App. LEXIS 414 (1979).

Where prosecution presented evidence which placed revolver and air pistol in hands of defendant and codefendant, such guns had connection with crime and thus it was not error to admit guns into evidence and show them to jury in prosecution for assault on police officer with dangerous weapon, assault with dangerous weapon, and carrying pistol without license. D.C. Code §§ 22-502, 22-505(a, b), 22-3204. *Oesby v. United States*, 398 A.2d 1, 1979 D.C. App. LEXIS 332 (1979).

Even if accused, who elected not to testify at trial on charge of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon, had "testimonial privilege" at trial to don jacket he was alleged to have worn at time of the offenses, denial of request that he be permitted to put on such jacket "to make double sure" that jacket had never been seen by his wife, who had testified that she had never seen the jacket, was not error. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a). *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Admitting colored photographs of complainant showing scars on upper portion of her body was not an abuse of discretion, in prosecution for, inter alia, assault with a dangerous weapon and malicious disfigurement, where photographs were not inflammatory and were clearly probative of the condition of complainant's body and, thus, were material on issue of malicious disfigurement. D.C. Code §§ 22-502, 22-506.

Villines v. United States, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

— Identity of persons or things, admissibility of evidence.

While lineup was not conducted under most ideal circumstances it was not so impermissibly suggestive to misidentification as to preclude identification testimony by eyewitnesses who had ample opportunity to view defendant during robbery. D.C. Code §§ 22-502, 22-2901, 22-3204; U.S. Const. Amend. 5. United States v. Neverson, 463 F.2d 1224, 1972 U.S. App. LEXIS 9905 (C.A.D.C. 1972).

Evidence supported finding that each of witnesses who identified defendants as persons who robbed restaurant had seen defendants under circumstances affording an independent basis for their subsequent in-court identifications, although photographs had been used in identification process. 18 U.S.C. § 1201; D.C. Code §§ 22-502, 22-2204, 22-2901. Matthews v. United States, 449 F.2d 985, 1971 U.S. App. LEXIS 11551 (C.A.D.C. 1971).

Although victim of robbery and assault picked defendant out of group sitting in General Sessions courtroom at time when defendant was not accompanied by counsel, where such identification followed three photographic identifications based upon face-to-face encounter taking place only a few hours before first photographic identification, the General Sessions identification did not taint the later in-court identification by victim and the in-court identification was not improper. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. United States v. York, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

Record established that victim's photographic identification of defendant as robber and assailant was not conducted under circumstances so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. United States v. York, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

There is no presumption that photographic identification of defendant by victim of robbery and assault is invalid. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. United States v. York, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

Government has burden of presenting clear and convincing evidence that in-court identification of defendant by victim of robbery and assault is based on other than an illegally

obtained pretrial identification but there is no presumption of invalidity. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. United States v. York, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

Eyewitness's statement to police officers, with regard to identity of assailant, "It's [name that matched defendant's first name]," was not hearsay at trial for assault with a dangerous weapon; defense elicited and made use of statement not for truth of its assertion but to show that it had been made, for purpose of suggesting that effect of statement was a rush to judgment by officers and a contaminated identification of defendant by victim. Lewis v. United States, 930 A.2d 1003, 2007 D.C. App. LEXIS 550 (2007).

Victim's identification of defendant as her assailant from a photo array of nine persons was reliable, though made six weeks after her assault; victim had a good opportunity to view her assailant, victim was able to give detailed and accurate description of defendant prior to viewing array, victim was able to describe in detail knife defendant used and clothes he was wearing on day he assaulted her, and victim identified defendant as her assailant out of nine photographs in array without hesitation. McCoy v. United States, 781 A.2d 765, 2001 D.C. App. LEXIS 211 (2001).

Although police officer's identification of defendant was vulnerable to attack before jury, in that officer could not pick defendant out of photo array a few days after shooting but claimed to recognize defendant 19 days later at student discipline hearing, identification was legally sufficient to support finding by jury that defendant was individual who fired shots at police officer, as required for convictions of assault with a dangerous weapon and possession of firearm during crime of violence. D.C. Code 1981, §§ 22-502, 22-3204(b). United States v. Bamiduro, 718 A.2d 547, 1998 D.C. App. LEXIS 178 (1998).

In prosecution of defendant for armed robbery and assault with a dangerous weapon, in-court identifications by complaining witness were proper as they were based upon an independent source. D.C. Code §§ 22-502, 22-2901, 22-3202. Washington v. United States, 377 A.2d 1348, 1977 D.C. App. LEXIS 382 (1977).

Totality of circumstances did not give rise to substantial likelihood of irreparable misidentification from photographs and accordingly, trial court did not err in denying defendants' motion to suppress identification, in prosecution for armed robbery, robbery and assault with dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. Hill v. United States, 367 A.2d 110, 1976 D.C. App. LEXIS 436 (1976).

In prosecution for armed robbery, robbery, and assault with dangerous weapon, trial court did not err in admitting testimony of detectives in relation to pretrial identification of defendant, and in any event, there was no prejudicial error. D.C. Code §§ 22-502, 22-2901, 22-3202. *Thompson v. United States*, 354 A.2d 848, 1976 D.C. App. LEXIS 510 (1976).

One-man showup held shortly after commission of offense was not unjustified because assault victim sustained head injury, where victim was alert and sitting up in hospital bed when confronting accused shortly after attack. U.S. Const. Amend. 5; D.C. Code §§ 22-501, 22-502, 22-3202. *Washington v. United States*, 334 A.2d 185, 1975 D.C. App. LEXIS 338 (1975).

— In general.

Admission of lay opinion of detective who conducted post-crime interview with victim, that victim did not appear to be intoxicated at hospital during the interview, was not plain error in prosecution for assault with dangerous weapon; the testimony enabled the jury to determine for itself victim's level of impairment. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

In prosecution for assault with a dangerous weapon, testimony that complainant suffered miscarriage as result of assault was probative of dangerous character of board with which complainant was struck, and probative value outweighed probable prejudicial effect and testimony was therefore properly admitted. D.C. Code § 22-502. *Freeman v. United States*, 391 A.2d 239, 1978 D.C. App. LEXIS 297 (1978).

Where testimony, in prosecution for assault with a dangerous weapon and carrying a concealed weapon, by complaining witness concerning alleged rape by defendant was highly probative of defendant's intent and motive in pointing gun at her and in explaining circumstances surrounding defendant's use of the gun for purposes of frightening her into submission, and where jury was given immediate cautionary instruction concerning limited purpose of the testimony and similar instruction was contained in final charge, admission of such testimony was not abuse of discretion. D.C. Code §§ 22-502, 22-3204. *Wooten v. United States*, 285 A.2d 308, 1971 D.C. App. LEXIS 258 (1971).

— Other offenses, admissibility of evidence.

Evidence of the circumstances surrounding prior robbery investigation, involving defendant and the complainant in present prosecution for assault with a dangerous weapon and

for carrying a pistol without a license, was admissible since such evidence was clearly relevant to the identification question which defendant raised by his defense of mistaken identity; moreover, since no evidence was introduced connecting defendant in any way with the earlier crime, the possibility of any prejudice to defendant in the instant case was remote. D.C. Code §§ 22-502, 22-3204. *United States v. Mizzell*, 452 F.2d 1328, 1971 U.S. App. LEXIS 7048 (C.A.D.C. 1971).

Evidence of uncharged prior threats and assaultive conduct that victim testified defendant had committed against her was admissible under motive exceptions to general rule precluding admission of evidence of uncharged crimes against accused, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); defendant's threats and assaultive conduct toward victim during month preceding offenses charged, in an unsuccessful attempt to coerce her into continuing their relationship, was indicative of defendant's motive to engage in assaultive conduct against victim that formed basis for charges. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Probative value of evidence of uncharged prior threats and assaultive conduct that victim testified defendant had committed against her outweighed its prejudicial effect, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW). *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Evidence of homicide and assault victims' debt to defendant from prior drug sale was admissible, to explain reason for defendant's attempted dummy sale, to victims, of soap for cocaine intended to make up outstanding debt from prior sale. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Since testimony that defendant was in possession of girl's missing watch bore directly on his motive and intent in confronting the girl's landlord and explained the circumstances of the assault on landlord since it suggested that defendant's accusation of the landlord as a thief was knowingly false and that defendant's demeanor during their altercation was a charade, and since this testimony undermined defendant's claim that the landlord was the aggressor and that defendant only acted in self-defense, the testimony was relevant and its probative value far outweighed its prejudicial effect as evidence of another crime. D.C. Code § 22-502. *Chambers v. United States*, 383 A.2d 343, 1978 D.C. App. LEXIS 428 (1978).

With respect to defendant's defense to charge of assault with a dangerous weapon that he was "only joking" when he pointed weapon at another, evidence that defendant was suffering withdrawal from heroin and was in need of money on the day of the incident and exhibited physical symptoms inconsistent with a frivolous state of mind was relevant to show intent or to negate lack thereof. D.C. Code § 22-502. *Harris v. United States*, 333 A.2d 397, 1975 D.C. App. LEXIS 332 (1975).

In prosecution on charges of cruelty to a child and assault with a dangerous weapon, prior assault by defendant on the same child, which occurred some 17 months earlier, was not too remote to preclude its receipt in evidence on the question of intent. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

Evidence as to defendant's prior assault on the same child unquestionably was relevant as to whether he had the requisite intent to support verdicts finding him guilty of the charges of cruelty to a child and assault with a dangerous weapon, namely, a belt. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

In prosecution of defendant on charges of cruelty to a child and assault with a dangerous weapon, namely, a belt, the trial court did not abuse its discretion in permitting the government to introduce, during its direct case, evidence of defendant's prior conviction of having assaulted the same child, where intent was placed clearly in issue by the contention in defendant's opening statement that an assault episode, involving the child's head being struck by a pliers tossed by defendant, was accidental. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

— Provocation or justification, admissibility of evidence.

Trial court did not abuse its discretion when it concluded that alleged molesting of defendant's son one month prior to charged assault was too attenuated to warrant reception in evidence, in prosecution for assault with a dangerous weapon. D.C. Code 1961, § 22-502. *Harley v. United States*, 377 F.2d 172, 1967 U.S. App. LEXIS 6761 (C.A.D.C. 1967).

— Self-defense, admissibility of evidence.

To determine whether defendant was aggressor and whether he could establish claim of self-defense to charges of assault with a dangerous weapon and murder, jury was required to consider all of circumstances leading up to fatal affray at victim's home, and it was not error to admit evidence that defendant had shortly before entered house of a former girl friend and attacked her and homicide victim.

D.C. Code 1961, §§ 22-502, 22-2403. *Harris v. United States*, 364 F.2d 701, 1966 U.S. App. LEXIS 5634 (C.A.D.C. 1966).

— Subsequent condition or conduct of accused, admissibility of evidence.

Trial court, in prosecution for assault with a deadly weapon and other crimes, did not abuse discretion in admitting, over objection, evidence of defendant's alleged flight from jurisdiction prior to trial, notwithstanding objection that any probative value was outweighed by possible prejudicial impact which testimony would have on jury. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Argument or conduct of counsel.

In prosecution for assault with a dangerous weapon, district attorney's argument to jury that "from the testimony of the doctor, the wound was a serious one and if it had been an inch lower the defendant might be here for murder" was permissible on question whether the weapon, a razor blade, was a dangerous one and whether it was likely to produce death or great bodily harm. D.C. Code 1940, § 22-502. *Josey v. U.S.*, 135 F.2d 809, 1943 U.S. App. LEXIS 3423 (1943).

Prosecutor's remarks in opening and closing statements were not improper, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); challenged statements in opening, describing defendant as man who could not let go and who had almost cost victim her life, did not go beyond permissible bounds, and use of words "ram" and "kill" in closing argument were not improper since victim testified that defendant used very words on day of offenses. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

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Prosecutor did not engage in argument of facts not in evidence when she argued that sideways nature of victim's stab wound was consistent with victim's version of events, rather than defendant's version that he had stabbed victim in self-defense when victim "leaped" on him, in prosecution for aggravated assault while armed and assault with a danger-

ous weapon, as surgeon who had operated on victim testified that instead of going “directly backward,” victim’s knife wound had gone “across the neck” from left to right. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor’s comment during rebuttal argument, to effect that defense was asking jury “to accept the word of a convicted thief and a convicted drug dealer” was improper, in prosecution for aggravated assault while armed and assault with a dangerous weapon; while prosecutor was entitled to remind jury of defendant’s convictions during closing argument as part of her challenge to his credibility, given that defendant had testified and had been impeached with prior convictions for receiving stolen property, shoplifting, and distribution of marijuana, there was significant distinction between citing defendant’s prior convictions as bearing on his credibility and castigating defendant as a criminal. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor’s comments during rebuttal closing argument regarding defendant, including that defendant had clearly made false statements because he knew that he was guilty, and that he had something to hide, were unquestionably improper, in prosecution for aggravated assault while armed and assault with a dangerous weapon; comments did not constitute discussion of the evidence at all and articulated only the prosecutor’s unsupported, not wholly coherent, but nonetheless forceful, assertions that defendant had been lying to avoid admitting his guilt. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor’s statements in closing and rebuttal argument were plain error in prosecution for assault with a dangerous weapon; prosecutor misstated evidence as to whether witness had seen defendant with gun, implied facts not in evidence and testimony not in record when she argued that witness who heard victim state attacker’s first name knew who defendant was, and suggested that jury should assume defendant’s guilt from fact of his arrest. *D.C. Code 1981, § 22-502. Lewis v. United States*, 541 A.2d 145, 1988 D.C. App. LEXIS 81 (1988).

Prosecutor who failed to disclose witness’ photographic identification of defendant despite trial court’s order to disclose all identifications to defense before testimony and who could have informed defendant of photographic

identification at bench conference immediately preceding testimony of witness committed misconduct in prosecution for armed robbery, assault with intent to commit robbery while armed, assault with intent to kill while armed, assault with dangerous weapon, and carrying pistol without license. *D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor’s misconduct which consisted of failure to disclose witness’ photographic identification of defendant before testimony despite trial court’s order to disclose all photographic identifications to defendant, which occurred after another witness’ identification of defendant’s photograph, and which occurred in trial with weak defense to robbery charges and implausible explanation by defendant for possession of stolen property did not substantially prejudice defendant by swaying jury verdict in prosecution for armed robbery, assault with intent to kill and commit robbery while armed assault with dangerous weapon, and carrying pistol without license. *D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor’s closing argument, which urged jurors to use “knowledge of the street” to evaluate each witness’ testimony and which stated that two victims for reasons of their own repeatedly testified as to inability to recall events, created ambiguity whether prosecutor intended to remind jurors to use common sense or whether prosecutor was arguing facts not in evidence and suggesting that victims suffered false loss of memory, did not clearly demonstrate prosecutor’s intent to argue worst possible meaning, and, therefore, was not misconduct in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. *D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who made incomplete missing witness argument after objection was sustained to claim that only girl friend and sister supported defendant’s alibi of being at party with several other people acted improperly in prosecution for armed robbery, assault with intent to commit robbery and with intent to kill while armed, assault with dangerous weapon, and carrying pistol without license. *D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who called victims of robbery to testify despite knowledge that victims poorly remembered events, who wanted jury to be able to hear from victims named in indictment, who

wanted to prevent adverse inference against government that could result from absence of victims' testimony, and who wanted to test witnesses' ability to contribute to truth did not call witnesses for improper motives and did not commit misconduct in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In prosecution for assault with a deadly weapon, even if remarks made by prosecutor during summation impinged on defendant's right to remain silent, such an error would have been harmless, in light of the overwhelming evidence of defendant's guilt and in view of the instructions that defendant was not required to prove his innocence, that he had absolute right not to testify and that jury was not permitted to draw any inference of guilt due to defendant's failure to testify. D.C. Code § 22-502; U.S. Const. Amend. 5. *Brown v. United States*, 383 A.2d 1082, 1978 D.C. App. LEXIS 434 (1978).

Comments of prosecutor during assault trial to the effect, *inter alia*, that missing witness was too scared to come and testify, that defendants were killers and were dressed like gangsters, that one defendant was a "young buck," that guilty verdict would be a matter of achievement and courage, and that presumption of innocence might not apply as much to defendants as it might to others in less serious cases did not rise to the level of substantial prejudice necessary for reversal, in light of the strength of the Government's case and correcting instructions by the trial court. D.C. Code §§ 22-501, 22-502, 22-3202, 22-3204. *Smith v. United States*, 315 A.2d 163, 1974 D.C. App. LEXIS 371 (1974), writ of certiorari denied by 419 U.S. 896, 95 S. Ct. 174, 42 L. Ed. 2d 139, 1974 U.S. LEXIS 2930 (1974).

Arrest.

Evidence at hearing on motion to suppress disclosed that police officer, who spotted defendant while proceeding to scene of robbery and who had obtained a description of robber which fit defendant, had probable cause to arrest defendant without a warrant. D.C. Code §§ 22-502, 22-2901, 22-3202. *Randall v. United States*, 353 A.2d 12, 1976 D.C. App. LEXIS 481 (1976).

Totality of facts and circumstances, including information from radio report about fleeing pedestrian and pursuing citizen, and identification of pursuing citizen, justified warrantless arrest of pedestrian while he was being transported by officers to scene of reported incident, even though sum total of information available to officers when they placed pedestrian under arrest came from an unidentified victim of an

undisclosed robbery and assault. D.C. Code §§ 22-502, 22-2901, 22-3201; U.S. Const. Amend. 4. *Bates v. United States*, 327 A.2d 542, 1974 D.C. App. LEXIS 297 (1974).

Conduct of trial.

In prosecution for aggravated assault while armed, defendant's right to a public trial was not violated by trial judge's excluding from courtroom and courthouse family members who displayed signs in hallway requesting that defendant be sent home, where one juror mentioned to fellow jurors that she saw the signs, and juror felt that signs were an attempt to influence jury. *Zeledon v. United States*, 770 A.2d 972, 2001 D.C. App. LEXIS 97 (2001).

In view of trial court's preparations to allow defendant charged with felony-murder, burglary while armed, attempted armed robbery, and assault with a dangerous weapon to represent himself, and steps trial court took to ensure that this could be done without prejudice to defendant, trial court did not abuse its discretion in denying request for continuance. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

In prosecution for assault with deadly weapon, fact that complainant's daughter, who was seated with complainant in courtroom, was introduced to jury panel during voir dire was not an abuse of discretion and did not prejudice defendant. D.C. Code § 22-502. *Brown v. United States*, 383 A.2d 1082, 1978 D.C. App. LEXIS 434 (1978).

Refusal, in prosecution for offenses, which allegedly took place in November, 1971, of sodomy, taking indecent liberties with a minor and assault with a deadly weapon, to grant continuance for psychiatric examination of accused merely on basis of fact that accused's record included at least one 1967 conviction for a crime against nature was not an abuse of discretion. D.C. Code §§ 22-502, 22-3501(a), 22-3502, 24-301(a). *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

Constitutional rights of defendant.

Exhibition, in presence of defense counsel, of photograph of formal counseled lineup to two eyewitnesses to robbery on day of robbery trial, 14 months after the robbery, did not constitute violation of due process. D.C. Code §§ 22-502, 22-3202. *United States v. King*, 461 F.2d 152, 1972 U.S. App. LEXIS 10935 (C.A.D.C. 1972).

Identification of defendants who were charged with armed robbery and assault with a deadly weapon, by victim, after defendants were picked up near scene of the crime and brought back to a squad car did not violate defendants' due process rights on theory identification was tainted by suggestive circum-

stances surrounding it, where victim had given officer a detailed description of the robbers, had participated in the search for them and in fact had pointed out defendants to the arresting officer. *United States v. Wilson*, 449 F.2d 1005, 1971 U.S. App. LEXIS 9489 (C.A.D.C. 1971).

Where robbery victim on morning after robbery was shown 15 photographs depicting males of various ages, including one photograph of defendant that was not highlighted so as to prompt its selection and victim identified defendant's photograph, which was sixth photograph shown to him, as that of robber and remained firm in such identification after examining remaining photographs, such identification did not deny due process and did not vitiate subsequent in-court identification. D.C. Code §§ 22-502, 22-2901; Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *United States v. Hamilton*, 420 F.2d 1292, 1969 U.S. App. LEXIS 11374 (C.A.D.C. 1969).

Where an intruder broke into apartment of two women, and shortly thereafter defendant was arrested as a suspect, and about 30 minutes after the attack the women were asked to come down to the street in front of their apartment and view defendant who was sole occupant of patrol wagon, use of "one-man showup" did not deny defendant due process of law. D.C. Code §§ 22-502, 22-1801. *Bates v. U.S.*, 405 F.2d 1104, 1968 U.S. App. LEXIS 4485 (C.A.D.C. 1968).

Trial court's admission of eyewitness's statement to police officers, with regard to identity of assailant, "It's [name that matched defendant's first name]," did not violate defendant's Sixth Amendment right of confrontation at trial for assault with a dangerous weapon, even assuming that statement was testimonial; statement was relied upon by defense solely to prove its effect on those who heard it, not to establish truth of matter asserted. *Lewis v. United States*, 930 A.2d 1003, 2007 D.C. App. LEXIS 550 (2007).

Defendant had right to be present when trial court amended judgment and commitment order to add provision for supervised release to his sentence, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW). *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Neither Fifth Amendment privilege against self-incrimination nor due process standards prevented standing of codefendants side by side before jury to assess their relative physical appearances, in prosecution for armed robbery, robbery and assault with a dangerous weapon, and it was of no consequence that defendant declined to take stand to testify on his own behalf since such physical display did not constitute "testimony." U.S. Const. Amend. 5; D.C. Code §§ 22-502, 22-2901, 22-3202. *Hill v.*

United States, 367 A.2d 110, 1976 D.C. App. LEXIS 436 (1976).

Construction and application.

Assault with dangerous weapon statute concerns itself with danger of instrumentality used without regard to whether it was specifically intended that its use in particular instance would issue in serious injury, and thus specific intent to inflict injury with weapon is not necessary element of assault with dangerous weapon. D.C. Code § 22-502. *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

Construction with other laws.

Defendant, who was convicted of assault with a dangerous weapon, was properly denied treatment under Narcotic Addict Rehabilitation Act since he was convicted of crime of violence. 18 U.S.C. § 751(a); D.C. Code § 22-502. *United States v. Fitzgerald*, 466 F.2d 377, 1972 U.S. App. LEXIS 8236 (C.A.D.C. 1972).

Defense of others.

In view of fact that defendant's companion could not justifiably return the fire of a security guard who was attempting to prevent a felony and who had been fired on first, defendant likewise had no right to shoot and, therefore, defendant charged with assault with intent to kill while armed was not entitled to an instruction of the defense of another based on theory that he drew his own gun and shot at security guard only after his companion fell to the ground and the security guard continued to fire. D.C. Code §§ 22-501, 22-502, 22-3202. *Taylor v. United States*, 380 A.2d 989, 1977 D.C. App. LEXIS 284 (1977).

Defenses generally.

Where record unequivocally established that, after three years of representing defendant, defense counsel concurred with conclusions reached by psychiatrist and judge that defendant was a malingeringer and expressed opinion that it was tactically unwise to raise an insanity defense unless he felt he had a chance, defendant was not entitled to reversal of conviction of armed robbery assault with a deadly weapon and carrying a pistol without a license on ground of judicial interference with his defense counsel's attempt to pursue insanity issue. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3204, 24-301(a). *United States v. Simms*, 463 F.2d 1273, 1972 U.S. App. LEXIS 9318 (C.A.D.C. 1972).

Since a specific intent to inflict serious injury with a weapon is not necessary under statute relating to assault with a dangerous weapon,

drunkenness is no defense to such a charge. D.C. Code 1961, § 22-502. *Parker v. United States*, 359 F.2d 1009, 1966 U.S. App. LEXIS 6529 (C.A.D.C. 1966).

Different offenses in same transaction.

Even though defendant was actually sentenced to aggregate maximum of 12 years in prison, eight years less than he could have received for entry with intent to commit robbery under Federal Bank Robbery Act, and 13 years less than Act's aggravated robbery penalty, where defendant was convicted of entering federally insured bank with intent to commit robbery under Federal Bank Robbery Act and of local offense of assault for convictions stemming from a single course of criminal conduct, it was error to fragment the robbery and venture outside federal scheme, and therefore, conviction and sentencing of defendant for assault with dangerous weapon was invalid. 18 U.S.C. § 2113; D.C. Code 1973, § 22-502. *United States v. Leek*, 665 F.2d 383, 1981 U.S. App. LEXIS 17422 (C.A.D.C. 1981).

Even though defendant plead guilty to two counts upon which he subsequently was convicted and sentenced, district court had no power to convict or impose sentence under local statute governing assault with dangerous weapon, where local conviction stemmed from same course of criminal conduct giving rise in defendant's guilty plea to section of Federal Bank Robbery Act governing entry with intent to commit robbery. 18 U.S.C. § 2113(a); D.C. Code 1973, § 22-502. *United States v. Leek*, 665 F.2d 383, 1981 U.S. App. LEXIS 17422 (C.A.D.C. 1981).

Assault with dangerous weapon upon motel clerk was lesser included offense of armed robbery of same person, and conviction of former could not stand as conviction for another offense. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Lee*, 509 F.2d 400, 1974 U.S. App. LEXIS 5476 (C.A.D.C. 1974), writ of certiorari denied by 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765, 1975 U.S. LEXIS 1180 (1975).

Assault with dangerous weapon was lesser included offense in armed robbery offense, and additional convictions for assault with dangerous weapon would accordingly be vacated where defendant had been convicted on three armed robbery counts. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Assault with dangerous weapon was lesser included offense of armed robbery; thus, defendants could not be convicted of both three counts of armed robbery and three counts of assault with a deadly weapon and convictions of assault would be reversed. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. McKin-*

ley, 485 F.2d 1059, 1973 U.S. App. LEXIS 7985 (C.A.D.C. 1973).

The conviction of defendant for federal bank robbery by force and violence and in addition thereto for assault with a dangerous weapon under the District of Columbia Code permitting a maximum sentence of up to 30 years, whereas if defendant had been charged with federal crime of assault with a dangerous weapon in connection with bank robbery his maximum sentence would have been no more than 25 years, was plain error, since it permitted Government to obtain a sentence longer than the maximum authorized under highest tier of bank robbery scheme. 18 U.S.C. § 2113(a); D.C. Code § 22-502. *United States v. Canty*, 469 F.2d 114, 1972 U.S. App. LEXIS 7278 (C.A.D.C. 1972).

Defendant could be properly charged and convicted of not only federal bank robbery but also under District of Columbia statute relating to carrying of a dangerous weapon, since federal bank robbery statute was unconcerned with the type of weapon person might use or with his right under local law to carry such weapon. 18 U.S.C. § 2113(a); D.C. Code §§ 22-502, 22-3204. *United States v. Canty*, 469 F.2d 114, 1972 U.S. App. LEXIS 7278 (C.A.D.C. 1972).

Where robbery constituted a unitary transaction, defendant could not properly be convicted and sentenced on two robbery counts. 18 U.S.C. § 2113(a); 18 U.S.C. § 292(c); D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Hopkins*, 464 F.2d 816, 1972 U.S. App. LEXIS 8848 (C.A.D.C. 1972).

Trial court lacked jurisdiction to convict defendant, who had been indicted only for robbery, of assault with dangerous weapon (an offense not necessarily included in robbery) even though defendant failed to object to dangerous-weapon charge. Fed. Rules Crim. Proc. rule 31(c), 18 U.S.C.; D.C. Code, 1961, §§ 22-502, 22-2901. *Crosby v. United States*, 339 F.2d 743, 1964 U.S. App. LEXIS 3783 (C.A.D.C. 1964).

Under statute providing that no person shall possess pistol or any other firearm while committing crime of violence or dangerous crime, where defendant's convictions for assault with dangerous weapon and attempted armed robbery merge to become one "crime of violence or dangerous crime," there can be only one associated offense of possession of firearm during crime of violence. D.C. Code 1981, §§ 22-502, 22-2901, 22-3204(b). *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Convictions of both attempted robbery while armed and of assault with a dangerous weapon, arising out of same incident, were proper in

view of fact that each offense clearly required proof of a fact that other did not because offenses were directed against different victims. D.C. Code 1981, §§ 22-502, 22-2402, 22-3202. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Conviction for assault with dangerous weapon could not stand in view of defendant's conviction for armed robbery arising out of same incident. *Harling v. United States*, 460 A.2d 571, 1983 D.C. App. LEXIS 374 (1983).

Offense of assault with a deadly weapon must be set aside as a lesser included offense of armed robbery only when conviction for armed robbery arose out of same act of defendant. D.C. Code §§ 22-502, 22-2901, 22-3202. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

Conviction of assault with a deadly weapon would not be set aside as a lesser included offense of armed robbery, where jury's conviction of assault with a deadly weapon of necessity included finding that assault occurred after conclusion of all earlier crimes, including armed robbery. D.C. Code §§ 22-502, 22-2901, 22-3202. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

Where, in course of armed robbery, shotgun was pointed at two distinct individuals at different times, there was no error in entering separate judgments of conviction of armed robbery and assault with dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *Borrero v. United States*, 332 A.2d 363, 1975 D.C. App. LEXIS 324 (1975).

It was improper to convict defendant both for assault with a dangerous weapon and armed robbery where the assault was a necessary part of the evidence needed to support the count of armed robbery. D.C. Code §§ 22-502, 22-2901, 22-3202. *Taylor v. United States*, 324 A.2d 683, 1974 D.C. App. LEXIS 259 (1974).

Discovery.

Where record of prosecution arising out of armed robbery showed that informant contacted police, some three weeks after crime, and told them of source and whereabouts of shotgun involved and of alleged conspiracy to murder government's principal witness, but record was otherwise silent as to participation by informant in offense itself, disclosure of identity of informant on pain of dismissal should not have been required. D.C. Code §§ 22-502, 22-2901. *United States v. Skeens*, 449 F.2d 1066, 1971 U.S. App. LEXIS 9627 (C.A.D.C. 1971).

Government was not guilty of any impropriety in failing to produce photographs of defen-

dants, made on day of arrest, before they were demanded by defense counsel. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Trantham*, 448 F.2d 1036, 1971 U.S. App. LEXIS 12105 (C.A.D.C. 1971).

Government's failure to disclose police reports that indicated that victim had reported another shooting incident involving defendant did not amount to a Brady violation; the reports would not have undermined victim's credibility and changed the outcome of the trial for assault with a dangerous weapon given that victim had already admitted to reason for bias against defendant. *Stewart v. United States*, 881 A.2d 1100, 2005 D.C. App. LEXIS 468 (2005), writ of certiorari denied by 547 U.S. 1174, 126 S. Ct. 2348, 164 L. Ed. 2d 859, 2006 U.S. LEXIS 4305, 74 U.S.L.W. 3669 (2006).

Bullet holes in rear of victim's van were irrelevant in defendant's trial for assault with a dangerous weapon, and thus, evidence of the additional bullet holes contained in police reports was not favorable to defendant and was not required to be disclosed under *Brady v. Maryland*, where the only pertinent bullet hole was hole in front bumper that was alleged to have occurred when defendant shot at victim. *Stewart v. United States*, 881 A.2d 1100, 2005 D.C. App. LEXIS 468 (2005), writ of certiorari denied by 547 U.S. 1174, 126 S. Ct. 2348, 164 L. Ed. 2d 859, 2006 U.S. LEXIS 4305, 74 U.S.L.W. 3669 (2006).

Refusal, in criminal prosecution in which accused was convicted of sodomy, taking indecent liberties with a minor and assault with a deadly weapon and in which three potential government witnesses were of tender age, to grant accused discovery of names and addresses of government witnesses was not abuse of discretion. D.C. Code §§ 22-502, 22-3501(a), 22-3502; D.C. Code SCR, Criminal Rule 16. *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

Double jeopardy.

Under the sovereign doctrine a state could prosecute defendant for robbery or assault even though he had already been tried for federal bank robbery in a federal court and thus make it possible for defendant to serve longer sentence than Congress had authorized in federal statute, but doctrine had no application where the federal bank robbery statute and the District of Columbia Code were enacted by the same sovereign. 18 U.S.C. § 2113(a); D.C. Code, § 22-502. *United States v. Canty*, 469 F.2d 114, 1972 U.S. App. LEXIS 7278 (C.A.D.C. 1972).

Where defendant did not raise at his second trial the issue that his acquittal of armed robbery at first trial was acquittal of unarmed robbery as well, defendant waived the defense of double jeopardy. D.C. Code §§ 22-502, 22-

2901, 22-3202; Fed.Rules Crim.Proc. rule 12(b)(2), 18 U.S.C. *United States v. Scott*, 464 F.2d 832, 1972 U.S. App. LEXIS 8719 (C.A.D.C. 1972).

Policies of double jeopardy clause did not preclude defendant, summarily punished for contempt of court arising out of the throwing of a water pitcher at prosecutor during trial for robbery, from being later prosecuted for assault with a dangerous weapon and assault on a federal officer in performance of his official duties as a result of the same act. Fed.Rules Crim.Proc. rule 42(a), 18 U.S.C.; 18 U.S.C. §§ 111, 401(1); D.C. Code § 22-502. *United States v. Rollerson*, 449 F.2d 1000, 1971 U.S. App. LEXIS 10789 (C.A.D.C. 1971).

Fact that defendant had been sentenced for contempt for having thrown ice-filled bucket at prosecuting attorney did not preclude subsequent prosecution on counts charging assault with a deadly weapon and assault on assistant United States attorney engaged in performance of his duties. D.C. Code § 22-502; 18 U.S.C. § 111. *United States v. Rollerson*, 308 F. Supp. 1014, 1970 U.S. Dist. LEXIS 13003 (D.D.C.1970), affirmed by 449 F.2d 1000, 145 U.S. App. D.C. 338, 1971 U.S. App. LEXIS 10789 (1971).

Counts of indictment charging assault with a dangerous weapon (ADW) merged with armed robbery counts for double jeopardy purposes, such that convictions for ADW and for corresponding counts of possession of a firearm during a crime of violence (PFCV) would be vacated. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Defendant's convictions for assault with a dangerous weapon and first-degree sexual abuse did not merge under Double Jeopardy Clause, as each conviction required an element the other did not; sexual assault statute required a "sexual act," which was not required for a conviction of assault with a deadly weapon, and the assault with a deadly weapon statute required use of a "dangerous weapon," which the sexual assault statute did not require. *Scott v. United States*, 953 A.2d 1082, 2008 D.C. App. LEXIS 379 (2008).

If assault and armed robbery charges are triggered by separate acts, convictions do not merge for double jeopardy purposes. D.C. Code 1981, §§ 22-502, 22-2901, 22-3202; U.S.C. Const.Amend. 5. *Simms v. United States*, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

Assault with dangerous weapon conviction merged, for double jeopardy purposes, with armed robbery conviction; victim was struck with hard object to quiet him during robbery, perpetrators were still transporting proceeds of robbery, perpetrators had previously threatened victim with bodily harm, and there was no indication that robbery had ended when victim was struck. D.C. Code 1981, §§ 22-502, 22-

2901, 22-3202; U.S. Const.Amend. 5. *Simms v. United States*, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

Convictions for armed disfigurement and lesser included offense of assault with dangerous weapon violated double jeopardy clause where both counts were predicated on proof of possession of same weapon. U.S. Const.Amend. 5. *Curtis v. United States*, 568 A.2d 1074, 1990 D.C. App. LEXIS 4 (1990).

Imposition of separate sentences for robbery and assault with deadly weapon upon defendant who entered bedroom of victim, beat him over the head with beer bottle and robbed him, did not violate double jeopardy. D.C. Code 1981, §§ 22-502, 22-2901; U.S. Const.Amend. 5. *Floyd v. United States*, 538 A.2d 248, 1988 D.C. App. LEXIS 56 (1988).

Double jeopardy did not bar subsequent prosecution for second-degree murder of defendant who had been acquitted of assault with intent to kill while armed arising from same incident and involving same victim, where victim had not died at time defendant was prosecuted for assault, and jury at first trial was not presented with question of malice. D.C. Code 1981, §§ 22-501, 22-502, 22-2403, 22-3202; U.S. Const.Amend. 5. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Imposition of two separate and concurrent sentences for convictions of assault with intent to kill while armed and malicious disfigurement while armed was not barred by double jeopardy clause. U.S. Const.Amend. 5. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Shooting of victim following attempted robbery of victim invaded separate interest and therefore was separate offense, and thus, imposition of consecutive sentences for convictions of assault with intent to commit robbery while armed and assault with dangerous weapon was permissible under double jeopardy clause. D.C. Code 1981, §§ 22-501, 22-502, 22-3202, 23-112; U.S. Const.Amend. 5. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

Examination of witnesses.

— Confrontation rights, examination of witnesses.

Trial court's holding criminal contempt hearing of recalcitrant witness outside the presence of the jury, in prosecution for aggravated assault while armed and assault with a dangerous weapon, did not deprive defendant of his Sixth Amendment right of confrontation, as the contempt hearing was not part of the prosecution of the defendant, but a proceeding against

the witness. *Martin v. United States*, 756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Prosecutor's leading questions which were asked despite victims' inability to recall events, but which did not constitute only direct evidence against defendant, did not violate defendant's Sixth Amendment right to confront witnesses in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; U.S. Const. Amends. 5, 6. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In prosecution for armed burglary, armed robbery, and assault, trial court's ruling curtailing in limine defense counsel's inquiry of complainant concerning her possible status as a police informant in other cases, which allegedly would have caused jury to view her testimony with skepticism, was not an abridgment of defendant's Sixth Amendment right to confrontation, in that such evidence was not relevant given fact that complainant's status was that of a crime victim rather than that of a provider of information regarding criminal activities of others and fact that jury had before it complainant's admission that she engaged in after-hours sale of cigarettes and liquor contrary to law. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 25-102 et seq.; U.S. Const. Amend. 6. *Smith v. United States*, 389 A.2d 1364, 1978 D.C. App. LEXIS 543 (1978).

— Credibility and impeachment, examination of witnesses.

Had defendant taken stand in prosecution for armed robbery, assault with dangerous weapon, and carrying dangerous weapon without license, evidence of prior conviction for impersonating owner of federal check would have been admissible for impeachment purposes. D.C. Code §§ 22-502, 22-2901, 22-3204. *United States v. Moore*, 459 F.2d 1360, 1972 U.S. App. LEXIS 11942 (C.A.D.C. 1972).

Cross-examination of defendant during which prosecution was permitted to develop that for some time prior to date of offense defendant had been absent from his military post without leave was improper, and prejudice was magnified by erroneous admission of government's rebuttal evidence as to defendant's absence from military post. D.C. Code §§ 22-502, 22-1801(a), 22-2901. *United States v. Shumate*, 429 F.2d 777, 1970 U.S. App. LEXIS 8423 (C.A.D.C. 1970).

Decision, rendered after hearing on admissibility that 1959 conviction of one defendant for housebreaking and larceny and 1962 conviction of another defendant for attempted housebreaking could be brought out on cross-examination in robbery prosecution unless either

defendant could satisfy court that since conviction he had led legally blameless life was not abuse of discretion. D.C. Code §§ 14-305, 22-502, 22-2901, 22-3214(a); U.S. Const. Amends. 5, 6, 14. *United States v. Bailey*, 426 F.2d 1236, 1970 U.S. App. LEXIS 10227 (C.A.D.C. 1970).

Prosecutor had good faith belief he could establish prior convictions for felony carrying a dangerous weapons (CDW), as factual predicate for impeaching defendant on cross-examination in prosecution for assault with dangerous weapon by asking about prior convictions, where prosecutor had based his questions on Pretrial Services Agency report indicating that defendant had two prior felony CDW convictions, though in fact defendant had been previously convicted of carrying a pistol without a license, unregistered firearm, and unlawful possession of ammunition. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

Allowing prosecution to introduce, on rebuttal, certification of defendant's prior convictions for carrying a pistol without a license (CPWL), unregistered firearm, and unlawful possession of ammunition, was not plain error in prosecution for assault with dangerous weapon, though prosecutor's impeachment of defendant on cross-examination had been based on the factual predicate of prior convictions for felony carrying a dangerous weapons (CDW), because CDW was closely related to CPWL. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

In prosecution for attempted robbery, burglary, assault, and murder, trial court did not err in denying defendant's pretrial motion to limit his impeachment to fact but not nature of his prior convictions. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Defense counsel, in prosecution for assault with a dangerous weapon, should have been allowed to impeach the prosecution's case by cross-examining one of the three prosecution witnesses as to his juvenile status, viz., the fact that he was on probation as a juvenile for a robbery conviction, since the three witnesses, two brothers and their cousin, were as one because of their unity of testimonial interest, to wit, their interest in keeping the one brother's probation from being revoked, and since the three may have thought that they themselves would be suspects, for any version of the shooting tending to make defendant's activities appear to have been in self-defense would concomitantly point the finger of accusation at the

three witnesses. D.C. Code §§ 22-502, 22-3204; U.S. Const. Amend. 6. *Gillespie v. United States*, 368 A.2d 1136, 1977 D.C. App. LEXIS 415 (1977).

In prosecution for unlawful entry and assault with deadly weapon, trial court did not improperly limit defendant's attempts to cross-examine government witnesses as to their possible desire to protect their employer from civil suit. D.C. Code §§ 22-502, 22-3102. *Hyman v. United States*, 342 A.2d 43, 1975 D.C. App. LEXIS 431 (1975).

In prosecution for sodomy, taking indecent liberties with a minor and assault with a deadly weapon, questioning of complainant as to, inter alia, "why is it that the first time you said the man tried to do it and later you said that he did do it" did not constitute "impeachment", for purposes of statute permitting party to impeach its own witness only if party is taken by surprise by witness' testimony, but rather a permissible effort to obtain an "explanation" for established inconsistent statements. D.C. Code §§ 14-102, 22-502, 22-3501(a), 22-3502. *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

Where government's only witness to fact that stabbing was intentional was victim, refusal to permit defense counsel to cross-examine witness, with whom defendant had been living, as to whether or not she was aware of another woman in defendant's life was error. D.C. Code § 22-502. *White v. United States*, 297 A.2d 766, 1972 D.C. App. LEXIS 295 (1972).

— Cross-examination, examination of witnesses.

In prosecution for assault with a dangerous weapon, permitting district attorney to cross-examine defendant as to why defendant didn't run into house to avoid trouble if she believed complaining witness was going to do defendant some harm was proper, since the cross-examination was calculated to search for nature of defendant's belief and was proper to determine whether defendant went further than she was justified in doing. D.C. Code 1940, § 22-502. *Josey v. U.S.*, 135 F.2d 809, 1943 U.S. App. LEXIS 3423 (1943).

Where defendant, charged with possession of prohibited weapon and with assault with a dangerous weapon, called as a character witness his employer who testified that defendant had a good reputation in the community of keeping the peace and good order, cross-examination of employer as to whether he had heard that defendant had been convicted of the crime of false pretenses was proper. D.C. Code §§ 22-502, 22-3214(b). *Darden v. United States*, 342 A.2d 24, 1975 D.C. App. LEXIS 417 (1975).

— In general.

Trial court properly rejected attempt by two witnesses who were unfamiliar with defen-

dant's reputation as to character traits in issue in robbery and assault case to testify as to his character. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Hinkle*, 448 F.2d 1157, 1971 U.S. App. LEXIS 8860 (C.A.D.C. 1971).

Foundation for lay opinion of detective who conducted post-crime interview with victim, that victim did not appear to be intoxicated at hospital during the interview, was assumed to exist in prosecution for assault with dangerous weapon, where defendant failed to pose any objection to detective's testimony. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

Trial court followed the correct course of action, in prosecution for aggravated assault while armed and assault with a dangerous weapon, when it prevented a recalcitrant witness from being called to the stand in front of the jury for the sole purpose of his refusing to answer the government's questions, and in holding a contempt hearing of the witness out of the presence of the jury; though witness did not assert a Fifth Amendment privilege or any valid reason for refusing to testify, it was likely that the jury would speculate as to the possible reasons for the refusal. *Martin v. United States*, 756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Prosecutor who called robbery victims to testify despite victims' expressed inability to recall events was entitled to continue questioning victims in order to probe memory and test recollection in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who asked detective open-ended question leading to testimony as to identification made by witness that had not testified about identification and whose open-ended question led to detective's testimony in violation of court order was not sufficiently cautious and injected error into trial for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

— Leading questions, examination of witnesses.

Prosecutor's eight leading questions which were put to victims despite victims' inability to recall events of robbery were improper in prosecution for armed robbery, assault with intent

to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Harmless or reversible error.

— Admission of evidence, harmless or reversible error.

Where informant's statement that defendant had been arrested on another charge was elicited on cross-examination by defendant's trial counsel, the trial judge instructed the jury to disregard the statement and the evidence of defendant's guilt was strong, the informant's statement was not prejudicial. D.C. Code §§ 22-502, 22-2901, 22-3202(a). *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

In prosecution for armed robbery of bus passengers and assault with dangerous weapon, even if defendant's statement, "I didn't mean to do it" made after he was arrested and brought back to scene and confronted by outraged passengers was somehow attributable to hostile confrontation of passengers, it was not of character to justify finding that it undermined fairness of trial, considering evidence as whole. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Porcha*, 450 F.2d 697, 1971 U.S. App. LEXIS 8068 (C.A.D.C. 1971).

Defendant was not prejudiced by any error in trial court's admission of eyewitness's statement to police officers, with regard to identity of assailant, "It's [name that matched defendant's first name]"; defense counsel made full, intentional use of statement in attempt to discredit victim, and eyewitness's identification of defendant was merely cumulative of identifications by victim and another eyewitness. *Lewis v. United States*, 930 A.2d 1003, 2007 D.C. App. LEXIS 550 (2007).

Defendant was not prejudiced in presenting his theory of self-defense that homicide victim was first aggressor based on trial court's decision precluding defendant from presenting additional evidence of violent character of assault victim who was also present in room when defendant and friend attempted to sell victims soap rather than cocaine; there could be no legal imputation of assault victim's intent to homicide victim because, although victims may have been cohorts, they were victims, not parties charged as aiders and abettors. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

In prosecution for armed robbery, robbery, and assault with dangerous weapon, no prejudicial error resulted from admission of hearsay testimony, where cautionary instruction was

given to jury at time, and in addition, subsequent testimony of the then absent witness giving rise to hearsay objection served further to remove any likelihood of prejudice. D.C. Code §§ 22-502, 22-2901, 22-3202. *Thompson v. United States*, 354 A.2d 848, 1976 D.C. App. LEXIS 510 (1976).

— Arguments and conduct of counsel, harmless or reversible error.

Any error by trial court's refusal to instruct jury of adverse inference from Government's decision to omit evidence referred to in opening statement of defendant's initial, false statement to police as to how and where he received injuries, in order to preclude defendant from presenting evidence of subsequent statement to police regarding claim of self-defense, was harmless, in trial for aggravated assault while armed and related offenses; although jury never heard evidence that victim had been high on crack cocaine and was drunk, that victim had pulled knife on defendant, or that defendant believed that victim would kill him, which defendant asserted in response during opening statement, such failure could be attributed to defendant's decision not to testify, and not to any action by Government, only portion of defendant's opening that was affected by Government's opening statement was addition of defendant's later statement to police regarding claim of self-defense, evidence at issue would have shown that defendant, once informed by police that they had evidence linking him to stabbing, had opportunity to change his story and claim self-defense, and evidence that defendant had stabbed victim ten times, in back, together with evidence indicating that no one saw victim with knife, tended to disprove defendant's claim of self-defense. *Evans v. United States*, 12 A.3d 1, 2011 D.C. App. LEXIS 23 (2011).

Prosecutor's improper comment during rebuttal argument, to effect that defense was asking jury "to accept the word of a convicted thief and a convicted drug dealer," even when viewed in context of prosecutor's other improper remarks, did not result in defendant suffering substantial prejudice, and thus defendant was not entitled to have his convictions for aggravated assault while armed and assault with a dangerous weapon overturned on this ground. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor's improper comments during rebuttal argument, including that defendant had clearly made false statements because he knew that he was guilty, and that he had something to hide did not warrant reversal, in prosecution for aggravated assault while armed and assault

with a dangerous weapon; defendant voiced no objection that trial court's curative instruction following prosecutor's improper comments were inadequate to remedy impropriety to which it had been directed, and government's case against defendant was strong. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor's comments during rebuttal argument, with respect to alleged victim's testimony, including that victim had been honest about what had happened, as well as similar comments regarding state's witness, including that his testimony had been "incredibly straightforward," some of which might have been infelicitous, were relatively innocuous, in prosecution for aggravated assault while armed and assault with a dangerous weapon, as it was likely that jury understood prosecutor to be arguing merely that particular testimony she cited evinced that victim and state's witness were credible. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Even if prosecutor's closing argument in response to defendant's attacks on victim's credibility had constituted misconduct, defendant nevertheless would not have been entitled to reversal of his convictions for assault with a dangerous weapon and possession of a prohibited weapon, as prosecutor's closing argument was not a particularly egregious situation resulting in clear miscarriage of justice. *McCoy v. United States*, 781 A.2d 765, 2001 D.C. App. LEXIS 211 (2001).

Any error in trial court's failure to intervene, sua sponte, to prevent prosecutor from impeaching defendant by cross-examining him about his prior convictions, and to prevent prosecutor from arguing in closing and rebuttal that defendant had lied, was harmless, in prosecution for assault with dangerous weapon, where jury heard significant damaging testimony from defendant that he was a drug abuser who had been convicted of drug-related offenses. *Thomas v. United States*, 772 A.2d 818, 2001 D.C. App. LEXIS 114 (2001), writ of certiorari denied by 543 U.S. 913, 125 S. Ct. 233, 160 L. Ed. 2d 193, 2004 U.S. LEXIS 6169, 73 U.S.L.W. 3214 (2004).

Prosecutor's improper remarks in closing and rebuttal arguments, which argued facts that were not in evidence and suggested that fact of defendant's arrest conclusively demonstrated guilt, were sufficiently prejudicial to require reversal in prosecution for assault with a dan-

gerous weapon; no contemporaneous curative instructions were given, misconduct related directly to issue of defendant's guilt and bolstered what was otherwise relatively weak and wholly circumstantial government case. *D.C. Code* 1981, § 22-502. *Lewis v. United States*, 541 A.2d 145, 1988 D.C. App. LEXIS 81 (1988).

Prosecutor's improper, incomplete missing witness argument which claimed that only defendant's sister and girl friend supported alibi defense of being at party with several other potential witnesses, which trial court ordered prosecutor to abandon, and which was made in context of strong evidence against defendant did not substantially sway jury and did not prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. *D.C. Code* 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In proceeding in which defendant was convicted of assault with deadly weapon and in which defendant introduced person as a prospective witness, any error in permitting prosecutor to comment during closing argument in regard to defendant's failure to call such person as a witness was harmless error, in view of the airtight case against defendant. *D.C. Code* § 22-502. *Brown v. United States*, 383 A.2d 1082, 1978 D.C. App. LEXIS 434 (1978).

— Conduct and deliberations of jury, harmless or reversible error.

Where Allen charge was given after jury which had not been sequestered had deliberated 2 hours and 20 minutes and announced that they had reached a verdict on charge of carrying a dangerous weapon but were deadlocked on charge of assault with deadly weapon and after court took jury verdict of acquittal on carrying charge and where jury deliberated only 25 minutes before returning verdict of guilty on assault charge, Allen charge was not coercive to the point of requiring reversal of conviction. *D.C. Code* §§ 22-502, 22-3204. *Winters v. United States*, 317 A.2d 530, 1974 D.C. App. LEXIS 391 (1974).

— Conduct of trial generally, harmless or reversible error.

Refusal of bifurcated trial prosecution sought on ground that defendant would defend on ground of want of criminal responsibility was not reversible error where defense assured trial court that there was no defense on merits, and evidence to prove that defendant was one who robbed filling station was very strong. *D.C. Code* §§ 22-502, 22-2901, 22-3204; *U.S. Const. Amend. 5*. *United States v. Grimes*, 421 F.2d 1119, 1969 U.S. App. LEXIS 10770 (C.A.D.C.

1969), writ of certiorari denied by 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98, 1970 U.S. LEXIS 1795 (1970).

— **Counsel for accused, harmless or reversible error.**

Where victims' identification of defendant charged with armed robbery and assault with a dangerous weapon was reliable, where photograph of lineup showed little suggestivity, and where photograph of lineup was introduced into evidence at trial and defense counsel had the opportunity to, and did, argue to the jury that the lineup was suggestive, any error in attorney's failure to represent defendant at lineup due to his being informed that defendant was not in lineup and his failure to recognize defendant in lineup was harmless. D.C. Code §§ 22-502, 22-2901, 22-3202. *Washington v. United States*, 377 A.2d 1348, 1977 D.C. App. LEXIS 382 (1977).

— **Examination of witnesses, harmless or reversible error.**

In prosecution for armed robbery and assault with a dangerous weapon, trial court committed prejudicial error in ruling that a prospective defense character witness whose testimony was to be limited to defendant's reputation for truth and veracity could be cross-examined about an alleged arrest of defendant for rape; in addition to introducing the reprobated "bad man—good man" dichotomy into the trial, the relationship between rape and veracity is tenuous at best, and any possible probative value of the evidence would have been far outweighed by its prejudicial effect. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Fox*, 473 F.2d 131, 1972 U.S. App. LEXIS 6730 (C.A.D.C. 1972).

Scope of cross-examination of key government witness was not improperly limited and jury was not erroneously instructed in prosecution for assault with dangerous weapon and mayhem. *Mathis v. U.S.*, 300 F.2d 916, 1962 U.S. App. LEXIS 5609 (C.A.D.C. 1962).

Defendant was not entitled to a mistrial at trial for assault with a dangerous weapon based on statement by police officer, during his testimony, that defendant was homeless, even though defendant argued that statement suggested that he might have been mentally ill; statement came unexpectedly when officer casually mentioned homelessness when responding to a question about whether he had searched for weapons, defense counsel immediately objected, trial court struck officer's response and later instructed jury not to consider stricken testimony, government had a strong case against defendant, and defendant's claim of prejudice was purely speculative. *Lewis v. United States*, 930 A.2d 1003, 2007 D.C. App. LEXIS 550 (2007).

Error, as result of prosecutor's open-ended question leading detective to violate court order not to mention photographic identification made by witnesses who had not given identification testimony, did not prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license, where detective did not testify that witness had made identification, and defense did not rest on claim of misidentification. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's improper use of eight leading questions which were put to robbery victims who could not recall events, which asked whether property was taken from victims and whether victims remembered identifying defendant to police, which put before jury a fact not otherwise known, which was directly relevant to main issue in case, but which asked for cumulative evidence and were not answered, did not substantially prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In simple assault prosecution arising out of automobile accident, any error on part of trial court in preventing cross-examination of complaining witness before jury as to existence or possibility of civil lawsuit growing out of automobile accident was harmless beyond reasonable doubt. D.C. Code § 22-502. *Sullivan v. United States*, 404 A.2d 153, 1979 D.C. App. LEXIS 414 (1979).

In prosecution for armed burglary, armed robbery and assault, error of a constitutional dimension occurred in restricting scope of defense cross-examination of detective and complainant concerning her possible role as an informant in other cases, which might have demonstrated her need to curry favor with authorities, presumably in exchange for their overlooking her own illegal conduct of bootlegging liquor and cigarettes, but such error was harmless, where complainant testified that she believed that police were aware of her illegal activities, complainant admitted status as lawbreaker, evidence showed that complainant was victim of violent assault and record reflected that restricted cross-examination was of relatively little importance in trial below. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 25-102 et seq.; U.S. Const. Amend. 6. *Smith v. United States*, 389 A.2d 1364, 1978 D.C. App. LEXIS 543 (1978).

In prosecution for assault with a dangerous weapon, in which complaining witness jail visitor testified that defendant corrections officer attacked him with blackjack, a dangerous weapon, and in which defendant testified that it was an Afro comb, not a dangerous weapon, prejudicial error occurred in trial court's cutting off, in limine, defense counsel's attempt to cross-examine complaining witness concerning his potential bias stemming from his having instituted a civil suit against defendant based on altercation since such attempt at cross-examination was relevant to issue of complaining witness' bias, especially where complaining witness' testimony was key to defendant's conviction. D.C. Code § 22-502; U.S. Const. Amend. 6. *Webb v. United States*, 388 A.2d 857, 1978 D.C. App. LEXIS 535 (1978).

Where defendant's guilt on charge of assault with dangerous weapon turned wholly on credibility of complainant's testimony, refusal of trial court to permit defense counsel to ask complainant with whom defendant had been living whether she was aware of another woman in defendant's life was prejudicial error. D.C. Code § 22-502. *White v. United States*, 297 A.2d 766, 1972 D.C. App. LEXIS 295 (1972).

— Exclusion of evidence, harmless or reversible error.

Government's decision not to introduce defendant's initial false statement to police regarding how and where he received his injuries, despite having referred to such evidence during opening statement, after defense counsel had explained defendant's statement and informed jury that defendant had asserted self defense, did not warrant mistrial on charge for aggravated assault while armed and related offenses, based on defendant's claim that comment made jury aware of false statement without Government having to put forth any evidence, which would have been subject to cross-examination, about statement; Government's comment about false statement during opening was confined to opening statement, it was not touted to jury as critical, and jury was instructed three times that argument was not evidence. *Evans v. United States*, 12 A.3d 1, 2011 D.C. App. LEXIS 23 (2011).

Trial court's erroneous exclusion of the transcript of defense witness's inconsistent statements before the grand jury was harmless; witness was at the scene of the shooting and was the only person who directly identified defendant as the shooter, he was called by the defense, which argued that it was witness who had the motivation to shoot victim and actually did so, transcript of witness's testimony before the grand jury was not read in full at the trial, and instead, defense counsel would impeach aspects of witness's trial testimony by referring

him to specific page of grand jury transcript and reading the specific statement that was inconsistent with witness's trial testimony, and jury verdict revealed that jurors dismissed witness's testimony that defendant was the shooter. *Spencer v. United States*, 991 A.2d 1185, 2010 D.C. App. LEXIS 146 (2010).

There was no reasonable probability of different outcome, in assault prosecution arising from a nonfatal shooting, if government had made pretrial disclosure of statement by alleged accomplice that he handed gun to someone other than defendant; victim, who identified defendant as shooter, never testified that alleged accomplice handed a gun directly to defendant or that defendant even spoke with alleged accomplice, and thus the undisclosed information would not have undermined victim's credibility, but would have tended only to corroborate his identification of defendant rather than alleged accomplice as shooter. *Ginyard v. United States*, 816 A.2d 21, 2003 D.C. App. LEXIS 32 (2003), writ of certiorari denied by 538 U.S. 1066, 123 S. Ct. 2237, 155 L. Ed. 2d 1123, 2003 U.S. LEXIS 4218, 71 U.S.L.W. 3735 (2003).

Investigating officer's failure to disclose that she overlooked a rusted gun later found in the vehicle from which defendant fled, or that she had been subjected to disciplinary proceeding for submitting erroneous item descriptions of her investigation, was not so serious that there would have been a reasonable probability that the suppressed evidence would have produced a different result in prosecution for assault with a deadly weapon (ADW) so as to trigger Brady or Jencks Act sanctions, where only evidence of the assault was testimony of other officers, who identified defendant as person who shot at one of them, and retrieved operable pistol from defendant's flight path. *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

Although trial judge might have been unduly restrictive in curtailing counsel's examination of several defense witnesses, since most of the testimony as proffered was marginally relevant or cumulative its exclusion was not an abuse of discretion warranting reversal of conviction. D.C. Code §§ 22-502, 22-2901, 22-3202. *Randall v. United States*, 353 A.2d 12, 1976 D.C. App. LEXIS 481 (1976).

Denial, in prosecution for sodomy, taking indecent liberties with a minor and assault with a deadly weapon, of formal introduction of documents reflecting prior inconsistent statements of complaining witness was not reversible error where there was both extensive cross-examination and pointed final argument with regard to such inconsistent statements. D.C. Code §§ 22-502, 22-3501(a), 22-3502. *Davis v.*

United States, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

— **In general.**

Findings on motion to vacate sentence that movant's testimony that appointed trial counsel had not informed movant of time limit for filing criminal appeals was not credible were not clearly erroneous. 18 U.S.C. § 2255; D.C. Code §§ 22-502, 22-2901, 22-3204. *United States v. Washington*, 475 F.2d 357, 1973 U.S. App. LEXIS 11934 (C.A.D.C. 1973).

Error in trial court's determination that defendant's display of knife constituted use of excessive deadly force, thus precluding claim of self-defense, was harmless, in bench trial for simple assault and attempted possession of prohibited weapon, in view of trial court's disbelief of defendant's story that he displayed weapon to deter onrushing attacker, and finding that defendant, not alleged attacker, was aggressor. *Douglas v. United States*, 859 A.2d 641, 2004 D.C. App. LEXIS 460 (2004).

— **Instructions, harmless or reversible error.**

Assuming that failure of trial judge to inform defendant's counsel of larceny charge before he summed up constituted error, in situation where defendant was indicted for robbery and assault with a deadly weapon, such failure lacked the prejudice necessary to constitute reversible error where, *inter alia*, defendant's admission in open court established his intention and attempt to trick complainants, so that damage was done when defendant took the stand and it was not likely that any variation in summation would have changed the verdict. D.C. Code §§ 22-502, 22-2201, 22-2901; Fed. Rules Crim. Proc. rule 30, 18 U.S.C. Walker v. United States, 418 F.2d 1116, 1969 U.S. App. LEXIS 12640 (C.A.D.C. 1969).

Errors, if any, in instructions in prosecution for assault with dangerous weapon, on burden of proof to negate claim of defendant that discharge of the pistol was accidental, and with respect to credibility of chief witness for the prosecution, were not, under the circumstances, prejudicial. D.C. Code 1961, § 22-502. *Dean v. U.S.*, 314 F.2d 250, 1962 U.S. App. LEXIS 3285 (C.A.D.C. 1962).

Trial court's aiding and abetting instruction was erroneous as to aiding and abetting the element of "possession" with respect to the crime of possession of a firearm during a crime of violence, and because carrying pistol without license also was a possessory offense, the jury had to find that the accomplice had the intent to assist the principal carry the unlicensed weapon, and these errors were "clear" for purposes of plain error review, but defendant's substantial rights were not affected by the erroneous aiding and abetting instruction;

throughout trial, the prosecutor's theory was that defendant, not his companion, shot victim, and aiding and abetting theory was offered as fall-back to the government's principal argument that it was defendant who shot victim. *Spencer v. United States*, 991 A.2d 1185, 2010 D.C. App. LEXIS 146 (2010).

Error was not harmless, in prosecution for aggravated assault while armed, in trial court's failure to define "serious bodily injury," as medical evidence was conflicting in regard to whether victim's injuries of broken collarbone and arterial bleeding were life threatening, and jury would not necessarily have found serious bodily injury if it were correctly instructed. *Zeledon v. United States*, 770 A.2d 972, 2001 D.C. App. LEXIS 97 (2001).

It is reversible error to instruct jury solely on elements comprising attempted-battery assault when evidence adduced at trial could support only attempt-to-frighten assault. D.C. Code 1981, § 22-502. *Peterson v. United States*, 657 A.2d 756, 1995 D.C. App. LEXIS 66 (1995).

Where jury charge in prosecution for assault with dangerous weapon adequately focused jury's attention on self-defense issue and did not leave jury with erroneous impression the self-defense is permitted only when accused is threatened with death or serious bodily injury, but rather emphasized general concept of self-defense doctrine, reversal was not required due to error in denying defendant's requested instruction regarding permissible use of nondeadly force to defend oneself. D.C. Code 1981, § 22-502. *McPhaul v. United States*, 452 A.2d 371, 1982 D.C. App. LEXIS 475 (1982).

Where at least two witnesses observed blows being struck with pipe and two others noticed serious injury sustained, Government's evidence in prosecution for assault with dangerous weapon was strongly persuasive that defendant used deadly force in course of fight, and error in denying defendant's requested instruction regarding permissible use of nondeadly force to defend oneself did not affect outcome of case and was therefore harmless. D.C. Code 1981, § 22-502. *McPhaul v. United States*, 452 A.2d 371, 1982 D.C. App. LEXIS 475 (1982).

— **Preliminary proceedings, harmless or reversible error.**

Government's failure to provide complaint submitted to Civilian Complaint Review Board (CCRB), in which complainant alleged he was mistreated by police officers who arrested defendant, would not require reversal of convictions for drug trafficking and weapons offenses, even assuming complaint was Brady material; presentation of the material to impeach officers' testimony would not have made a different result reasonably probable, where the evidence against defendant was overwhelming and none of the officers who testified were implicated in

the complaint. *Farley v. United States*, 767 A.2d 225, 2001 D.C. App. LEXIS 33 (2001), writ of certiorari denied by 534 U.S. 982, 122 S. Ct. 415, 151 L. Ed. 2d 316, 2001 U.S. LEXIS 9927, 70 U.S.L.W. 3280 (2001).

Where assault and weapon charges against one defendant were joined for trial with murder charges against other defendants, particular defendant was prejudiced by association with evidence proving bloody and grotesque killing, and in view of reference throughout trial to defendants as group having name of particular defendant, associating particular defendant in minds of jurors with murder with which he was not charged, prejudice required reversal and there was thus abuse of discretion in denying severance. D.C. Code §§ 22-502, 22-2401, 22-3202, 22-3204, 23-311(c); D.C. Code SCR, Criminal Rule 8(b). *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

In prosecution for sodomy, taking indecent liberties with minor and assault with a deadly weapon, refusal to grant accused access to complaining witness' subpoenaed school records, which reflected no prior homosexual or other serious behavioral problems, was not reversible error. D.C. Code §§ 22-502, 22-3501(a), 22-3502. *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

— Rulings as to indictment or pleas, harmless or reversible error.

In view of clear evidence that defendant aided and abetted his confederate who was armed with a gun, any error concerned with alleged prolixity of indictment which charged both armed robbery and robbery, or any other claim of defect in presentation of two theories of robbery to jury, was harmless. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Porcha*, 450 F.2d 697, 1971 U.S. App. LEXIS 8068 (C.A.D.C. 1971).

— Sentence and judgment, harmless or reversible error.

Trial court's error in amending judgment and commitment order outside of defendant's presence, to add provision for supervised release to his sentence, was harmless in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); sentence correction affected only mandatory release provision, court was aware of requirement to impose release term at time of sentencing, being mistaken only as to its term, and in denying motion to reduce, made clear that original sentence was lenient, leaving no reasonable possibility that court would have reduced term of incarceration further.

Frye v. United States, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

In view of concurrent sentences imposed upon convictions for assault with intent to kill while armed and assault with a dangerous weapon, the mildness of the punishment adjudged, the trial judge's recommendation for psychiatric treatment and the necessity for conserving judicial resources, the Court of Appeals would not reach question as to whether the crime of assault with dangerous weapon merged into crime of assault with intent to kill while armed with a dangerous weapon, but would vacate the convictions on the four counts which charged assault with a dangerous weapon. D.C. Code §§ 22-501, 22-502, 22-3202. *United States v. Hill*, 470 F.2d 361, 1972 U.S. App. LEXIS 8107 (C.A.D.C. 1972).

Trial court's error in amending judgment and commitment order outside of defendant's presence, to add provision for supervised release to his sentence, was harmless in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); sentence correction affected only mandatory release provision, court was aware of requirement to impose release term at time of sentencing, being mistaken only as to its term, and in denying motion to reduce, made clear that original sentence was lenient, leaving no reasonable possibility that court would have reduced term of incarceration further. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Indictment or information.

Where assault with intent to rape committed against two women and purse snatching committed against third woman occurred within short time of each other and in approximately the same location but were not otherwise related, the mere temporal and spacial proximity could not justify characterization of the assault and robbery as different parts of the same series of acts or transactions and joinder of the robbery count with the other charges was improper and conferred upon the district court no jurisdiction over the alleged D.C. Code offense of robbery. 26 U.S.C. (I.R.C.1954) § 5861(d, i); D.C. Code §§ 22-501, 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 8, 8(b), 14, 18 U.S.C.; 18 U.S.C. § 5010(b). *United States v. Jackson*, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

Where offenses of robbery, assault with dangerous weapon, assault on member of police force, unauthorized use of vehicle, and carrying dangerous weapon were based on two or more connected acts constituting part of common scheme and plan, defendants were alleged to have participated in same series of acts constituting offenses and each of defendants aided and abetted offenses charged against other

defendants, it was proper for grand jury to join defendants and offenses in the indictment. D.C. Code §§ 22-502, 22-505(a), 22-2204, 22-2901, 22-3204; Fed. Rules Crim. Proc. rule 8(a, b), 18 U.S.C. *United States v. Wilson*, 434 F.2d 494, 1970 U.S. App. LEXIS 8760 (C.A.D.C. 1970).

Indictment charging defendant with assault with a deadly weapon was not constructively amended by prosecution when it presented evidence that defendant acted as a principal by threatening victim with a pistol and that defendant also acted as an aider and abettor when he passed pistol to companion who shot victim, and such indictment was not constructively amended by trial court when it instructed jury that defendant could be found guilty of such crime either as a principal or as an aider and abettor. D.C.C.E §§ 22-105, 22-502. *Barker v. United States*, 373 A.2d 1215, 1977 D.C. App. LEXIS 326 (1977).

No variance existed between indictment charging defendant with assault with a dangerous weapon and evidence presented at trial as result of Government's evidence that defendant acted as a principal by threatening victim with a pistol and that defendant also acted as an aider and abettor when he passed pistol to companion who shot victim, in view of fact that state's evidence at trial was based on same set of factual circumstances as was presented to grand jury at time of indictment. D.C. Code §§ 22-105, 22-502. *Barker v. United States*, 373 A.2d 1215, 1977 D.C. App. LEXIS 326 (1977).

Where each of two robberies was committed with sawed-off rifle, each involved as victim a delivery truck driver who collected money after each delivery, each driver forced into truck and driven or made to drive to another location while the money was taken from him, the two offenses occurred within five days of each other and, when defendant was removed from police car after arrest, a revolver was found beside seat on side where he had been sitting, joinder of the two robbery charges and charge of carrying dangerous weapon was proper. 18 U.S.C. § 5010(c); D.C. Code §§ 22-502, 22-2901 to 22-3202. *Goins v. United States*, 353 A.2d 298, 1976 D.C. App. LEXIS 490 (1976).

Proof that defendant pointed a blank or gas cartridge-type pistol at another was not at variance with indictment charging that the weapon was a "pistol," and, in any event, no prejudice to defendant existed in view of defendant's admission that he knew the nature of the weapon seized from him. D.C. Code § 22-502. *Harris v. United States*, 333 A.2d 397, 1975 D.C. App. LEXIS 332 (1975).

Instructions.

— Discharge of jury before verdict, instructions.

In prosecution for burglary and robbery and assault with a dangerous weapon, appearance

in jury room of bullet which had no relationship to case did not necessitate declaration of mistrial, in view of trial court's instructions to jury to disregard. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 22-3204. *Evans v. United States*, 392 A.2d 1015, 1978 D.C. App. LEXIS 327 (1978).

— Evidentiary basis, instructions.

In prosecution for assault with a dangerous weapon (ADW), trial committed reversible error when it instructed jury on law of aiding and abetting in absence of evidentiary support for such instruction; in closing argument, prosecutor sought to exploit the instruction by telling the jury that because of "the concept of aiding and abetting," it was the jury's duty to convict as long as it concluded "that the act occurred and that defendant participated" in the act, even if it did not believe that defendant stabbed or cut victim. *Hairston v. United States*, 908 A.2d 1195, 2006 D.C. App. LEXIS 545 (2006).

In prosecution for assault with a dangerous weapon (ADW), there was no evidentiary basis for instructing jury that defendant may have been aider or abettor; victim's testimony indicated that defendant acted as principal, while victim's prior statements cast defendant in the role of accomplice rather than principal, such statements were admitted only for their relevance to assessing victim's credibility and could not be considered for their truth, and while impeachment of victim's testimony by use of prior statements might have created a reasonable doubt on the issue of whether defendant was the principal, it could not serve as evidence that there was a different principal whose existence was supported by no other, non-conjectural evidence. *Hairston v. United States*, 908 A.2d 1195, 2006 D.C. App. LEXIS 545 (2006).

— In general.

Refusal, in prosecution for assault with a dangerous weapon, to instruct on lesser included offense of simple assault was proper where there was neither evidence nor any theory advanced by defense as to an unloaded gun being used, defense throughout evidence was that no gun existed and live cartridge found in one defendant's pocket made gun a dangerous weapon, even if there had been no cartridge in chamber, and gun police officers related had been in possession of both defendants could not be found on search following chase. D.C. Code § 22-502. *United States v. Daniels*, 437 F.2d 656, 1970 U.S. App. LEXIS 6923 (C.A.D.C. 1970).

Defendant charged with drug trafficking and weapons offenses was not entitled to missing witness instruction regarding individual who filed complaint with Civilian Complaint Review Board (CCRB) for arresting police officers' conduct, as defendant failed to establish the pecu-

liar availability of the witness to the government, where government attempted, unsuccessfully, to subpoena witness for trial, and defendant's counsel was given witness's name and address, and when he attempted to contact witness, defendant's brother answered the door of witness's apartment. *Farley v. United States*, 767 A.2d 225, 2001 D.C. App. LEXIS 33 (2001), writ of certiorari denied by 534 U.S. 982, 122 S. Ct. 415, 151 L. Ed. 2d 316, 2001 U.S. LEXIS 9927, 70 U.S.L.W. 3280 (2001).

Trial court adequately instructed jury on elements required for intent-to-frighten assault by use of pattern instruction and further instruction that offense involves pointing dangerous weapon at another person in menacing or threatening manner or using weapon in manner that would reasonably justify other person in believing that weapon might be immediately used against him, despite contention that instructions were inadequate because first part mirrored instruction on attempted-battery assault. D.C. Code 1981, § 22-502. *Peterson v. United States*, 657 A.2d 756, 1995 D.C. App. LEXIS 66 (1995).

In prosecution for assault with a deadly weapon and possession of a pistol without a license, evidence was sufficient to warrant trial court's "mere presence" jury instruction. *Barker v. United States*, 373 A.2d 1215, 1977 D.C. App. LEXIS 326 (1977).

— Instructions after submission of cause.

Jury instructions with respect to liability for assault with a dangerous weapon (ADW) as an aider and abettor fairly apprised jury that such liability required finding that defendants either actually knew or that it was reasonably foreseeable to them that principal would use shod foot to kick victim, and instructions were thus not plain error; in addition to "natural and probable consequences" language, instructions told jury that legal responsibility of aider and abettor for principal's use of weapon was conditioned on actual knowledge that some type of weapon would be used, or reasonable foreseeability of use of weapon. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

Trial court was not required to reinstruct jury, in response to jury note that it had not yet reached decision, that conviction for assault with deadly weapon was necessary for conviction for possession of firearm during crime of violence in order to avoid inconsistent verdicts, where original instructions stated that conviction on assault charge was prerequisite to possession charge, and there was no request for reinstruction by defense counsel or evidence of jury confusion. D.C. Code 1981, §§ 22-502, 22-3204. *Smith v. United States*, 684 A.2d 307, 1996 D.C. App. LEXIS 210 (1996).

Where jury had commenced its deliberations in prosecution for armed robbery, assault with a dangerous weapon, receiving stolen property, and carrying a pistol without a license, when it presented to the court a question concerning the armed robbery count, the court did not abuse its discretion by giving, in the face of defendant's objection but in the absence of a request to present argument, a supplemental instruction on aiding and abetting. D.C. Code §§ 22-502, 22-2205, 22-2901, 22-3202, 22-3204. *Atkinson v. United States*, 322 A.2d 587, 1974 D.C. App. LEXIS 243 (1974).

— Lesser included offenses, instructions.

Where deceased died of gunshot wound inflicted by the defendant, defendant was not entitled to have lesser included offense of assault with dangerous weapon submitted to jury as alternative verdict in murder prosecution. *United States v. Hardin*, 443 F.2d 735, 1970 U.S. App. LEXIS 5866 (C.A.D.C. 1970).

In murder prosecution, failure to instruct that the jury might, if so persuaded by evidence, find defendant guilty of assault with a dangerous weapon as a lesser offense included within murder charge was not error, where jury was instructed as to elements of first-degree murder, second-degree murder and manslaughter, and was authorized to convict of one or to acquit and there was no foundation in evidence for conviction of assault with a dangerous weapon. *United States v. Marcey*, 440 F.2d 281, 1971 U.S. App. LEXIS 11708 (C.A.D.C. 1971).

In prosecution for assault with a dangerous weapon court did not err in failing to instruct jury on lesser offense of simple assault where there was no foundation in evidence for giving of such an instruction. D.C. Code 1961, § 22-502. *Parker v. United States*, 359 F.2d 1009, 1966 U.S. App. LEXIS 6529 (C.A.D.C. 1966).

A defendant accused of assault with a dangerous weapon is entitled to instruction on simple assault as a lesser included offense if a foundation for it is found in the evidence. D.C. Code 1961, § 22-502; Fed.Rules Crim.Proc. rule 31(c), 18 U.S.C. *Greenfield v. United States*, 341 F.2d 411, 1964 U.S. App. LEXIS 3558 (C.A.D.C. 1964).

Defendant accused of assault with dangerous weapon was entitled to instruction on lesser included offense of simple assault, where jury question was raised as to whether soda pop bottle used by defendant was a dangerous weapon and jury was instructed that if it should find that assault was with a bottle and that bottle was a dangerous weapon this would come within statutory definition of assault with dangerous weapon. D.C. Code 1961, § 22-502. *Greenfield v. United States*, 341 F.2d 411, 1964 U.S. App. LEXIS 3558 (C.A.D.C. 1964).

In trial for assault with dangerous weapon, District Court is not required by criminal pro-

cedure rule to instruct jury that they may find defendant guilty of lesser offense of simple assault and should not so instruct them, in absence of evidence, justifying conviction of simple assault. D.C. Code 1940, § 22-502; Fed.Rules Crim.Proc. rule 31(c), 18 U.S.C. MacIllrath v. U.S., 188 F.2d 1009, 1951 U.S. App. LEXIS 3139 (C.A.D.C. 1951).

In prosecution for assaults on three persons with deadly weapon, evidence that defendant shot one of such persons with a pistol and then clubbed the others on their heads therewith, causing serious injuries, established assaults with dangerous weapon and did not justify instruction on simple assault. D.C. Code 1940, § 22-502; Fed.Rules Crim.Proc. rule 31(c), 18 U.S.C. MacIllrath v. U.S., 188 F.2d 1009, 1951 U.S. App. LEXIS 3139 (C.A.D.C. 1951).

Instruction on assault with dangerous weapon as lesser-included offense of assault with intent to kill while armed was appropriate, given evidence of assault on defendant's sister-in-law in kitchen resulting on gunshot wound. D.C. Code 1981, §§ 22-501, 22-502. Alexander v. United States, 718 A.2d 137, 1998 D.C. App. LEXIS 184 (1998).

Defendant charged with armed assault with intent to kill and armed mayhem was entitled to charge that jury could consider assault with dangerous weapon as lesser included offense for both of charged offenses; evidence indicated that, after victim had argued with defendant in convenience store and defendant threatened to kill him, defendant left store, and that when victim left store, defendant produced handgun and fired gun, striking victim in right hip. Hayward v. United States, 612 A.2d 224, 1992 D.C. App. LEXIS 221 (1992).

Evidence, including complainant's testimony that defendant had baseball bat in hand when two of them were standing in bedroom, that he put bat down when she screamed and that she thought he hit her with something, provided rational basis for finding that defendant assaulted complainant with his hands, but not with baseball bat, and thus, evidence warranted instruction on simple assault as lesser included offense to charge of assault with a dangerous weapon. D.C. Code 1981, §§ 22-502, 22-504. Glymph v. United States, 490 A.2d 1157, 1985 D.C. App. LEXIS 355 (1985).

Evidence that series of beatings and other abuses defendant administered to complainant lasted little more than an hour established a continuing course of assaultive conduct, and all of the beatings, kickings, and shovings were encompassed within single charge of assault with dangerous weapon, and thus were charged in indictment and could be considered along with incident involving baseball bat in deciding whether lesser included offense instruction should have been given, even though some of the individual blows may have been struck by

defendant's bare hands. D.C. Code 1981, § 22-502. Glymph v. United States, 490 A.2d 1157, 1985 D.C. App. LEXIS 355 (1985).

Defendant convicted of assault with intent to kill while armed was not entitled to instruction on alleged lesser included offense of assault with dangerous weapon where evidence did not warrant such instruction, and there was no legitimate factual dispute in evidence as to any of elements of crime charged. D.C. Code 1981, § 22-501. White v. United States, 451 A.2d 848, 1982 D.C. App. LEXIS 450 (1982).

In prosecution for first-degree felony-murder, second-degree murder, armed robbery, and robbery, evidence provided no rational basis for a lesser charge of assault with a deadly weapon, or simple assault, and court was not required to put case to jury on basis that essentially indulged and even encouraged speculations as to bizarre reconstruction. D.C. Code §§ 22-2401, 22-2901, 22-3202. Day v. United States, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

— Malice, instructions.

In prosecution for second-degree murder while armed and assault with a dangerous weapon, jury instructions defining express malice and implied malice did not necessarily cause jury to view defendant's flight from police as a wrongful act, and jury did not convict on that thesis alone. D.C. Code 1981, §§ 22-502, 22-2403, 22-3202. Powell v. United States, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

— Necessity and sufficiency, instructions.

Explanation of penalty for offense is required only for charge of first-degree murder; in every other instance, sentencing is solely the province of the court, and not of jury. D.C. Code §§ 22-502, 22-2401, 22-2403, 22-2901, 22-3202, 22-3204. United States v. Caldwell, 543 F.2d 1333, 1974 U.S. App. LEXIS 5417 (C.A.D.C. 1974), writ of certiorari denied by 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97, 1976 U.S. LEXIS 1234 (1976).

Viewing court's charge in its entirety clearly showed that instruction on specific intent was not omitted in prosecution for armed robbery, assault with a dangerous weapon, and carrying a dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3204. United States v. Gaither, 440 F.2d 262, 1971 U.S. App. LEXIS 11869 (C.A.D.C. 1971).

Instruction in prosecution for assault with dangerous weapon that case was a serious case from government's standpoint because serious felony had been committed did not have effect of negating defendant's plea of self-defense, where court gave full charge on self-defense. D.C. Code 1951, § 22-502. Scurry v. United

States, 347 F.2d 468, 1965 U.S. App. LEXIS 5889 (C.A.D.C. 1965), writ of certiorari denied by 389 U.S. 883, 88 S. Ct. 139, 19 L. Ed. 2d 179, 1967 U.S. LEXIS 1026 (1967).

Trial judge's jury instruction, in prosecution for aggravated assault while armed and assault with a dangerous weapon, that the jury could give evidence of the court's holding recalcitrant witness in contempt such weight as it deemed fair, was inappropriate and an unnecessary accommodation of defense counsel's request to have the court take judicial notice of the contempt, in that witness's failure to testify had no probative value. *Martin v. United States*, 756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Trial court's aiding and abetting instruction correctly and unambiguously stated applicable law in prosecution for murder, assault with dangerous weapon (ADW), conspiracy to distribute cocaine, and carrying pistol without license, despite fact that alleged act of aiding and abetting by furnishing murder weapon to murderer, was itself a crime. D.C. Code 1981, §§ 22-502, 22-2403, 22-3202, 22-3204. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

Substitution of phrase "deep rooted belief" for phrase "abiding conviction" in standard instruction on reasonable doubt was improper in defendant's trial for assault with dangerous weapon. D.C. Code 1981, § 22-502. *Foreman v. United States*, 633 A.2d 792, 1993 D.C. App. LEXIS 282 (1993).

Where both Government and defendant opposed instructions on lesser included offenses as to defendant charged with burglary, attempted robbery, assault, and murder, trial court's refusal to so instruct jury on request of codefendant was not error. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Instruction that jury had to find defendant guilty of charged crimes of burglary and assault if Government proved existence of each element of offenses beyond reasonable doubt was not equivalent to trial court directing guilty verdict in light of other instructions explaining, inter alia, presumption of innocence, Government's duty to prove each element of offense beyond reasonable doubt, meaning of reasonable doubt and Government's need to establish defendant's presence at time and place of offenses in face of his alibi defense and thus was not plain error. D.C. Code §§ 22-502, 22-1801(a). *Watts v. United States*, 362 A.2d 706, 1976 D.C. App. LEXIS 343 (1976).

Where, during prosecution for assault with dangerous weapon and carrying pistol without license, defendant testified that he did not act at all, repudiating his initial admission to police that he shot complainant in self-defense, evidence of self-defense was absent and trial

court properly refused instruction on that subject. D.C. Code §§ 22-502, 22-3204. *Hale v. U.S.*, 361 A.2d 212, 1976 D.C. App. LEXIS 336 (1976).

An instruction under the aiding and abetting statute is not necessary in order for the acts of one principal in furtherance of a crime to be imputed to another principal; hence, fact that defendant may have only held gun during armed robbery of supermarket did not require finding that since he did not physically commit all elements of the offense he could not be held legally responsible for the acts of the other individual, who seized the cash from the safe, unless he was found to have aided and abetted such individual. D.C. Code §§ 22-105, 22-502, 22-2901 to 22-3202. *Hazel v. United States*, 353 A.2d 280, 1976 D.C. App. LEXIS 486 (1976).

Promptly corrected misstatement by court to effect that no specific intent and only general intent need be found for conviction on count charging possession of a prohibited weapon was not so confusing as to prevent fair deliberation of defendant's innocence by jury which convicted him of the greater offense of assault with a dangerous weapon, the general intent crime, and reached no verdict, as it was instructed, on lesser included offense of possession of a prohibited weapon. D.C. Code §§ 22-502, 22-3214(b). *Darden v. United States*, 342 A.2d 24, 1975 D.C. App. LEXIS 417 (1975).

Where police officers testified that they arrived at apartment in response to disorderly conduct complaint, that they were confronted by defendant who was kicking at the door and yelling profanities, that they placed her under arrest, which she resisted violently, that she broke away and obtained a knife, and that she advanced on the officers, requiring them to draw their guns and seek reinforcements to subdue her, and where defendant testified that she had not threatened any officer with a knife but had herself been attacked by the officers, defendant was not entitled to an instruction on self-defense. D.C. Code §§ 22-502, 22-505(a). *Holt v. United States*, 340 A.2d 827, 1975 D.C. App. LEXIS 413 (1975).

— Necessity for request, instructions.

Although, in prosecution for assault with a dangerous weapon and for carrying a pistol without a license, prosecution evidence was introduced to the effect that defendant assaulted the complainant in retaliation for her telling the police she believed he had been involved in a robbery, trial judge was not required to, sua sponte, give a limiting instruction concerning the evidence connecting defendant with the robbery, particularly since the evidence in question concerned not so much acts which had been engaged in by defendant, but rather the activities of the complainant, and since that evidence was relevant on the

issues of identity and motive. D.C. Code §§ 22-502, 22-3204. *United States v. Mizzell*, 452 F.2d 1328, 1971 U.S. App. LEXIS 7048 (C.A.D.C. 1971).

Trial court was not required to give sua sponte special unanimity instruction with respect to charge of assault with dangerous weapon predicated on striking victim with hard object, even if there was some jury confusion about whether hard object had been gun held to victim's head; charge arose from single incident, prosecutor never argued that holding gun to victim's head was basis of assault charge, and there was no indication of jury confusion during deliberations. D.C. Code 1981, § 22-502. *Simms v. United States*, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

Trial court did not err in failing to sua sponte instruct, in prosecution for assault with a dangerous weapon and burglary in the second degree, on lesser included offenses of simple assault, carrying a dangerous weapon, and unlawful entry. D.C. Code §§ 22-502, 22-1801(b), 22-2201. *Jackson v. United States*, 377 A.2d 1151, 1977 D.C. App. LEXIS 392 (1977).

— Province of jury, instructions.

In prosecution for robbery and assault, court's statement in instruction to jury, that "one of the persons charged here" had succeeded in getting pocketbook of one complaining witness went beyond permissible comment on evidence, where identification was issue for jury. D.C. Code 1961, §§ 22-502, 22-2901. *Battle v. United States*, 345 F.2d 438, 1965 U.S. App. LEXIS 6265 (C.A.D.C. 1965).

In prosecution for assault with dangerous weapon, trial court's instruction on self-defense should not assume that the assault was by use of dangerous weapon. D.C. Code 1961, § 22-502. *Greenfield v. United States*, 341 F.2d 411, 1964 U.S. App. LEXIS 3558 (C.A.D.C. 1964).

— Self-defense, instructions.

In prosecution for assault with a dangerous weapon, requested instruction that if defendant had reasonable grounds to believe that complaining witness was about to inflict violence on her and was coming at her with a knife in a menacing manner, defendant was justified in defending herself and didn't have to retreat was fatally defective and was properly refused. D.C. Code 1940, § 22-502. *Josey v. U.S.*, 135 F.2d 809, 1943 U.S. App. LEXIS 3423 (1943).

Defendant's attempt to sell soap instead of cocaine to assault victim presented at least a factual issue for jury as to whether defendant invited and provoked encounter that led to shooting of homicide victim who was also present in room, and thus, trial court did not abuse its discretion in giving jury an instruction on provocation, with respect to claim of self-defense against homicide victim. D.C. Code 1981,

§§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Defendant was not entitled to self-defense instruction as to one of two shooting victims, in homicide and assault prosecution arising from incident in which defendant shot victims upon victims' perceived discovery that defendant and friend were attempting to dupe victims by selling them soap rather than cocaine; defendant used excessive force when he fired two shots virtually straight down into victim's body, while victim's weaponless hands were visible and after defendant shot second victim in head, and defendant did not do everything in his power, consistent with his safety, to avoid danger and avoid necessity of taking a life. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Trial court did not err in instructing jury to assess defendant's actions against second shooting victim separately from defendant's actions against first shooting victim, in considering defendant's self-defense claim in homicide and assault prosecution arising from incident in which defendant shot victims upon victims' perceived discovery that defendant and friend were attempting to dupe victims by selling them soap rather than cocaine; by time defendant shot second victim, defendant no longer could reasonably believe that defendant faced a concerted threat from second victim and first victim, whom defendant had just killed. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Trial judge could properly consider comparative sizes of defendant and victim in evaluating objective circumstances for purposes of determining whether to instruct jury on self-defense in prosecution for assault with dangerous weapon. D.C. Code 1981, §§ 22-502, 22-3202. *Harper v. United States*, 608 A.2d 152, 1992 D.C. App. LEXIS 360 (1992).

Defendant charged with assaulting police officer while armed was not entitled to self-defense instructions, where no lesser-included charge of simple assault was before jury and defendant did not claim that police officers used excessive force. D.C. Code 1981, §§ 22-504, 22-505, 22-3202. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Jury instructions in prosecution for assault on police officer while armed, in which jury was advised three times that government had to prove beyond reasonable doubt that defendant knew or had reason to know that men at whom he fired shots were police officers, adequately explained law to jury and adequately encompassed defense theory that defendant thought his pursuers were drug dealers; it was not necessary that instructions be modified to focus

jury's attention on defendant's claim that he had not heard police officers identify themselves, that under circumstances he had no reason to believe his plain clothes pursuers were police officers, and that he therefore reasonably believed they were drug dealers. D.C. Code 1981, §§ 22-505, 22-3202. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Although sole evidence bearing on use of nondeadly force in prosecution for assault with dangerous weapon came from defendant himself, it was error to deny him requested instruction which would explain permissible use of nondeadly force to defend oneself. D.C. Code 1981, § 22-502. *McPhaul v. United States*, 452 A.2d 371, 1982 D.C. App. LEXIS 475 (1982).

— Urging or coercing agreement of jury, instructions.

After having given "Winters instruction" to apparently deadlocked jury in prosecution for armed robbery, robbery, and assault with dangerous weapon, sending jury back for deliberation still another time for "a short period after lunch," following subsequent report that jury was still "hung," did not in effect coerce verdict. D.C. Code §§ 22-502, 22-2901, 22-3202. *Thompson v. United States*, 354 A.2d 848, 1976 D.C. App. LEXIS 510 (1976).

Joint or separate trial of charges or defendants.

In view of fact that scene of armed robbery and assaults on January 17 was different from that of armed robbery and assault on January 11 and assaults on January 16, the victims were different, and only common factor was that in each case the offender was a man wearing a fur coat and fur hat, and that there was no evidence of a common scheme or plan embracing commission of all of the offenses, it was prejudicial error to join trial of charges relating to offenses on January 17 with trial on other counts alleging offenses on January 11 and January 16, notwithstanding Government's contention that evidence of each offense was simple and distinct so that jury could not possibly have been confused. D.C. Code §§ 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rule 14, 18 U.S.C. *United States v. Carter*, 475 F.2d 349, 1973 U.S. App. LEXIS 12198 (C.A.D.C. 1973).

Denial of defendant's pretrial motion for severance, in bank robbery prosecution in which defendant's brother was a codefendant, did not constitute abuse of discretion, where there were no statements by defendant's brother received in evidence against defendant, and at defendant's request jury was instructed that fact that defendants were brothers in and of itself should not lead them to conclude that they acted in concert in robbing the bank. 18

U.S.C. § 2113(a); 18 U.S.C. § 292(c); D.C. Code §§ 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rule 8, 18 U.S.C. *United States v. Hopkins*, 464 F.2d 816, 1972 U.S. App. LEXIS 8848 (C.A.D.C. 1972).

Refusal to grant a severance for trial purposes as to defendant tried for several crimes including first-degree murder arising out of two separate robberies was prejudicial to defendant because there was not only the danger that evidence with respect to two robberies would cumulate in jurors' minds and tend to prove defendant guilty of each, but also because the evidence as to one of the robberies was so weak that its primary usefulness was to support government's case as to robbery which resulted in the murder. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901; Fed.Rules Crim.Proc. rules 8(a), 14, 16, 18 U.S.C. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

Joint trial of defendant for second-degree murder while armed and assault with a deadly weapon with codefendant charged with second-degree murder while armed did not cause jury to be inflamed against defendant by evidence of murder; it was undisputed that defendant cut victim on the wrist prior to his being stabbed by codefendant in the chest, and jury acquitted each of defendants for murder, convicting defendant instead of assault with deadly weapon and codefendant of assault with intent to kill while armed. D.C. Code 1981, §§ 22-501, 22-502, 22-2403, 22-3202, 23-311. *Jackson v. United States*, 650 A.2d 659, 1994 D.C. App. LEXIS 218 (1994).

Trial court did not err in denying defendants' motions for severance in trial on charges of conspiracy to possess and distribute cocaine, assault with dangerous weapon, and attempted distribution of cocaine where in neither case was evidence against defendant insignificant when compared with evidence against codefendants nor was defendant's defense irreconcilable with defenses of codefendants. D.C. Code 1981, §§ 22-502, 33-541(a)(1), 33-549. *Belton v. United States*, 581 A.2d 1205, 1990 D.C. App. LEXIS 220 (1990).

Defendant's statement that defendant would become embarrassed and confounded by having to present separate defenses to robbery charges for two separate incidents and that defendant would testify as to one case but not other, but which did not reveal content of defendant's testimony, was not convincing showing that defendant had both important testimony to give concerning one count and strong need to refrain from testifying on other robbery count and, therefore, did not establish prejudice to defendant which would justify severance of prosecutions. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule

8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Two robbery incidents prosecuted against defendant in same trial, which were proved by prosecution's use of four witnesses testifying as to first robbery and then use of nine witnesses testifying as to second robbery, which were defended by claim of misidentification as to first robbery and denial of commission of any crime as to second robbery, which prosecutor argued as distinct offenses, which led trial court to instruct jury at beginning and end of trial to view robberies as separate and distinct incidents, involved sufficiently distinct and separate evidence as to each robbery, were not confused in mind of jury to prejudice of defendant, and, therefore, did not need to be severed. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Charges against defendant, including two counts of assault with a dangerous weapon, one count of second-degree murder while armed, and two counts of carrying a pistol without a license, were properly joined based on the similar character of the offenses, which arose out of two incidents, one occurring at about 5:30 p.m. and the other, an unrelated incident, at about 1:00 a.m. the following morning, in that the evidence of each offense tended to negate the possibility that defendant had acted in self-defense, as he asserted, and tended to establish rather that he had pursued a deliberate course of action in each incident, and the evidence regarding the two incidents was separate and distinct so that it was not likely to be amalgamated in the jury's mind into a single inculpatory mass. D.C. Code 1981, §§ 22-502, 22-2403, 22-3204; Criminal Rule 8. *Bruce v. United States*, 471 A.2d 1005, 1984 D.C. App. LEXIS 311 (1984).

In prosecutions for murder, kidnapping, etc., arising out of the so-called "Hanafi" take-overs of three buildings, the trial court did not abuse its discretion in refusing to sever that count of the indictment charging assault with a deadly weapon. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Where assault and weapon charges against one defendant were distinct in time and place from charges of first-degree murder while armed, brought against other defendants, and evidence of murder was overwhelmingly major portion of five-week trial while there was comparatively meager evidence on assault and weapon charges, and evidence of murder would not have been admissible at separate trial of particular defendant on assault and weapon

charges, it was error to deny severance. D.C. Code §§ 22-502, 22-2401, 22-3202, 22-3204, 22-311(c); D.C. Code SCR, Criminal Rule 8(b). *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

Denial of motion to sever counts of indictment in proceeding in which accused was convicted of four rape offenses and other offenses was not abuse of discretion, in view of similar characteristics of such offenses, in which assailant entered through rear of apartments, awoke victims, threatened them with weapon, demanded silence and submission and committed no act of violence if there was compliance with his orders, in which, in three of the cases, he sought to prevent victims from getting good look at him and cut or threatened to cut phone lines and in which he cut off any pants worn by victims. D.C. Code §§ 22-502, 22-1801(a), 22-2801, 22-3202, 22-311(a), 22-313; D.C. Code SCR, Criminal Rules 8(a), 14. *Bridges v. United States*, 381 A.2d 1073, 1977 D.C. App. LEXIS 304 (1977), writ of certiorari denied by 439 U.S. 842, 99 S. Ct. 135, 58 L. Ed. 2d 141, 1978 U.S. LEXIS 2828 (1978).

Jurisdiction.

Even if joinder of D.C. Code offense of robbery with charges of possession of unregistered firearm, possession of firearm not identified by serial number, assault with intent to commit rape while armed and assault with a dangerous weapon was proper under rule pertaining to joinder of defendants, district court divested itself of jurisdiction over the robbery count when it granted defendants' pretrial motion to sever the robbery charge in order to avoid the possibly prejudicial atmosphere of a single trial. 26 U.S.C. (I.R.C.1954)s 5861(d, i); D.C. Code §§ 22-501, 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 8, 8(b), 14, 18 U.S.C.; 18 U.S.C. § 5010(b). *United States v. Jackson*, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

Where District of Columbia superior court judge dismissed juvenile's petition for habeas corpus without prejudice to its being filed in the United States district court for the District of Columbia, the respondent was federal officer, petitioner was charged with federal offense as well as with violations of District of Columbia law and petitioner was challenging the conditions of his confinement, federal court had jurisdiction to consider the petition. D.C. Code §§ 16-1901, 16-2301, 16-2301(3)(A), 22-502, 22-2901, 22-3202, 22-110(d); 18 U.S.C. § 2114; 18 U.S.C. §§ 2241(c)(1, 3), 2254(b, c); U.S. Const. art. 1, § 9, cl. 2; Amend 8. *Bland v. Rodgers*, 332

F. Supp. 989, 1971 U.S. Dist. LEXIS 12463 (1971).

In view of defendant's concession that he approached complainant in his car within district, rode with complainant into Maryland and returned with him to district, and in view of fact that defendant was overheard by officer threatening complainant with injury if he did not remain silent while they were all at intersection concededly within district line, trial court did not lack jurisdiction of offenses of armed robbery, assault with dangerous weapon and mayhem and malicious disfigurement. D.C. Code §§ 11-923(b)(1), 22-502, 22-506, 22-2901, 22-3202; D.C. Code SCR, Criminal Rule 12(b)(2). *Adair v. United States*, 391 A.2d 288, 1978 D.C. App. LEXIS 567 (1978).

Juvenile offenders, generally.

Trial court met requirements of Youth Rehabilitation Act by weighing and rejecting option of sentencing defendant under Act, for voluntary manslaughter, assault, and weapon convictions. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202, 22-3204, 24-801 et seq. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Trial court's finding that defendant, who was convicted of assault with a dangerous weapon and assault, who had a long record of offenses and poor employment record, who committed instant offense while serving sentence under Youth Act, and who was unlikely to receive any training under Youth Act that he could not receive under adult sentence, would derive "no benefit" from sentence under the Youth Act, satisfied requirements of statute pertaining to sentencing under another applicable statute of one otherwise eligible for sentencing under Youth Act. 18 U.S.C. § 5010(d); D.C. Code §§ 22-502, 22-504. *Tuckson v. United States*, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

Where juvenile, who had stopped at roadblock but on spying an opening swerved toward opening and approaching officer, with officer leaping to safety as vehicle brushed his trousers, was charged with, among other things, assault on a police officer and assault with a dangerous weapon, i.e., the automobile, dismissal of count charging assault on a police officer did not also require dismissal of charge of assault with a dangerous weapon. D.C. Code § 22-502. In re J.A.H., 315 A.2d 825, 1974 D.C. App. LEXIS 377 (1974).

Trial judge's statement that it was almost inconceivable that youth, who had been convicted of two counts of assault with a dangerous weapon and one count of carrying a dangerous weapon, could be handled under Federal Youth Corrections Act in view of his prior convictions of armed robbery and assault with dangerous weapon, his extensive juvenile record and fact

that he had repeatedly absconded from juvenile correctional facilities constituted a sufficient affirmative on-the-record finding that youth would not benefit from treatment under the Act and trial judge's refusal to sentence youth under the Act was within his discretion. D.C. Code §§ 22-502, 22-3204; 18 U.S.C. §§ 5005 et seq., 5006(e), 5010(b, d, e), 5025. *Paul v. United States*, 301 A.2d 226, 1973 D.C. App. LEXIS 240 (1973).

Record sustained conviction of juvenile of manslaughter and assault with a deadly weapon, and decision of juvenile court that juvenile was within its jurisdiction and should be committed to custody of Department of Public Welfare for indeterminate period was proper. D.C. Code §§ 22-502, 22-2403. In re *Bumphus*, 254 A.2d 400, 1969 D.C. App. LEXIS 267 (App. 1969).

Lesser included offenses, generally.

An assault with a dangerous weapon on the victim of an armed robbery is lesser offense included within robbery offense and does not support a separate conviction. D.C. Code §§ 22-502, 22-2901, 22-3202(a). *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

Assaults of bank tellers with dangerous weapons were lesser included offenses of armed robberies of tellers and defendants could not be convicted of both the robberies and the assaults. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Cooper*, 504 F.2d 260, 1974 U.S. App. LEXIS 6885 (C.A.D.C. 1974).

Whether unlawful entry is lesser included offense with respect to any particular crime that is charged depends not solely upon comparison of statutory requirements for respective crimes but also upon analysis of facts of offense as charged in each indictment and as proved at trial. D.C. Code §§ 22-502, 22-1801(a, b), 22-2901, 22-3101, 22-3202. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Inasmuch as assault with a dangerous weapon is included in armed robbery, and defendant was convicted of both offenses, judgments and sentences for assault with a dangerous weapon were required to be vacated. *United States v. Anderson*, 490 F.2d 785, 1974 U.S. App. LEXIS 10723 (C.A.D.C. 1974).

Assault with a dangerous weapon is a lesser included offense of assault with intent to commit robbery while armed, and thus defendant could not be convicted of the lesser as well as the greater offense. U.S. Const. Amend. 6; D.C. Code §§ 22-501, 22-502, 22-3202. *United States v. Alston*, 483 F.2d 1264, 1973 U.S. App. LEXIS 8807 (C.A.D.C. 1973).

Assault with dangerous weapon is lesser included offense of assault with intent to rob while armed. D.C. Code §§ 22-501, 22-502,

22-3202, 22-3204. *United States v. Chavis*, 476 F.2d 1137, 1973 U.S. App. LEXIS 10719 (C.A.D.C. 1973).

Where charges of assault with intent to commit rape while armed and charges of assault with a dangerous weapon arose from the same act or transaction, the latter charge, requiring proof of two of the three elements constituting former offense, merged with and became a lesser offense to the charge of assault with intent to commit rape while armed, barring conviction on the lesser offense. D.C. Code §§ 22-501, 22-502, 22-3202. *United States v. Chavis*, 476 F.2d 1137, 1973 U.S. App. LEXIS 10719 (C.A.D.C. 1973).

Under District of Columbia statute assault with a dangerous weapon is a lesser included offense of robbery while armed. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Johnson*, 475 F.2d 1297, 1973 U.S. App. LEXIS 11465 (C.A.D.C. 1973).

Offense of assault with dangerous weapon was not necessarily included in indictment charging robbery. Fed.Rules Crim.Proc. rule 31(c), 18 U.S.C.; D.C. Code 1961, §§ 22-502, 22-2901; U.S. Const. Amend. 5. *Crosby v. United States*, 339 F.2d 743, 1964 U.S. App. LEXIS 3783 (C.A.D.C. 1964).

Simple assault is a lesser included offense of assault with a dangerous weapon (ADW); factual element which separates ADW from simple assault is the use of a weapon. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Assault with dangerous weapon was lesser included offense of armed robbery because all elements of assault with dangerous weapon were included in armed robbery and assault was committed to effect robbery; therefore, conviction for assault with dangerous weapon merged into conviction for armed robbery and double jeopardy clause precluded punishment for both defenses. U.S. Const.Amend. 5; D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Norris v. United States*, 585 A.2d 1372, 1991 D.C. App. LEXIS 26 (1991).

Assault with dangerous weapon was lesser included offense of mayhem while armed, arising out of incident in which defendant, while fighting with victim and with general intent to injure, struck victim with pencil, lodging pencil in victim's right eye; there was evidence that defendant acted in self-defense and did not realize pencil was in his hand when he struck victim. D.C. Code 1981, §§ 22-502, 22-506, 22-3202, 22-3202(a). *Wynn v. United States*, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

Assault with dangerous weapon was lesser included offense of robbery while armed and two offenses merged where they both arose out of same act of defendant. *Leftwitch v. United States*, 460 A.2d 993, 1983 D.C. App. LEXIS 378 (1983).

Counts of assault with a dangerous weapon were lesser included offenses of offenses of assault with attempt to commit robbery and armed robbery and, therefore, defendant could not be convicted of the former offenses in addition to the latter. D.C. Code §§ 22-501, 22-502, 22-3202. *Quick v. United States*, 316 A.2d 875, 1974 D.C. App. LEXIS 386 (1974).

Crime of assault with a dangerous weapon is a lesser included offense within the crime of armed robbery and where defendant was sentenced upon conviction of both crimes, sentence on crime of assault with a dangerous weapon was vacated. D.C. Code §§ 22-502, 22-2901, 22-3202. *Skinner v. United States*, 310 A.2d 231, 1973 D.C. App. LEXIS 372 (1973).

Merger of offenses.

Convictions of assault with a dangerous weapon merged with armed robbery convictions connected with same robbery of drugstore and would thus be set aside. *United States v. Toy*, 482 F.2d 741, 1973 U.S. App. LEXIS 8806 (C.A.D.C. 1973).

Defendant's convictions for assault with dangerous weapon and assaulting, resisting, or interfering with police officer with dangerous weapon, stemming from defendant's actions against police officers, did not merge; action that gave rise to assault with dangerous weapon charge occurred when defendant stopped in front of unmarked police vehicle and pointed his pistol directly at windshield, causing officers to crouch down to seek cover, and at time of this assault, defendant would not yet have known he was assaulting police officers, and moments later, after officers exited vehicle and identified themselves, they commanded that defendant stop and, as they gave chase, the next assault by defendant occurred, and there was clear separation between the first and second assaults. *Scott v. United States*, 975 A.2d 831, 2009 D.C. App. LEXIS 249 (2009).

Offenses of attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW) merged; elements of proof that jury was instructed to consider for attempted AAWA and ADW overlapped, serious bodily injury, the only element distinguishing ADW from AAWA, was not required to prove attempted AAWA, and when resulting serious bodily injury was eliminated as element of proof for attempted AAWA, offense contained no element that ADW did not. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Offenses of attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW) merged; elements of proof that jury was instructed to consider for attempted AAWA and ADW overlapped, serious bodily injury, the only element distinguishing ADW from AAWA, was not re-

quired to prove attempted AAWA, and when resulting serious bodily injury was eliminated as element of proof for attempted AAWA, offense contained no element that ADW did not. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Conviction for assault with a dangerous weapon (ADW) and conviction for aggravated assault did not merge; "serious bodily injury" was an element of aggravated assault but not ADW, and use of a weapon was an element of ADW but not aggravated assault. *Bodrick v. United States*, 892 A.2d 1116, 2006 D.C. App. LEXIS 80 (2006).

Three of defendant's four convictions for possession of a firearm during the commission of a crime of violence (PFDCV) merged, as convictions were based on single possession of single weapon during violent act. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Where a defendant has reason to know that his intended target is not alone and fires multiple shots in their direction, multiple convictions for assault with a dangerous weapon (ADW) are permitted. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Defendant's three convictions for assault with a dangerous weapon (ADW), which were based on defendant's firing of multiple shots into vehicle carrying three passengers, did not merge; windows of car were not tinted and all three passengers were sitting upright when they drove past defendant, co-defendant shot at defendant from passenger seat as car moved up street, rendering it obvious that at least one other person was in car, i.e., the driver, and offense occurred in early daylight so it could be inferred that defendant knew there were others in the car when he fired shots at them. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Defendant's convictions for possession of a firearm during a crime of violence (PFCV), one of which was predicated on a first-degree burglary charge and the others of which were based on armed robbery charges, did not merge, where the underlying convictions involved different victims and were not based on a single violent act in that defendant could have turned around and left the house after the burglary, but instead he elected to proceed with the robberies. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct.

1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

No merger occurred between counts of kidnapping while armed and assault with dangerous weapon (ADW) directed against different victims, during same criminal incident, or between any of these counts and any other count involving crimes directed at still other identifiable victims. D.C. Code 1981, §§ 22-502, 22-2101, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Two assault with dangerous weapon (ADW) counts from same criminal incident were separate assaults, not a collective assault on two victims, and therefore did not merge, where the first count involved assault on victim in apartment and second count involved assault on a different victim in hallway. D.C. Code 1981, § 22-502. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon (ADW) counts from same criminal incident, since burglary required proof of element that other crimes did not, and kidnapping, armed robbery and assault with dangerous weapon all required proof of elements that burglary did not. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Possession of firearm during crime of violence (PFCV) count did not merge with any kidnapping "while armed" count, burglary while armed count, armed robbery count, or assault with dangerous weapon (ADW) count from same criminal incident. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(b). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Armed robbery count did not merge with assault with dangerous weapon counts (ADW) from same criminal incident, since armed robbery count concerned different victim from identifiable victims of ADW counts. D.C. Code 1981, §§ 22-502, 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Assault with dangerous weapon (ADW) counts based on collective assault of four victims merged into single count, but this single count did not merge with ADW on a fifth victim who was distinct from the group; testimony clearly suggested that after defendants had generally menaced occupants of apartment, one defendant stuck his gun in fifth victim's face. D.C. Code 1981, § 22-502. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Assault with dangerous weapon (ADW) counts did not merge with carrying pistol without license (CPWL) count from same criminal incident, as ADW required proof of attempt to

injure while CPWL did not, and CPWL required proof of carrying pistol, which ADW did not. D.C. Code 1981, §§ 22-502, 22-3204(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Assault with dangerous weapon (ADW) counts did not merge with possession of prohibited weapon (PPW) count from same criminal incident. D.C. Code 1981, §§ 22-502, 22-3214(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with armed robbery count or with assault with dangerous weapon (ADW) count, since each required proof of element the other did not. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Offenses of attempted armed robbery and assault with dangerous weapon merged; both were committed against same victim and achieved by same action of placing gun against victim's stomach and demanding his money. D.C. Code 1981, §§ 22-502, 22-2901. *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Once defendant's conviction for assault with dangerous weapon merged with conviction for attempted armed robbery, his related convictions for possession of firearm during crime of violence or dangerous offense also merged, as they concerned violations of same statute by same actions of placing gun against victim's stomach and demanding his money, and there was no indication of legislative intent to allow multiple sentences in such circumstances. D.C. Code 1981, §§ 22-502, 22-2901, 22-3204(b). *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Conviction for kidnapping did not merge with convictions for assault with intent to rape while armed, mayhem while armed, and assault with a deadly weapon; assault-related convictions required proof that defendant was armed, and kidnapping conviction required proof of asportation or confinement. D.C. Code 1981, §§ 22-501, 22-506, 22-2101, 22-3202. *Whitaker v. United States*, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

Offenses of assault with dangerous weapon and possession of firearm during commission of crime of violence did not merge because each required proof of element that the other did not, and each addressed distinct societal interest. D.C. Code 1981, §§ 22-502, 22-3204(b). *Freeman v. United States*, 600 A.2d 1070, 1991 D.C. App. LEXIS 334 (1991).

As long as assault was committed for purposes of effecting robbery, conviction for assault with dangerous weapon merges into conviction for armed robbery and absent intent to kill, degree of assault is irrelevant. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Norris v. United States*, 585 A.2d 1372, 1991 D.C. App. LEXIS 26 (1991).

Any two assault convictions arising from the firing of a single shot in the direction of two or more persons would merge. *Horton v. United States*, 541 A.2d 604, 1988 D.C. App. LEXIS 65 (1988).

Two offenses merge when the lesser offense consists entirely of some but not all of the elements of the greater offense; however, the doctrine of merger does not apply where the offenses arise out of separate acts or transactions, and where offenses are separate, trial court's decision to prescribe concurrent sentences may not be reviewed. *Logan v. United States*, 460 A.2d 34, 1983 D.C. App. LEXIS 354 (1983).

Evidence in prosecution for assault with intent to commit mayhem, assault with a dangerous weapon and malicious destruction of property sustained finding that defendant twice assaulted victim at different times and in different places, once with intent to commit mayhem and once with a dangerous weapon, and therefore, the two offenses did not merge, and trial court's imposition of concurrent sentences for the two offenses could not be reviewed. *Logan v. United States*, 460 A.2d 34, 1983 D.C. App. LEXIS 354 (1983).

Convictions for assault with a dangerous weapon were not subject to being reversed on ground that they merged with convictions for malicious disfigurement while armed where it was clear that the jury found defendants guilty of assault with a dangerous weapon as a lesser included offense of either the assault with intent to kill while armed count or the assault with intent to commit robbery while armed count and that, by specific request, the lesser included offense charge was limited to either of those counts. D.C. Code 1973, §§ 22-401, 22-501, 22-502, 22-506, 22-3202, 22-3502. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

In prosecution for murder, kidnapping, and assault arising out of the "Hanafi" take-overs of three buildings, the kidnapping convictions of defendants did not merge with the other offenses. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Convictions for first-degree burglary, robbery and assault with a dangerous weapon merged with more serious offenses, i.e., burglary in first

degree while armed and armed robbery, and case was accordingly remanded with instructions to vacate convictions and related sentences for the first-mentioned convictions. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 22-3204. *Evans v. United States*, 392 A.2d 1015, 1978 D.C. App. LEXIS 327 (1978).

Assault with a dangerous weapon committed by one defendant who, while armed with shotgun, threatened and warned robbery victims to return to apartment building when victims attempted to follow robbers, was separate and distinct from assault with intent to commit robbery while armed committed immediately previous to warning not to follow by defendant and other robbers in hallway of apartment building, and thus former offense did not merge into latter. D.C. Code §§ 22-501, 22-502, 22-3202. *Heiligh v. United States*, 379 A.2d 689, 1977 D.C. App. LEXIS 252 (1977).

Although defendant's robbery and assault with a dangerous weapon convictions had to be vacated, defendant's conviction of possession of prohibited weapon, which required proof of specific intent to use weapon unlawfully against another, an element not present in armed robbery, robbery, or assault with a dangerous weapon, did not merge into his armed robbery conviction. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3214(b). *Woody v. United States*, 369 A.2d 592, 1977 D.C. App. LEXIS 420 (1977).

Convictions of both assault with dangerous weapon and simple assault were sustained where there were two separate assaults, each proved by different evidence, despite contention that conviction of simple assault should be vacated because it merged into conviction of assault with a dangerous weapon. D.C. Code §§ 22-502, 22-504. *Tuckson v. United States*, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

Conviction of assault with dangerous weapon upon one individual merged into greater offense of armed robbery against such individual and would be vacated. *Bell v. United States*, 332 A.2d 351, 1975 D.C. App. LEXIS 318 (1975).

Where assault with dangerous weapon offense was submitted to jury on specific instruction that it could convict on assault with dangerous weapon charge only if it found that separate and apart from pointing the gun at complaining witness, the complaining witness was beaten with the gun, and jury returned verdict of guilty, assault with dangerous weapon was not a lesser included offense within the armed robbery, offenses did not merge, and punishment for both did not constitute cumulative punishment. D.C. Code §§ 22-502, 22-2901, 22-3203. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

Since evidence showed that offenses arose out of separate acts no need existed to consider whether offense of inducing a female to engage in prostitution was a lesser included offense of compelling female to reside with defendant for purposes of prostitution, or whether assault with a dangerous weapon was a lesser included charge of malicious disfigurement. D.C. Code §§ 22-502, 22-506, 22-2705, 22-2706. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

A count charging assault with a dangerous weapon is merged with a count charging armed robbery. D.C. Code §§ 22-502, 22-2901, 22-3202. *Smith v. United States*, 312 A.2d 781, 1973 D.C. App. LEXIS 406 (1973).

Conviction for assault with a dangerous weapon did not merge into convictions for assault with intent to kidnap while armed. When the plan to kidnap the victim went sour, and the victim broke free and ran, the offense of assault on the victim with intent to kidnap while armed had ended and the subsequent shooting of the victim invaded a separate interest, and thus constituted a separate offense. *United States v. Rodriguez*, 115 WLR 2729 (Super. Ct. 1987).

Nature and elements of offenses.

— Ability to execute intent, nature and elements of offenses.

Under expanded concept of common-law criminal assault, focus is not on defendant's actual ability or specific intent to inflict threatened harm, but, rather, focus is on defendant's apparent ability to accomplish threatened injury. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Present ability of weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon; only apparent ability through the eyes of the victim is required. D.C. Code § 22-502. *Harris v. United States*, 333 A.2d 397, 1975 D.C. App. LEXIS 332 (1975).

— Dangerous or deadly weapon, nature and elements of offenses.

Throwing of sulphuric acid in person's face constitutes assault with dangerous weapon, within statute. D.C. Code 1961, § 22-502. *Bishop v. United States*, 349 F.2d 220, 1965 U.S. App. LEXIS 5028 (C.A.D.C. 1965), US Supreme Court certiorari denied by 393 U.S. 870, 89 S. Ct. 158, 21 L. Ed. 2d 139, 1968 U.S. LEXIS 868 (1968).

A pistol used as a club is a dangerous weapon, and fact that defendant's attempt to pistol whip complaining witness did not result in physical injury did not make the action any less an assault with a dangerous weapon. *McGill v. U.S.*, 270 F.2d 329, 1959 U.S. App. LEXIS 3402 (C.A.D.C. 1959).

Shoes on feet were such a "dangerous weapon" when used to inflict serious injuries by kicking as to warrant conviction for assault with dangerous weapon. *Medlin v. U.S.*, 207 F.2d 33, 1953 U.S. App. LEXIS 2823 (C.A.D.C. 1953).

A "dangerous weapon" within statute providing for punishment for assault with a dangerous weapon is one likely to produce death or great bodily injury, but the weapon need not meet both alternatives, and hence an assault with a "dangerous weapon" need not be an assault with a deadly weapon. D.C. Code 1929, T. 6, § 27. *Tatum v. U.S.*, 110 F.2d 555, 1940 U.S. App. LEXIS 4594 (1940).

An instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

In determining whether object used during assault was a "dangerous weapon" court may look to use to which object was put during assault, and injury inflicted is another important, and often decisive, factor in establishing dangerousness. D.C. Code 1981, § 22-3202(a). *Arthur v. United States*, 602 A.2d 174, 1992 D.C. App. LEXIS 13 (1992).

Stationary bathroom fixtures were not "dangerous weapons" with which defendant could be armed within meaning of mayhem while armed and malicious disfigurement while armed statutes; attached sink, toilet, and bathtub against which defendant alleged hurled his wife were preexisting part of surroundings in which defendant found himself while perpetrating assault and not something which defendant could possess or with which he could arm himself. D.C. Code 1981, §§ 22-502, 22-506, 22-3202. *Edwards v. United States*, 583 A.2d 661, 1990 D.C. App. LEXIS 298 (1990).

Pencil is capable of causing bodily harm and thus may in some circumstances be "dangerous weapon." D.C. Code 1981, §§ 22-502, 22-506, 22-3202, 22-3202(a). *Wynn v. United States*, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

In determining whether weapon is dangerous weapon, best evidence of dangerous character is injury actually inflicted by weapon. D.C. Code 1981, §§ 22-502, 22-506, 22-3202, 22-3202(a). *Wynn v. United States*, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

A "deadly or dangerous weapon" is an object which is likely to produce death or great bodily injury by use made of it. *Powell v. United States*, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

An instrument capable of producing death or serious bodily injury by its manner of use

qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others. *Powell v. United States*, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

Court would not draw a distinction between weapons that are dangerous "per se" and other dangerous weapons. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Some weapons, under appropriate circumstances, are so clearly dangerous that it is prudent for court to declare them to be such, as a matter of law; included in this class are rifles, pistols, swords and daggers, when used as they were designed to be used and within striking distance of victim. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In determining whether weapon is a "dangerous weapon" under aggravated assault statute, trier of fact must consider whether object or material is known to be "likely to produce death or great bodily injury" in manner in which it is used, intended to be used, or threatened to be used. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Gist of assault with dangerous weapon is in character of weapon with which assault is made. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

An imitation or blank pistol used in an assault by pointing it at another is a "dangerous weapon" in that it is likely to produce great bodily harm. D.C. Code § 22-502. *Harris v. United States*, 333 A.2d 397, 1975 D.C. App. LEXIS 332 (1975).

Blank or gas cartridge-type pistol was a dangerous weapon when used in an assault by pointing it at another. D.C. Code § 22-502. *Harris v. United States*, 333 A.2d 397, 1975 D.C. App. LEXIS 332 (1975).

— In general.

Essential elements of assault with a dangerous weapon (ADW) are: (1) an attempt, with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure; (2) the apparent present ability to injure the victim; (3) a general intent to commit the act or acts which constitute the assault; and (4) the use of a dangerous weapon in committing the assault. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Where defendant picked up fully loaded and operable gun from front car seat and pointed gun at first police officer, second officer in-

formed first officer that defendant had a gun pointed in his direction and first officer grabbed defendant, pulled him from automobile, and caused him to drop the gun, first officer had well-grounded apprehension of personal injury which was accompanied by apparent attempt to commit violent personal injury which was only prevented by the acts of the officer himself and offense of "assault with a dangerous weapon" was made out. D.C. Code § 22-502. *United States v. James*, 452 F.2d 1375, 1971 U.S. App. LEXIS 7018 (C.A.D.C. 1971).

Essential elements of assault with a dangerous weapon (ADW) are: (1) an attempt, with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure; (2) the apparent present ability to injure the victim; (3) a general intent to commit the act or acts which constitute the assault; and (4) the use of a dangerous weapon in committing the assault. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Elements of "attempted-battery" assault with dangerous weapon are attempt or effort, with force or violence, to do injury to person of another, apparent present ability to carry out such attempt or effort, general intent to engage in attempt or effort and dangerous weapon used in perpetration thereof. D.C. Code 1981, § 22-502. *Wynn v. United States*, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

Offenses of assault with intent to kill and malicious disfigurement are governed by separate statutes and each statutory provision requires proof of element which other does not. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Wilson v. United States*, 528 A.2d 876, 1987 D.C. App. LEXIS 392 (1987).

Fact that defendant knew or should have known that complainants were police officers was an element of offense of assault on a police officer with a dangerous weapon. D.C. Code § 22-505. *Fletcher v. United States*, 335 A.2d 248, 1975 D.C. App. LEXIS 357 (1975).

— Mayhem, nature and elements of offenses.

While common-law mayhem was traditionally viewed as a crime against the King and was therefore limited to injuries which deprived a fighting man of use of one of his limbs or some part of his body which affected his ability or willingness to engage in combat, modern view of mayhem relates more to preservation of the normal functioning of the human body and proscription against malicious disfigurement focuses upon willful permanent disfigurement rather than disablement. D.C. Code 1981, § 22-506. *Smith v. United States*,

466 A.2d 429, 1983 D.C. App. LEXIS 482 (1983).

— Motive and intent, nature and elements of offenses.

Statute providing that every person convicted of an assault with a dangerous weapon shall be sentenced to imprisonment for not more than ten years should not be construed to require that the weapon be used with a conscious purpose to inflict injury. D.C. Code 1961, § 22-502. *Parker v. United States*, 359 F.2d 1009, 1966 U.S. App. LEXIS 6529 (C.A.D.C. 1966).

Fact that statute relating to assault with a dangerous weapon is grouped with other crimes which all require particular intent does not mean that assault with a dangerous weapon, unlike simple assault, should be viewed as requiring a similar intent where the statute was silent as to any requirement of intent, although in all other offenses to which reference was made the requirement was explicit. D.C. Code 1961, §§ 22-501 to 22-504. *Parker v. United States*, 359 F.2d 1009, 1966 U.S. App. LEXIS 6529 (C.A.D.C. 1966).

There is no statutory requirement for either robbery or assault with a dangerous weapon, that there be a specific intent to commit the other. D.C. Code 1961, §§ 22-501, 22-502, 22-1801, 22-2901, 22-3102, 22-3202. *United States v. Suggs*, 269 F. Supp. 732, 1967 U.S. Dist. LEXIS 8793 (D.D.C.1967).

Assault with a dangerous weapon is a general intent crime. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

Defendant could be convicted of assault on police officer with dangerous weapon based on theory of intent to frighten, even if officer was not aware that defendant was reaching for his pistol and bringing it up, where evidence that defendant did reach for pistol was reliable and it was reasonable for a juror to find that defendant had necessary intent either to injure or create apprehension of fear in officer; it was not necessary that officer actually experience apprehension or fear. *Parks v. United States*, 627 A.2d 1, 1993 D.C. App. LEXIS 135 (1993).

Person may be convicted of assault with intent to kill even though state of mind at time of the crime was not sufficient to constitute murder; person who commits an assault with specific intent to kill but who acts with adequate provocation, justification or excuse may be charged and convicted despite the fact that, had the victim of the assault died, charge of manslaughter not murder would have been

appropriate. D.C. Code 1981, §§ 22-501, 22-2405. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Assault is general intent crime, and attention is focused upon menacing conduct of accused and his purposeful design either to engender fear in, or do violence to, his victim. D.C. Code § 22-502. *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

Intent to use unlawfully is a required element in both the offense of assault with a dangerous weapon and the offense of possession of a dangerous weapon with intent to use unlawfully against another. D.C. Code §§ 22-502, 22-3214(b). *United States v. Brooks*, 330 A.2d 245, 1974 D.C. App. LEXIS 335 (1974).

Pleas.

In prosecution for assault with a dangerous weapon, court's comments to defendant encouraging him to plead guilty to charge of assault with a dangerous weapon went beyond permissible range and thus defendant's motion to withdraw his plea of guilty should have been granted and failure to do so constituted reversible error. D.C. Code SCR, Criminal Rule 11; D.C. Code § 22-502. *Byrd v. United States*, 377 A.2d 400, 1977 D.C. App. LEXIS 371 (1977).

Where defendant, indicted for sodomy, assault with dangerous weapon and mayhem, neither raised defense of insanity prior to return of jury verdict of guilty nor brought to court's attention prior imprisonment for sex-related crime or attempted suicide while in prison and confinement there for psychiatric treatment, defendant had not been improperly deprived of defense of insanity during trial. D.C. Code §§ 22-502, 22-506, 24-301, 24-301(j). *Hughes v. United States*, 308 A.2d 238, 1973 D.C. App. LEXIS 331 (1973).

Post-conviction bail.

Federal Bail Reform Act, rather than District of Columbia Code bail provisions, is applicable where a defendant, convicted in federal court of a District of Columbia Code offense, presents a motion for release pending appeal in federal courts of District of Columbia. 18 U.S.C. §§ 3146, 3148, 3772; D.C. Code §§ 22-502, 22-2901, 22-3202, 23-1325, 23-1325(c); Fed.Rules App.Proc. rules 9, 9(c), 18 U.S.C.; Fed.Rules Crim.Proc. rules 46, 46(c), 18 U.S.C. *United States v. Brown*, 483 F.2d 1314, 1973 U.S. App. LEXIS 8492 (C.A.D.C. 1973).

Appellant, convicted of robbery and assault with a deadly weapon, whose appeal presented a substantial claim that he was wrongfully identified, would be released on personal recog-

nizance on certain enumerated conditions which were so structured as to allow for a maximum amount of supervision over appellant while still allowing for his freedom from incarceration. D.C. Code §§ 22-502, 22-2901; 18 U.S.C. §§ 3146, 3148, 3150. *Banks v. United States*, 414 F.2d 1150, 1969 U.S. App. LEXIS 12256 (C.A.D.C. 1969).

Presumptions and burden of proof.

To support conviction for assault with a dangerous weapon, government must prove beyond a reasonable doubt that defendant made an attempt, with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure, but no actual injury to the victim is necessary, that defendant had the apparent present ability to injure the victim, that defendant had a general intent to commit act or acts which constitute the assault, and that a dangerous weapon was used in committing the assault. *McCoy v. United States*, 781 A.2d 765, 2001 D.C. App. LEXIS 211 (2001).

Government was not required to prove that no one else had opportunity to commit the crime, to obtain conviction for assault with dangerous weapon (ADW) arising from incident in which defendant fired shots into former girlfriend's apartment; it was enough if evidence permitted jury reasonably to infer, beyond reasonable doubt, that defendant committed the assault. D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

To convict on charge of assault with dangerous weapon, prosecution must prove each element of assault in addition to proving that assault was committed with dangerous weapon. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

To convict defendant of crime of assault on police officer with dangerous weapon, government must prove beyond reasonable doubt each element of offense of simple assault, defendant's knowledge that victim was police officer engaged in performance of official duties, and defendant's use of dangerous weapon during assault. *Parks v. United States*, 627 A.2d 1, 1993 D.C. App. LEXIS 135 (1993).

To convict defendant of assault on police officer with dangerous weapon, the Government must prove elements of simple assault, use of dangerous weapon by defendant in commission of the assault, and that defendant knew or should have known that victim was police officer. *Carter v. United States*, 531 A.2d 956, 1987 D.C. App. LEXIS 450 (1987).

Assault with a dangerous weapon requires proof that the weapon actually was used in assault while malicious disfigurement, with the punishment enhancement element of being armed, requires only proof that the accused

was armed or had a dangerous weapon readily available; malicious disfigurement while armed requires proof of specific intent and permanent disfigurement while assault with a dangerous weapon does not require proof of either fact. D.C. Code 1973, §§ 22-401, 22-501, 22-502, 22-506, 22-3202, 22-3502. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

In prosecution for assault with a dangerous weapon, government does not have to prove an attempted battery in every case where an assault is not committed with weapon that is dangerous "per se"; thus, appropriate inquiry for jury is, as it has been in the past: did defendant commit assault, that is, was his threatening act coupled with an apparent ability to injure the victim, and did he commit that assault with a dangerous weapon. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

For government to prove assault with dangerous weapon, it must prove elements of simple assault plus crucial fourth element, that defendant committed an assault with a dangerous weapon and to sustain conviction, government must prove each of these elements beyond a reasonable doubt. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

To support a conviction for assault, the government must prove an attempt or effort with force or violence to inflict bodily harm with apparent present intent to carry out this attempt or effort. D.C. Code § 22-504. *Jones v. United States*, 401 A.2d 473, 1979 D.C. App. LEXIS 351 (1979).

To prove assault with dangerous weapon, Government must not only prove that defendant made attempt or effort, with force or violence to do injury to person of another, that defendant had apparent present ability to effect such injury when he made attempt or effort, and that, at time of commission of assault, he intended to do the acts which constituted the assault, but also that defendant committed assault with dangerous weapon. D.C. Code § 22-502. *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

If instrument found on defendant after arrest was not used in crime and is not per se dangerous weapon, Government must show something in addition to fact that it was found on defendant to meet tests laid down for various dangerous weapons statutes. D.C. Code §§ 22-502, 22-3204, 22-3214. *Cooper v. United States*, 368 A.2d 554, 1977 D.C. App. LEXIS 403 (1977).

Questions of law and fact.

Testimony of operator of coin-operated laun-

dry and dry cleaning establishment that he had seen defendant many times before robbery, that room was well lighted, and that he had opportunity to observe robber for about 30 seconds, was sufficient for jury on issue of identity in armed robbery prosecution. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Inge*, 494 F.2d 1102, 1974 U.S. App. LEXIS 9695 (C.A.D.C. 1974).

Competency of mentally retarded 18-year-old prosecutrix to testify in prosecution for assault with intent to commit rape while armed, assault with a dangerous weapon and carrying a dangerous weapon, was a threshold question of law committed to the trial court's discretion; it remained for the jury, however, to assess credibility of the witness and the weight to be given her testimony. D.C. Code §§ 22-501, 22-502, 22-3202, 22-3204. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Evidence in prosecution for assault with dangerous weapon and carrying a dangerous weapon after conviction of felony did not warrant grant of motion for acquittal on theory of self defense. D.C. Code §§ 22-502, 22-3204. *United States v. James*, 452 F.2d 1375, 1971 U.S. App. LEXIS 7018 (C.A.D.C. 1971).

Evidence that defendant was seen entering getaway car, carrying a gun, some ten minutes before robbery, accompanied by one of confessed active perpetrators, that someone drove getaway car, and that defendant was seen with two of active robbers one day later was sufficient to take to jury aiding and abetting case against defendant for entering bank with intent to commit robbery therein, bank robbery, armed robbery, and assault with a dangerous weapon. 18 U.S.C. § 2113(a); D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Parker*, 442 F.2d 779, 1971 U.S. App. LEXIS 11966 (C.A.D.C. 1971).

That weapon allegedly used by defendant in holding up complaining witness was not recovered and put in evidence at trial did not raise reasonable doubt as a matter of law as to defendant's guilt of assault with dangerous weapon. D.C. Code § 22-502. *United States v. Curtis*, 427 F.2d 630, 1970 U.S. App. LEXIS 9170 (C.A.D.C. 1970).

Whether defendant was one of holdup men in robbery of shoe store was question for jury in robbery and assault with dangerous weapon prosecution. D.C. Code §§ 22-502, 22-2901. *United States v. York*, 426 F.2d 1191, 1969 U.S. App. LEXIS 10675 (C.A.D.C. 1969).

Evidence was sufficient to present question for jury as to whether defendant was guilty of assault with a dangerous weapon. D.C. Code 1961, § 22-502. *Dean v. U.S.*, 314 F.2d 250, 1962 U.S. App. LEXIS 3285 (C.A.D.C. 1962).

Fact of use of a dangerous weapon or the dangerous use of an object in committing an

assault is all that is required for conviction of assault with a dangerous weapon (ADW) as a principal, as the principal actor is the one who actually handles the dangerous object or uses an object in a manner that is found to be dangerous. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

Question of whether an object used in an assault that is not inherently a weapon should be considered a "dangerous weapon" for purposes of a charge of assault with a dangerous weapon (ADW) is answered by a factual finding that the object was used in a manner that actually caused a risk of serious injury; such a finding necessarily proves that the object was capable of producing death or serious bodily injury by its manner of use, whether used to effect an attack or handled with reckless disregard for the safety of others. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

Statute criminalizing assault with a dangerous weapon (ADW) does not define the elements of the crime, leaving the definition of the offense to the common law; because there was no crime of "assault with a dangerous weapon" at common law, courts interpret the statute to require no more than is required to prove the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

Trial court did not abuse its discretion, in prosecution for aggravated assault while armed (AAWA) and assault with a dangerous weapon (ADW), in denying motion for new trial based on newly discovered evidence, where proffered new testimony would have offered little or no aid to jury on key factual issue of who had repeatedly kicked victim so as to cause his injuries. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

Whether an object used in the assault is a dangerous weapon is a question of fact for the jury. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Jury could reasonably find beyond reasonable doubt that defendant's boot-clad foot was dangerous weapon and that complainant's injuries were inflicted with it so as to support conviction for assault with dangerous weapon. D.C. Code 1981, § 22-502. *Moore v. United States*, 599 A.2d 1381, 1991 D.C. App. LEXIS 324 (1991).

Jury, which was given broad definitions of concept of malice in prosecution for second-degree murder while armed and assault with a dangerous weapon, was free to apply those concepts on the basis of its own findings of fact. D.C. Code 1981, §§ 22-502, 22-2403, 22-3202.

Powell v. United States, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

Whether an object or material which is not specifically designed as a dangerous weapon is a "dangerous weapon" under aggravated assault statute is ordinarily a question of fact to be determined by all circumstances surrounding assault. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Whether or not witness made truly independent identification of defendant was factually a matter of credibility which was reasonably reserved to jury by trial judge, in prosecution for armed robbery, robbery and assault with a dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *Hill v. United States*, 367 A.2d 110, 1976 D.C. App. LEXIS 436 (1976).

Review.

— Determination and disposition, review.

Where armed assault was essential part of proof establishing armed rape, armed assault was lesser offense included within the armed rape, and assault conviction was vacated. D.C. Code §§ 22-502, 22-2801, 22-3202(a). *United States v. Edmonds*, 524 F.2d 62, 1975 U.S. App. LEXIS 11658 (C.A.D.C. 1975).

Where concurrent sentences imposed on each conviction for assault with a dangerous weapon were adjudged to run concurrently with burglary and armed robbery convictions, no remand for resentencing was necessary on vacation of convictions for assault with a dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Where armed robberies and assaults with a dangerous weapon were committed against same persons, latter offenses merged into former, and convictions on assault charges could not stand, though a remand for resentencing was not required, where defendant had been given separate sentences, and all sentences were set to run concurrently. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Holiday*, 482 F.2d 729, 1973 U.S. App. LEXIS 8834 (C.A.D.C. 1973).

Where prosecutor's improper closing and rebuttal arguments were so highly prejudicial as to require reversal of conviction of defendant who relied upon insanity as a defense and was convicted of first-degree murder and assault with intent to kill while armed, judgment of conviction of codefendant, who was charged as an aider and abettor, asserted lack of intent to commit murder, and was convicted of second-degree murder, would also be nullified. D.C. Code §§ 22-105, 22-501, 22-502, 22-2401, 22-

2403, 22-3202. *United States v. Hawkins*, 480 F.2d 1151, 1973 U.S. App. LEXIS 9498 (C.A.D.C. 1973).

Where defendant had been convicted of assault with intent to kill armed with dangerous weapon, with sentence of from three to nine years, for assault with dangerous weapon, with concurrent two to six-year sentence, and carrying pistol without license, with concurrent one-year sentence, two to six-year sentence would be vacated on appeal, without remand. D.C. Code §§ 22-502, 22-3204. *United States v. Wimbush*, 475 F.2d 347, 1973 U.S. App. LEXIS 12222 (C.A.D.C. 1973).

Where, in prosecution for first-degree burglary and for assault with a deadly weapon, evidence disclosed a single act on part of defendant directed simultaneously at two persons, so that only a single conviction for assault on two persons was supported by evidence, convictions of first-degree burglary and of one assault would be affirmed, but conviction of an additional assault would be set aside, and sentences would be vacated and case would be remanded for resentencing. D.C. Code §§ 22-502, 22-1801(a). *United States v. Carmichael*, 469 F.2d 937, 1972 U.S. App. LEXIS 7118 (C.A.D.C. 1972).

Conviction of juvenile of first-degree felony-murder, armed robbery, assault with dangerous weapon, assault upon police officer with dangerous weapon and carrying dangerous weapon would be remanded to district court to consider possibility of sentencing under Youth Corrections Act. D.C. Code §§ 22-502, 22-505(b), 22-2401, 22-3202, 22-3204; 18 U.S.C. § 5005 et seq. *United States v. Howard*, 449 F.2d 1086, 1971 U.S. App. LEXIS 9212 (C.A.D.C. 1971).

Facts of case in which defendant convicted of assault with intent to kill and two counts of assault with dangerous weapon received general sentence of five to fifteen years, which was maximum permitted for assault with intent to kill, but more than maximum limits in respect to other two counts of indictment, presented especially appealing case for careful and precise sentencing, and, though conviction was affirmed, sentence was vacated and case was remanded for resentencing. D.C. Code §§ 22-501, 22-502. *United States v. Straite*, 425 F.2d 594, 1970 U.S. App. LEXIS 10026 (C.A.D.C. 1970).

Conviction for robbery and assault with a dangerous weapon was remanded for determination whether new trial was warranted on ground of ineffective assistance of counsel where counsel was not appointed until almost one year after offense, counsel was appointed slightly more than one month before trial, although counsel's failure to appear on date case was first set was allegedly due to misunderstanding case was not removed from ready calendar, and it was alleged that counsel had

inadequate time in which to obtain specified physical evidence and interview specified witnesses. D.C. Code §§ 22-2901, 22-502. *United States v. Weaver*, 422 F.2d 711, 1970 U.S. App. LEXIS 11108 (C.A.D.C. 1970).

Reconstructed photo array permitted Court of Appeals to conduct fair de novo review regarding both suggestibility and reliability of original array, in assault prosecution; police detective who created original array testified that reconstructed array was an accurate representation of original array shown to victim, five of nine photos in array were originals, copies of remaining four photos in array were made from original negatives, and process employed to replicate original array was trustworthy. *McCoy v. United States*, 781 A.2d 765, 2001 D.C. App. LEXIS 211 (2001).

Reduction of convictions to assault with dangerous weapon, rather than dismissal, would be appropriate remedy for failure to prove assault with intent to commit robbery of two victims as charged in indictment, despite constructive amendment to indictment. D.C. Code 1981, §§ 22-501, 22-502, 22-3202. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

In prosecution for assault with a dangerous weapon, wherein Government erroneously proffered to court that grandson of defense witness had been convicted of raping complainant and had been sentenced for that crime after complainant had testified against him, but in truth the grandson's case had been dismissed upon motion of the Government, which defense learned with certainty only after trial, limitation of cross-examination of complainant because of Government's erroneous proffer, assertedly precluding impeachment of complainant by showing that she had made false statement under oath and had made false criminal accusations before, did not compel granting of new trial on ground of newly discovered evidence, in view of fact that evidence of dismissal, had it been introduced, would have had minimal probative value in showing complainant's tendency to make false accusation. D.C. Code SCR, Criminal Rule 33; D.C. Code § 22-502. *Freeman v. United States*, 391 A.2d 239, 1978 D.C. App. LEXIS 297 (1978).

Although defendant was convicted of first-degree burglary while armed, first-degree burglary, armed robbery, robbery and assault with dangerous weapon, convictions for three lesser offenses of first-degree burglary, robbery and assault with dangerous weapon must be vacated on basis that they were lesser included offenses of first-degree burglary while armed and armed robbery. D.C. Code §§ 22-502, 22-1801(a), 22-2901, 22-3202. *Franey v. United States*, 382 A.2d 1019, 1978 D.C. App. LEXIS 419 (1978).

Where names of alleged alibi witnesses were known on day of trial and alibi testimony of witnesses, in light of complainant's positive identification of his assailant, would not have produced defendant's acquittal, refusal of defendant's motion for new trial on basis of newly discovered evidence consisting of alibi witnesses was not an abuse of discretion. D.C. Code SCR, Criminal Rule 33; D.C. Code §§ 22-502, 22-3204. *Williams v. United States*, 295 A.2d 503, 1972 D.C. App. LEXIS 266 (1972).

— In general.

Where respective penalties for mayhem and assault with a dangerous weapon were identical, contention that defendant who poured acid on girl should have been indicted for mayhem rather than assault with dangerous weapon was frivolous. D.C. Code 1961, §§ 22-502, 22-506. *Bishop v. United States*, 349 F.2d 220, 1965 U.S. App. LEXIS 5028 (C.A.D.C. 1965), US Supreme Court certiorari denied by 393 U.S. 870, 89 S. Ct. 158, 21 L. Ed. 2d 139, 1968 U.S. LEXIS 868 (1968).

Trial court's failure, prior to its ruling and instruction, to strike government's reference to prior bad acts was not plain error, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); court ruled prior to prosecutor's opening statement that government could introduce most of prior bad acts evidence, and defendant had not demonstrated that prosecutor strayed from parameters of court's ruling, and thus, mentioning of prior bad acts evidence during prosecutor's opening statement was not plain error. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

— Presentation and reservation of grounds for review.

In prosecution for, inter alia, carrying a dangerous weapon, where comment by the court that if there was any believable evidence in the case, it was to effect that pistol was carried outside defendants' home or place of business was sustained by uncontradicted evidence and judge explicitly charged that all matters of fact were to be determined by the jury, no harm could result to defendants, who, in any event, failed to object. Fed.Rules Crim.Proc. rule 30, 18 U.S.C.; D.C. Code §§ 22-502, 22-3204. *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

Where no objection was made to admission of hearsay evidence concerning number of stitches required to close victim's wounds in prosecution for assault with dangerous weapon, and no objection was made to prosecutor's repetitive reference to number of stitches in summation, and there was strong evidence of guilt, there was no basis for reversal because of

prosecutor's repetitive reference to number of stitches in summation. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.; D.C. Code 1961, § 22-502. *Scurry v. United States*, 347 F.2d 468, 1965 U.S. App. LEXIS 5889 (C.A.D.C. 1965), writ of certiorari denied by 389 U.S. 883, 88 S. Ct. 139, 19 L. Ed. 2d 179, 1967 U.S. LEXIS 1026 (1967).

An assignment of error in failing to instruct jury on simple assault in prosecution for assaults with dangerous weapon comes too late on appeal from district court's judgment, in absence of request during trial for such instruction. D.C. Code 1940, § 22-502; Fed.Rules Crim.Proc. rule 31(c), 18 U.S.C. *MacIllrath v. U.S.*, 188 F.2d 1009, 1951 U.S. App. LEXIS 3139 (C.A.D.C. 1951).

In prosecution for aggravated assault while armed, defendant's request for a definition of "serious bodily injury" was sufficient to preserve for appellate review contention that such an instruction should have been given, as it apprised the judge of the defense's view. *Zeledon v. United States*, 770 A.2d 972, 2001 D.C. App. LEXIS 97 (2001).

In prosecution for aggravated assault while armed, defendant did not waive appellate review of contention that an instruction defining "serious bodily injury" should have been given, even though trial judge, in order to respond to a note sent by jury during deliberations, proposed to give several definitions, but yielded to defendant's preference to let the jury decide on term's meaning; as both courses of action were incorrect, defendant did not waive claim by choosing one. *Zeledon v. United States*, 770 A.2d 972, 2001 D.C. App. LEXIS 97 (2001).

In defendant's trial for assault with dangerous weapon, discernible difference between phrase "deep rooted belief" which was substituted for "abiding conviction" in standard reasonable doubt was not enough to establish "forfeited error." Criminal Rule 52(b); D.C. Code 1981, § 22-502. *Foreman v. United States*, 633 A.2d 792, 1993 D.C. App. LEXIS 282 (1993).

In defendant's trial for assault with dangerous weapon, it was not "obvious or readily apparent" that circuit court's substitution of phrase "abiding conviction" with phrase "deep rooted belief" in standard reasonable doubt instruction lessened standard of proof for conviction and, therefore, reformation of instruction was not plain error. D.C. Code 1981, § 22-502. *Foreman v. United States*, 633 A.2d 792, 1993 D.C. App. LEXIS 282 (1993).

In defendant's trial for assault with dangerous weapon, replacement of phrase "abiding conviction" with phrase "deep rooted belief" in instruction on reasonable doubt did not so prejudice defendant's rights as to jeopardize very fairness and integrity of trial, where case was not complex, where government presented strong proof of assault with dangerous weapon, and where instruction did not eliminate essen-

tial elements of charged offense or omit to mention reasonable doubt altogether. D.C. Code 1981, § 22-502. *Foreman v. United States*, 633 A.2d 792, 1993 D.C. App. LEXIS 282 (1993).

Defendant's failure to raise before trial court in support of motion to sever two robbery prosecutions justified decision of Court of Appeals not to consider arguments. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Defendant, who specifically objected to first two prosecution witnesses on ground that each witness could not remember anything, preserved for review issue that prosecutor should not have called both witnesses in prosecution for armed robbery, assault with intent to kill while armed, assault with dangerous weapon, assault with intent to commit robbery while armed, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Trial court's failure to give more particularized unanimity instruction was not plain error in trial for assault with intent to commit robbery and assault with intent to kill while armed, of which assault with dangerous weapon was lesser included offense, where arguments of prosecutor and defense counsel, taken together with verdict form and jury instructions, made clear to jury that shooting related only to charge of assault with intent to kill while armed. Criminal Rule 31(a); U.S.C. Const. Amend. 6; D.C. Code 1981, §§ 22-501, 22-502, 22-3202. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

In a case involving alleged assault with umbrella with pipe attached, trial court's failure to instruct jury on lesser included offense of simple assault did not constitute "plain error." D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Under facts of prosecution for assault with dangerous weapon, kidnapping, and other charges, it was not plain error to elicit testimony concerning complainant's fear of a gun or to reiterate this testimony in Government's closing argument even though it was the "pipe," and not the gun, which constituted a dangerous weapon, as evidence, although irrelevant to charge of assault with a dangerous weapon, was relevant to the kidnapping charge, as defendant was acquitted, not convicted, of charges to which questioned testimony was relevant, and as prosecutor made clear in his closing argument that it was the pipe and not the gun which constituted the dangerous

weapon. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In prosecution in which defendant was convicted of assault with a dangerous weapon and assault, prosecutor's remarks in closing argument regarding the finding of a bullet fragment in apartment into which defendant fled merely drew permissible inferences from evidence presented, and did not rise to the level of plain error. D.C. Code §§ 22-502, 22-504. *Tuckson v. United States*, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

In prosecution in which defendant was convicted of assault with a dangerous weapon and assault, admission of police officer's testimony that bullet fragment was given to him by woman who resided in apartment was not plain error affecting substantial rights. D.C. Code §§ 22-502, 22-504. *Tuckson v. United States*, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

In prosecution for cruelty to a child and assault with a dangerous weapon, it was not plain error for the trial judge to read to the jury evidence of defendant's prior guilty plea to a charge of assault involving the same child. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

The identification of defendant's photograph by assault victim, the two lineup identifications, the composite drawing, defendant's presence in the area of the attack, the two in-court identifications of him, and the clothing recovered from his home left so small a probability that probable cause was lacking in the case that the discretion of the Court of Appeals to consider plain error would not be wisely exercised by entertaining unraised issue regarding the trial court's alleged error in not suppressing identifications flowing from photographs taken of defendant when he was allegedly taken to police station without probable cause. D.C. Code §§ 22-502, 22-3204; U.S. Const. Amend. 4. *Adams v. United States*, 302 A.2d 232, 1973 D.C. App. LEXIS 246 (1973).

Instruction that the Government had no affirmative duty to make a paraffin test of gun seized from defendant charged with assault with a dangerous weapon and with carrying a concealed weapon to determine if he had ever used it was not "plain error" warranting review in absence of objection. D.C. Code SCR, Criminal Rules, 52(b); D.C. Code §§ 22-502, 22-3204. *Wooten v. United States*, 285 A.2d 308, 1971 D.C. App. LEXIS 258 (1971).

Right to trial by jury.

On record of appeal from conviction for assault with intent to kill and assault with dangerous weapon, waiver of jury trial was not shown to be involuntary, however, passive na-

ture of role played by trial court in inquiry as to defendant's understanding was subject to criticism on appeal. Fed. Rules Crim. Proc. rules 11, 23(a), 18 U.S.C.; D.C. Code §§ 22-501, 22-502. *United States v. Straite*, 425 F.2d 594, 1970 U.S. App. LEXIS 10026 (C.A.D.C. 1970).

Search and seizure.

Where two police officers had been provided information by a reliable informant, indicating possible illegal narcotics activity and, after observing defendant and another emerge from building as predicted, officers had right to stop the occupants of the taxicab long enough to ask to talk to them and to investigate, seizure of the pistol, which defendant held in plain view of the officers, was proper and, once defendant was lawfully under arrest, the seizure of the cartridges, in reasonable search of the vehicle incident to such arrest, was clearly appropriate. D.C. Code §§ 22-502, 22-3204; U.S. Const. Amend. 4. *United States v. James*, 452 F.2d 1375, 1971 U.S. App. LEXIS 7018 (C.A.D.C. 1971).

Where automobile stopped by police 45 minutes after offense was reliably identified as one used by suspect to leave scene of offense and search of defendant operator and his companion failed to produce any weapon, police had ample grounds for concluding that weapon used in assault was likely secreted in automobile, authorizing a warrantless search of automobile at scene of arrest, since only way in which a warrant could have been obtained would have been by temporarily seizing automobile and immobilizing it. U.S. Const. Amend. 4; D.C. Code §§ 22-502, 22-3204. *United States v. Free*, 437 F.2d 631, 1970 U.S. App. LEXIS 7754 (C.A.D.C. 1970).

Where police officers had reason to believe that revolver used by defendant charged with assault with a dangerous weapon might be concealed in defendant's truck and that bags of pastry and eyeglasses left behind by victims who had successfully escaped from the truck were also in the truck, warrantless search of the truck following arrest of defendant was lawful, and thus evidence seized in such search was admissible. D.C. Code § 22-502. *United States v. Bowles*, 304 A.2d 277, 1973 D.C. App. LEXIS 276 (1973).

Self-defense.

Defendant charged with assault with dangerous weapon was not entitled to instruction on self-defense where defendant put herself in position that was likely to result in escalation of tensions and used deadly force against man whose empty hands were in plain view, evidence did not show that victim was first aggressor, and defendant's witness confirmed that there was no fight or circumstances in which defendant was in danger of serious bodily in-

jury. D.C. Code 1981, §§ 22-502, 22-3202. *Harper v. United States*, 608 A.2d 152, 1992 D.C. App. LEXIS 360 (1992).

In prosecution for assault with intent to kill and assault with a dangerous weapon, defendant had no legitimate claim to defense of self-defense, where he voluntarily placed himself in a position which he could reasonably expect would result in violence. D.C. Code §§ 22-501, 22-502. *Nowlin v. United States*, 382 A.2d 9, 1978 D.C. App. LEXIS 404 (1978).

Sentence and judgment, generally.

Trial court's imposition of a condition of restitution as part of sentence imposed upon defendant convicted of assault with a deadly weapon and possession of a pistol without a license was not contrary to statute nor an abuse of trial court's sentencing discretion. D.C. Code §§ 22-105, 22-502, 22-3204. *Barker v. United States*, 373 A.2d 1215, 1977 D.C. App. LEXIS 326 (1977).

Speedy trial.

Right to speedy trial of defendant, charged with armed robbery, assault with dangerous weapon, and of carrying a pistol without a license, was not impinged by nine-month delay extending from his indictment to his trial where, during the first two months defendant was still at large and police were doing their best to locate him, where defendant did not press a speedy trial right until five months after he was arrested, and where record was sufficient to sustain finding that defendant suffered no prejudice to his defense which could be attributed to the delay at the postarrest stage of the prosecution. U.S. Const. Amend. 6; D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Parish*, 468 F.2d 1129, 1972 U.S. App. LEXIS 7437 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690, 1973 U.S. LEXIS 3259 (1973).

Record was devoid of any indication that delay in arresting defendant, which occurred ten months after date of the offenses, was the product of any deliberate effort by police to gain an advantage, record furnished abundant evidentiary support for finding that a reasonable endeavor was made to locate defendant and, in addition, record sustained additional finding that, in any event, defendant was not harmed by the delay, in prosecution for armed robbery, assault with a dangerous weapon, and for carrying a pistol without a license. U.S. Const. Amends. 5, 6; D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Parish*, 468 F.2d 1129, 1972 U.S. App. LEXIS 7437 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690, 1973 U.S. LEXIS 3259 (1973).

Verdict.

Assault with dangerous weapon was lesser included offense of principal offense of armed

robbery; accordingly, defendant could not be convicted of lesser offense in addition to greater. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Inge*, 494 F.2d 1102, 1974 U.S. App. LEXIS 9695 (C.A.D.C. 1974).

Where jury returned a verdict of guilty on each of four counts of robbery while armed involving different victims it was error to receive verdicts from the jury on the four counts of assault with a dangerous weapon, a lesser included offense, with respect to the same victims. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Johnson*, 475 F.2d 1297, 1973 U.S. App. LEXIS 11465 (C.A.D.C. 1973).

Where first jury returned verdict of not guilty of armed robbery but was unable to agree as to whether defendant was an unarmed robber and mistrial was declared, the acquittal of armed robbery was not an acquittal of unarmed robbery charge and double jeopardy prohibition did not preclude retrial of unarmed robbery charge. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Scott*, 464 F.2d 832, 1972 U.S. App. LEXIS 8719 (C.A.D.C. 1972).

Acquittal by defendant of assault with a dangerous weapon did not require his acquittal on companion charge of carrying a pistol which he used to defend himself on ground that such acquittal demonstrated conclusively that defendant was carrying pistol for a lawful purpose notwithstanding defendant was exposed to a serious current threat by victim, that he did not have time to get a license and that he made a serious attempt to secure police protection, in light of the history of antiweapons legislation evidencing the clearest intent to drastically tighten ban on carrying dangerous weapons. D.C. Code 1951, §§ 22-502, 22-3204, 22-3214. *Cooke v. U.S.*, 275 F.2d 887, 1960 U.S. App. LEXIS 5296 (C.A.D.C. 1960).

Jury's return of not guilty verdict on charge of assault with a deadly weapon did not automatically require acquittal of defendant on charge of possession of firearm during crime of violence which was based on same incident. D.C. Code 1981, §§ 22-502, 22-3204. *Smith v. United States*, 684 A.2d 307, 1996 D.C. App. LEXIS 210 (1996).

Trial court which individually polled jurors as to whether they agreed with announced guilty verdict as to last eight counts was not required to individually poll each juror with respect to agreement to each count and did not abuse discretion in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Fact that jury acquitted defendant on charge of carrying a dangerous weapon did not require them to find defendant not guilty on charge of

assault with deadly weapon. D.C. Code §§ 22-502, 22-3204. *Winters v. United States*, 317 A.2d 530, 1974 D.C. App. LEXIS 391 (1974).

Defendant's actions in holding child under shower in such a manner as to cause child to fight for air, and in repeatedly slapping and kicking the child after removing him from the shower, supported verdict of guilty on charge of cruelty to a child, irrespective of fact that child was also beaten with a belt and defendant was also convicted of assault with a dangerous weapon. D.C. Code §§ 22-502, 22-901. *Winters v. United States*, 317 A.2d 530, 1974 D.C. App. LEXIS 391 (1974).

Weight and sufficiency of evidence.

— Assault of women and children, weight and sufficiency of evidence.

Evidence supported two of four convictions for assault with dangerous weapon (ADW) arising from incident in which defendant fired gun into former girlfriend's apartment while girlfriend and her three children were present; defendant fired two shots into apartment and knew of presence of at least girlfriend and his son. D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

Evidence was sufficient to support convictions for assault with dangerous weapon (ADW), even though there was no direct evidence that defendant actually fired shots into former girlfriend's apartment; circumstantial evidence placed defendant at scene of assault, established defendant's desire to frighten girlfriend so that she would not go out and let him spend night, demonstrated defendant's anger and distress at girlfriend's refusal to allow him entry, and linked defendant spatially and temporally with gunshots constituting the assault. D.C. Code 1981, § 22-502. *James v. United States*, 718 A.2d 1083, 1998 D.C. App. LEXIS 193 (1998).

Evidence that defendant stared at child victim from pay phone, followed her to car, knocked on window with barrel of shotgun, and brandished barrel of weapon at two occupants of car was sufficient for jury to conclude that defendant acted in manner which would reasonably justify the occupants to believe that defendant would use weapon against them, and thus was sufficient to support convictions of assault with a deadly weapon on an attempt-to-frighten theory. D.C. Code 1981, § 22-502. *Peterson v. United States*, 657 A.2d 756, 1995 D.C. App. LEXIS 66 (1995).

While the development of direct testimony on the beating of child was less than a model of precision, the evidence as a whole was adequate to sustain jury's verdict finding defendant guilty of assault with a dangerous weapon, namely, a belt. D.C. Code § 22-502.

Robinson v. United States, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

In prosecution on charges of cruelty to child and assault with a dangerous weapon, namely, a belt, intent was an essential element of the offenses and hence had to be proved by the Government beyond a reasonable doubt. D.C. Code §§ 22-502, 22-901. Robinson v. United States, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

— **Defenses generally, weight and sufficiency of evidence.**

Where there was no proof that cylinderless gun found in possession of defendant's accomplice when arrested 40 hours after robbery had been the gun used in the robbery, there was no basis for defendant's claim that the robbery gun was inoperable and therefore could not legally be vehicle of an assault with a dangerous weapon. United States v. Alexander, 430 F.2d 904, 1970 U.S. App. LEXIS 7440 (C.A.D.C. 1970).

— **Identity and characteristics of persons or things, weight and sufficiency of evidence.**

Evidence on issue of joint criminal venture and possession of purse and shotgun found in speeding automobile, occupied by defendants as driver and passenger, a short time after a purse had been forcibly taken from a pedestrian by two men, one of whom was armed with pistol, was sufficient to support conviction of armed robbery, assault with a dangerous weapon and possession of unregistered firearm, notwithstanding that at least one of four or five original occupants of vehicle had fled and that identification of defendants was "inconclusive" at best. D.C. Code §§ 22-502, 22-2901, 22-3202; 26 U.S.C. (I.R.C.1954) § 5861(d). United States v. McCall, 460 F.2d 952, 1972 U.S. App. LEXIS 10560 (C.A.D.C. 1972).

Identification testimony of victim and chief prosecution witness was sufficient to sustain conviction of assault with intent to kill and convictions of assault with a deadly weapon. D.C. Code §§ 22-501, 22-502. Allen v. United States, 420 F.2d 223, 1969 U.S. App. LEXIS 9997 (C.A.D.C. 1969).

Conviction for robbery and assault with dangerous weapon was not vitiated by failure of police to fingerprint pistol. Harling v. United States, 401 F.2d 392, 1968 U.S. App. LEXIS 6335 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 1068, 89 S. Ct. 725, 21 L. Ed. 2d 711, 1969 U.S. LEXIS 2750 (1969).

Evidence was sufficient to establish identity of defendant as perpetrator of assault with a dangerous weapon and malicious destruction of property, even though defendant argued that victim did not recall giving a description of assailant as having facial hair, while defendant

had a mustache, and that there were discrepancies between testimonies of victim and eyewitness; victim had ample time to observe defendant's face as they approached each other while making near-continuous eye contact and while it was daylight, victim made a positive show-up identification of defendant a few minutes later and identified him at trial, and victim's identification was corroborated by eyewitness. Lewis v. United States, 930 A.2d 1003, 2007 D.C. App. LEXIS 550 (2007).

Convictions for multiple charges arising out of armed robbery of apartment building were supported by the identification of defendants by victims and police officers, and testimony that the defendants' weapons were operational. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(a, b), 22-3214(a). Hanna v. United States, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Sufficient evidence of defendants' identities as perpetrators of charged assault with dangerous weapon and possession of firearm during crime of violence was provided by identifications made by victims and circumstantial evidence, in light of child victim's selection of photograph of one defendant from photo array and fact that adult victim pointed out both defendants to police when he saw them a second time the same night, within five to ten minutes after the assault, and had accurately described one defendant prior to his apprehension, and in light of evidence of defendants' consciousness of guilt in that one defendant fled and the other attempted to hide clothing which would identify him. D.C. Code 1981, §§ 22-502, 22-3204(b). Peterson v. United States, 657 A.2d 756, 1995 D.C. App. LEXIS 66 (1995).

Fact that victim identified defendant as one of two men carrying pistols who assaulted victim was sufficient to sustain conviction of assault with dangerous weapon. D.C. Code 1981, § 22-502. Owens v. United States, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

Evidence in trial against various defendants failed to prove beyond a reasonable doubt that particular defendant made attempt or effort, with force or violence, to do injury to deceased, and thus failed to establish assault by such particular defendant. D.C. Code § 22-502. Sousa v. United States, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

— **In general.**

Evidence, including permissible inference jury was permitted to draw from fact that

defendant was found within an hour of larceny in exclusive possession of recently stolen truck, supported convictions of kidnapping of truck helper, armed robbery and assault with a dangerous weapon. D.C. Code §§ 22-502, 22-2101, 22-2901, 22-3202. *United States v. Wolford*, 444 F.2d 876, 1971 U.S. App. LEXIS 11155 (C.A.D.C. 1971).

Evidence sustained conviction for assault and carrying dangerous weapon. D.C. Code §§ 22-502, 22-3204. *United States v. White*, 429 F.2d 711, 1970 U.S. App. LEXIS 9357 (C.A.D.C. 1970).

From visual evidence presented, and particularly a demonstration in which prosecutor assisted by standing on a courtroom table to simulate defendant's position on a ledge above assault victim, it was possible with great accuracy to determine projectory of bullet and hence to furnish a basis from which court and jury could conclude beyond a reasonable doubt that defendant fired bullet that hit victim, that defendant had a dangerous weapon in his possession at time victim was shot and that defendant fired shot from a pistol; thus, evidence, though visual, was sufficient to sustain defendant's conviction of assault with a dangerous weapon. D.C. Code § 22-502. *United States v. Skinner*, 425 F.2d 552, 1970 U.S. App. LEXIS 10775 (C.A.D.C. 1970).

Evidence was sufficient to support defendant's conviction of six counts of armed kidnapping, five counts of armed rape, two counts of armed robbery, and one count each of assault with a deadly weapon and armed assault with intent to commit sodomy. D.C. Code §§ 22-502, 22-2101, 22-2801, 22-2901, 22-3202, 22-3502. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

— Insanity or other incapacity, weight and sufficiency of evidence.

Testimony by prison guards that they were locked in a cell and held as hostages, that defendant frequently checked the cell where the guards were confined, that he told the guards that he "had nothing to lose by going out looking," that defendant separated himself from a group of inmates who did not want to escape immediately before rebellious inmates clustered for breakout attempt, and that defendant thereafter came by the cell many times armed with a short piece of steel with a sharp end and threatened the hostages was sufficient to sustain defendant's convictions for attempted escape, armed kidnapping, robbery, and riot. 18 U.S.C. § 751; D.C. Code §§ 22-502, 22-1122, 22-2901, 22-3202. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct.

1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Record, including testimony of a private psychiatrist who examined defendant at government expense, was sufficient to support finding that criminal acts committed by defendant (armed robbery, assault with a dangerous weapon, and carrying a dangerous weapon) were not so proximately tied to defendant's mental impairment as to require his exculpation. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3204; 18 U.S.C. *United States v. Wilson*, 471 F.2d 1072, 1972 U.S. App. LEXIS 7095 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691, 1973 U.S. LEXIS 3264 (1973).

Finding that commission of robbery and assault with dangerous weapon was not causally connected with defendant's alleged mental illness and narcotic addiction was supported by substantial testimony. D.C. Code §§ 22-502, 22-2901. *United States v. Carter*, 436 F.2d 200, 1970 U.S. App. LEXIS 8882 (C.A.D.C. 1970).

In light of evidence on issue whether offense was a product of mental illness, conviction for robbery of property belonging to United States, assault with dangerous weapon and carrying dangerous weapon would be affirmed. 18 U.S.C. § 2112; D.C. Code §§ 22-502, 22-2901, 24-301(a). *Adams v. United States*, 413 F.2d 411, 1969 U.S. App. LEXIS 12488 (C.A.D.C. 1969).

— Juvenile offenders, weight and sufficiency of evidence.

Complainant's testimony that, just before she felt a blow from behind, juvenile had run behind her, and that neither of the two attackers who initially engaged her in fight had struck the blow to her back, and had been too far away to do so, was sufficient to prove simple assault, but was insufficient to establish that juvenile had used a weapon, as required to establish assault with dangerous weapon; although complainant testified that she felt blood coming down her back, no weapon was recovered, complainant testified she never had seen a weapon, and government did not elicit testimony regarding nature and extent of complainant's injury. D.C. Code 1981, § 22-502. *In re M.M.S.*, 691 A.2d 136, 1997 D.C. App. LEXIS 55 (1997).

It was within province of court, as trier of fact, to disbelieve testimony of waitress who had chosen juvenile's photograph from display on day after robbery of restaurant but who testified at trial that defendant was not the boy who had pointed gun at her. D.C. Code §§ 22-502, 22-2901. *In re W.K.*, 323 A.2d 442, 1974 D.C. App. LEXIS 251 (1974).

Positive identification by one eyewitness and somewhat tentative identifications by two other eyewitnesses were sufficient basis for finding juvenile guilty of robbery and assault with dangerous weapon. D.C. Code §§ 22-502,

22-2901. In re W.K., 323 A.2d 442, 1974 D.C. App. LEXIS 251 (1974).

Under record, trial court's finding that juvenile was an aider and abettor in assault and robbery, and hence a delinquent, was not plainly wrong. D.C. Code §§ 22-105, 22-502, 22-2901. In re W., 294 A.2d 174, 1972 D.C. App. LEXIS 237 (1972).

Uncontroverted testimony afforded ample basis for trier of fact to draw reasonable and permissible inference that the juvenile was involved as aider and abettor in the criminal conduct of robbing and assaulting another juvenile notwithstanding there was contradictory testimony by complaining witness. D.C. Code §§ 22-105, 22-502, 22-2901. In re W., 294 A.2d 174, 1972 D.C. App. LEXIS 237 (1972).

— **Mayhem, weight and sufficiency of evidence.**

Evidence that victim had facial scars from cuts and had lost some use of her right arm and hand was sufficient to support finding that she was permanently disabled required to support conviction for mayhem. D.C. Code 1981, § 22-506. Whitaker v. United States, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

Jury could infer from evidence in prosecution for malicious disfigurement that defendant had required deliberate intent to disfigure victim by throwing caustic liquid at him, even though no evidence was presented to show that defendant knew liquid would cause harmful burns. D.C. Code 1981, § 22-506. Curtis v. United States, 568 A.2d 1074, 1990 D.C. App. LEXIS 4 (1990).

In light of ferocity of the attack, the injuries sustained, and defendant's own comments while assaulting victim, there was ample circumstances from which jury could infer evidence of defendant's specific intent to commit mayhem. D.C. Code 1981, § 22-506. Smith v. United States, 466 A.2d 429, 1983 D.C. App. LEXIS 482 (1983).

— **Motive and intent, weight and sufficiency of evidence.**

Evidence that while defendant and victim were fighting, defendant, with general intent to injure, struck victim with pencil in hand, lodging pencil in victim's eye, was sufficient to sustain conviction for assault with dangerous weapon. D.C. Code 1981, § 22-502. Wynn v. United States, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

Evidence of a defendant's intent to commit offenses of attempted armed robbery, conspiracy and two counts of assault with deadly weapon was sufficient to sustain his convictions of such offenses. Jones v. United States, 386 A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

Evidence concerning threats made by one defendant to robbery victims as they attempted to follow robbers was sufficient to support conviction of that defendant for assault with a dangerous weapon. D.C. Code § 22-502. Heiligh v. United States, 379 A.2d 689, 1977 D.C. App. LEXIS 252 (1977).

— **Motor vehicle offenses, weight and sufficiency of evidence.**

Evidence adduced at trial permitted jury to conclude beyond a reasonable doubt that an automobile, driven at speeds and in manner that defendant employed, was likely to produce death or serious bodily injury because of wanton and reckless manner of its use in disregard of lives and safety of others and was sufficient to support defendant's conviction for assault with a dangerous weapon. D.C. Code 1981, § 22-502. Powell v. United States, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

In prosecution for assault with a dangerous weapon, assault on a police officer with a dangerous weapon and assault on a police officer, jury could have found that both defendants were participants in altercation provoked by one defendant's obstruction of public street in violation of traffic regulations, that fisticuffs followed, and that other defendant drove automobile into officer with guilty knowledge, intending to aid the other defendant. D.C. Code §§ 22-502, 22-505(a, b). Johnson v. United States, 386 A.2d 710, 1978 D.C. App. LEXIS 382 (1978).

In prosecution for assault with a dangerous weapon, an automobile, jury could have found that defendant, who did not drive automobile, who did not tell other defendant to do so and who had allegedly abandoned affray and stepped aside in retreat before automobile collided with officer, stepped aside for purpose of providing a clear path for the other defendant to run the officer down. D.C. Code § 22-502. Johnson v. United States, 386 A.2d 710, 1978 D.C. App. LEXIS 382 (1978).

— **Persons liable, weight and sufficiency of evidence.**

Evidence including testimony showing that defendant walked behind victims and tried to remove wallet from victim's pocket was sufficient to support the implicit finding of verdict that defendant aided and abetted the offense of assault with intent to commit robbery while armed with a dangerous weapon and the offense of assault with a dangerous weapon. D.C. Code §§ 22-105, 22-501 et seq., 22-502. United States v. Prater, 462 F.2d 292, 1972 U.S. App. LEXIS 10401 (C.A.D.C. 1972).

Evidence that inter alia, defendant and two other men entered store together, that they conversed together until other customers left the store, that defendant did not lie on the floor when one of the codefendants, with a gun, announced a "stick-up" and said "To the floor.", and that defendant moved from near the door to near the cash register after a codefendant ordered store employee to open it was sufficient to support defendant's conviction for armed robbery and assault with a dangerous weapon, and conflicting testimony of defendant and his codefendants whereby they all sought to establish that defendant and one of his codefendants were innocent bystanders did not destroy the permissible inference of defendant's guilt. D.C. Code §§ 22-105, 22-502, 22-2901, 22-3202. *United States v. Lumpkin*, 448 F.2d 1085, 1971 U.S. App. LEXIS 9452 (C.A.D.C. 1971).

Evidence was sufficient to convict defendant as aider and abettor with respect to assault with a deadly weapon; defendant drove codefendant to the scene and sat in car while codefendant got out of the car with gun drawn, and when codefendant returned with robbery victim's purse, defendant drove away and led police on chase with codefendant still at his side. *Maddox v. United States*, 745 A.2d 284, 2000 D.C. App. LEXIS 15 (2000).

Evidence was insufficient to convict defendant of assault with deadly weapon, on aiding and abetting theory; although defendant talked to attacker before assault, then brushed several inches from victim, and then talked to attacker again after the assault, defendant's presence at scene was not enough to establish participation in crime, and act of brushing by victim was not reasonable basis for inferring defendant distracted victim in order to facilitate stabbing. *Jones v. United States*, 625 A.2d 281, 1993 D.C. App. LEXIS 121 (1993).

Defendant was properly convicted for assault with dangerous weapon based upon pistol whipping of victim by coconspirators. D.C. Code 1981, §§ 22-502, 33-541(a)(1), 33-549. *Belton v. United States*, 581 A.2d 1205, 1990 D.C. App. LEXIS 220 (1990).

There was sufficient evidence from which jury could reasonably find that defendant aided and abetted shooting of victim outside of nightclub following fight in nightclub, thus sustaining conviction for assault with a dangerous weapon, where evidence showed that inside and outside events were part of continuous chain of events and the shooting outside the club was natural and probable consequence of defendant's actions in handing gun, inside the club, to person who shot victim outside of club. D.C. Code 1981, § 22-105. *Murchison v. United States*, 486 A.2d 77, 1984 D.C. App. LEXIS 575 (1984).

Evidence that defendant aided and abetted codefendant in crime of robbing decedent and

burglarizing her home was sufficient to sustain conviction of felony-murder. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Evidence was sufficient to sustain defendant's assault with dangerous deadly weapon conviction on theory that coparticipant engaged in such assault and that assault was natural and probable consequence of attempted robbery or defendant's participation in events leading to assault warranted holding him responsible, or that assault took place during defendant's and coparticipant's escape after committing another offense, or that defendant aided and abetted coparticipant in escape and thus was equally responsible for intended assault by coparticipant or that assault was object of conspiracy. D.C. Code § 22-105. *Jones v. United States*, 386 A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

Evidence was sufficient to sustain a defendant's conviction of two counts of assault with deadly weapon on theory that they were perpetrated in course of conspiracy in which defendant was involved. D.C. Code § 22-105a. *Jones v. United States*, 386 A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

Evidence in prosecution resulting in convictions of codefendants for second-degree burglary, armed robbery, and assault with dangerous weapon was sufficient to establish involvement of one codefendant as an aider and abettor. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

— Robbery, weight and sufficiency of evidence.

Evidence sustained determination that assaults with dangerous weapons upon persons other than bank tellers, committed in connection with bank robbery, were separate assaults rather than a single group assault. D.C. Code § 22-502. *United States v. Cooper*, 504 F.2d 260, 1974 U.S. App. LEXIS 6885 (C.A.D.C. 1974).

Evidence that assaults of two victims were used to effectuate robbery of third victim could not support convictions for assault with intent to commit robbery of first two victims, as charged in indictment. D.C. Code 1981, §§ 22-501, 22-502, 22-3202. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

— Self-defense, weight and sufficiency of evidence.

Evidence supported finding that defendant accused of manslaughter and assault with

deadly weapon had not acted in self-defense. D.C. Code 1961, §§ 22-502, 22-2405. *Rowe v. United States*, 370 F.2d 240, 1966 U.S. App. LEXIS 4197 (C.A.D.C. 1966).

— Use of dangerous weapon, weight and sufficiency of evidence.

Evidence, including testimony of identification witness, was sufficient to sustain conviction of armed robbery and assault with deadly weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Jones*, 517 F.2d 176, 1975 U.S. App. LEXIS 13243 (C.A.D.C. 1975).

Evidence sustained conviction for assault on police officer while armed with dangerous weapon. D.C. Code § 22-505(b). *United States v. Lee*, 509 F.2d 400, 1974 U.S. App. LEXIS 5476 (C.A.D.C. 1974), writ of certiorari denied by 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765, 1975 U.S. LEXIS 1180 (1975).

In prosecution for armed robbery and assault with deadly weapon, evidence that a weapon was used in robbery was sufficient. *United States v. DeCoster*, 487 F.2d 1197, 1973 U.S. App. LEXIS 7660 (C.A.D.C. 1973).

Evidence sustained conviction of armed robbery, assault with dangerous weapon, possession of prohibited weapon, a sawed-off shotgun, and possession of unregistered firearm. *United States v. Thomas*, 485 F.2d 1012, 1973 U.S. App. LEXIS 8265 (C.A.D.C. 1973).

Evidence was sufficient to support convictions of first-degree burglary and of assault with a deadly weapon despite claim that, absent corroborating evidence, testimony of complaining witness alone could not support findings of guilt. D.C. Code §§ 22-502, 22-1801(a). *United States v. Carmichael*, 469 F.2d 937, 1972 U.S. App. LEXIS 7118 (C.A.D.C. 1972).

Evidence sustained robbery and assault with dangerous weapon convictions of defendant who was identified by victims as robber who used sawed-off shotgun and who was observed in area where robbery occurred shortly before and shortly after robbery. *United States v. Randolph*, 443 F.2d 729, 1970 U.S. App. LEXIS 5865 (C.A.D.C. 1970).

Evidence was sufficient to support conviction for assault with dangerous weapon upon Canine Corps police officer and did not require conclusion that shots were fired not at policeman but at police dog. *Jackson v. United States*, 412 F.2d 149, 1969 U.S. App. LEXIS 9100 (C.A.D.C. 1969).

Evidence sustained conviction for house-breaking, impersonation of police officer, assault with dangerous weapon and robbery. *Parker v. United States*, 391 F.2d 457, 1967 U.S. App. LEXIS 5317 (C.A.D.C. 1967).

Sufficient evidence supported defendant's conviction for assault with a dangerous weapon (ADW); there was evidence that defendant intended to and did try to injure or frighten

victim by using his van as weapon in manner likely to cause her to have a car accident, and victim's testimony concerning the manner in which defendant used his vehicle, trying to run her off the road and force her into oncoming traffic, was sufficient to permit jury to find reasonably that defendant used his vehicle as dangerous weapon in committing assault. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Sufficient evidence supported defendant's conviction for assault with a dangerous weapon (ADW); there was evidence that defendant intended to and did try to injure or frighten victim by using his van as weapon in manner likely to cause her to have a car accident, and victim's testimony concerning the manner in which defendant used his vehicle, trying to run her off the road and force her into oncoming traffic, was sufficient to permit jury to find reasonably that defendant used his vehicle as dangerous weapon in committing assault. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Evidence was sufficient to support defendant's conviction for assault with a dangerous weapon; vehicle was immediately to the right of car, and as defendant leaned out of the passenger side window of car to fire shots at vehicle, defendant would have had an unobstructed line of sight directly into vehicle, and jury could have reasonably inferred from these facts that defendant realized that vehicle's driver was not alone in vehicle. *McCoy v. United States*, 890 A.2d 204, 2006 D.C. App. LEXIS 7 (2006).

Evidence that defendant drove car to scene of shootings, that he and other occupants of car called out to intended victim, and that he and others pointed their guns and fired shots at intended victim, was sufficient to show that defendant had general intent to commit assault with deadly weapon, as required to support conviction for that offense. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

Sufficient evidence supported convictions for aggravated assault while armed and assault with a dangerous weapon; during argument between defendant and victim, defendant plunged knife deep into victim's neck, and victim required emergency surgery to repair two life-threatening lacerations to his right carotid artery. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Defendant's mere display of knife in order to allegedly deter onrushing attacker did not constitute excessive use of deadly force as matter of law, for purposes of defendant's claim that he

acted in self-defense, in trial for simple assault and attempted possession of prohibited weapon. *Douglas v. United States*, 859 A.2d 641, 2004 D.C. App. LEXIS 460 (2004).

Sufficient evidence supported convictions for armed carjacking, armed robbery, aggravated assault while armed (AAWA), assault with a dangerous weapon (ADW), possession of a firearm while committing a crime of violence, and carrying a pistol without a license; victim was able to determine defendants' relative heights and complexions, although they masked their faces, officer apprehended defendant after he fled from car bearing license number of car reported stolen only a few minutes earlier, and wearing very shoes identified as those stolen from victim's feet, and defendant's girlfriend testified that defendants brought into her apartment several person items belonging to victim. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Defendant's conviction for assault with a deadly weapon was required to be reduced to simple assault, where there was no evidence that defendant struck victim with any sort of weapon and witness did not see what object, if any, defendant might have used to strike victim. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Evidence was sufficient to support conclusion, in prosecution for assault with a dangerous weapon (ADW), that defendant used his hiking boot as a dangerous weapon when he kicked victim; defendant admitted at plea hearing that he had been drinking "for the most part of the evening," that he kicked victim because he was upset by rumors that she was being escorted around town by another man, and that he punched victim at the same time that he kicked her. *Pringle v. United States*, 825 A.2d 924, 2003 D.C. App. LEXIS 297 (2003).

Evidence was sufficient to support convictions for assault with a dangerous weapon and possession of a prohibited weapon, where defendant grabbed victim from behind, pointed knife at her throat, and threatened to kill her, defendant choked victim and pushed her down a flight of stairs, and defendant wielded knife that was seven to nine inches long with serrated edges. *McCoy v. United States*, 781 A.2d 765, 2001 D.C. App. LEXIS 211 (2001).

Evidence was sufficient to support conviction for aggravated assault while armed; defendant caused arterial bleeding and a broken collarbone by stabbing his wife repeatedly with a knife, medical testimony established that bleeding was severe enough to result in death if left untreated, and circumstantial evidence showed that victim suffered extreme physical

pain. *Zeledon v. United States*, 770 A.2d 972, 2001 D.C. App. LEXIS 97 (2001).

Evidence was sufficient to establish identity, and thus, was sufficient to support convictions for aggravated assault while armed and assault with a dangerous weapon, where eyewitness who identified defendant observed the entire altercation, the gymnasium where the fight occurred was adequately lit, and eyewitness was no more than 30 feet from the incident, which was close enough to see a small, sharp object in defendant's hand and to observe defendant's face. *Martin v. United States*, 756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Reasonable jury could infer that defendant was in process of committing actual battery when, while looking at officer, defendant started car, put it in gear, reached down to floor, retrieved pistol from under seat, brought it back up in his hands, and leaned to his right while raising pistol up as far as his knee. *Parks v. United States*, 627 A.2d 1, 1993 D.C. App. LEXIS 135 (1993).

Testimony by police officer about manner in which defendant retrieved pistol to carry out intended escape from officer, either by shooting or frightening officer, supported finding that defendant used pistol during alleged assault. *Parks v. United States*, 627 A.2d 1, 1993 D.C. App. LEXIS 135 (1993).

Evidence supported conviction for assault of police officer with deadly weapon; officer and bystander testified that defendant pointed handgun at officer in patrol car who was attempting to catch defendant after defendant had run from police, although handgun was inoperable when found by police. *Bruce v. United States*, 617 A.2d 986, 1992 D.C. App. LEXIS 315 (1992), writ of certiorari denied by 507 U.S. 1042, 113 S. Ct. 1878, 123 L. Ed. 2d 496, 1993 U.S. LEXIS 2967, 61 U.S.L.W. 3715 (1993).

Evidence that both defendant and accomplice used their gun in a menacing and threatening manner toward victims was sufficient to support defendant's conviction for assault with a dangerous weapon, even though there was no evidence that the object used to strike victim in the head was a pistol, as stated in the indictment, not the victim's cane. *Butler v. United States*, 614 A.2d 875, 1992 D.C. App. LEXIS 188 (1992), writ of certiorari denied by 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558, 1992 U.S. LEXIS 7611, 61 U.S.L.W. 3401 (1992).

Sufficient evidence was adduced at trial to demonstrate that defendant used knife in his attack on victim where closed pocket knife was noticed on ground close to victim after attack, and victim's emergency physician testified that lacerations of victim's face resembled stab injuries caused by sharp object; thus, all of Government's alternative theories regarding assault with dangerous weapon were sustainable on

record. *Williams v. United States*, 521 A.2d 663, 1987 D.C. App. LEXIS 295 (1987).

There was sufficient evidence before the jury to prove beyond a reasonable doubt the elements of simple assault, where defendant stood 30 or 40 yards away from police officer and pointed a gun at him, which was later found to contain live ammunition. D.C. Code 1981, § 22-504. *Robinson v. United States*, 506 A.2d 572, 1986 D.C. App. LEXIS 507 (1986).

In prosecution for aggravated assault, fact that Government did not introduce extra testimony concerning seriousness of the injuries that weapon, i.e., umbrella with pipe attached, could inflict would not preclude jury from reasonably concluding that weapon which was exhibited in court was "dangerous." D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Testimony of robbery victims was sufficient proof that defendant carried a pistol, and, as it was reasonable to assume that pistol directed at victims in a menacing manner was loaded and operable, there was sufficient evidence that pistol involved in armed burglary, robbery and assaults was in fact operable. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3204. *Morrison v. United States*, 417 A.2d 409, 1980 D.C. App. LEXIS 324 (1980).

Evidence, though meager, was sufficient to sustain conviction of one defendant for assault with dangerous weapon. D.C. Code § 22-502. *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

Uncontradicted evidence that defendant grabbed pistol out of hand of complainant and, as he threw pistol to his brother, yelled at brother to kill victim was sufficient for jury to find that defendant was guilty of assault with a dangerous weapon. D.C. Code § 22-502. *Blango v. United States*, 335 A.2d 230, 1975 D.C. App. LEXIS 350 (1975).

Evidence, including testimony that shotgun shells similar to those used in gun used in armed robbery were found in defendant's automobile, was sufficient to sustain convictions of armed robbery and assault with dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *Borrero v. United States*, 332 A.2d 363, 1975 D.C. App. LEXIS 324 (1975).

Evidence was sufficient to sustain conviction for assault with a deadly weapon charged as separate and distinct from armed robbery offense. D.C. Code §§ 22-502, 22-2901, 22-3202. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

§ 22-403. Assault with intent to commit any other offense.

Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than 5 years.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 805.)

Cross references. — Additional penalty for possession of firearm, see § 22-4502.

Age, defenses to child sexual abuse, see § 22-3011.

Consent defense to sexual abuse, see § 22-3007.

Knowledge of age, state of mind proof requirement, see § 22-3012.

Marriage, defenses to child sexual abuse, see § 22-3011.

Prior Codifications. — 1981 Ed., § 22-503. 1973 Ed., § 22-503.

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"Other crimes" evidence, in form of testimony by defendant's sister on cross-examination by defense counsel, that defendant had set fires before in his father's house was inadmissible in prosecution for felony malicious destruction of

property, alleging that defendant again set that house on fire. *Coleman v. United States*, 779 A.2d 297, 2001 D.C. App. LEXIS 183 (2001).

In prosecution for assault of an indecent nature on a ten-year-old boy, evidence of what occurred between boy and defendant in defendant's apartment on date preceding and day after date charged in the information was admissible as an exception to general rule. *Posey v. U.S.*, 41 A.2d 300, 1945 D.C. App. LEXIS 79 (Cr.App. 1945).

Evidence of a separate offense other than one for which accused is on trial is admissible as an exception to the general rule, when the several offenses are so closely connected in time and locality as to be but parts of a single continuing transaction. *Posey v. U.S.*, 41 A.2d 300, 1945 D.C. App. LEXIS 79 (Cr.App. 1945).

Bail.

Defendant's past conduct is important evidence, perhaps the most important, in predicting his probable future conduct, with respect to determination of whether preventive detention is warranted in an assault with intent to kill while armed (AWIKWA) case; therefore, substantial weight must be accorded to presence in, or absence from, the defendant's record of convictions of dangerous crimes or a history of violent conduct. D.C. Code 1981, §§ 22-503, 22-3202, 23-1322(e), 23-1325(a). *Pope v. United States*, 739 A.2d 819, 1999 D.C. App. LEXIS 242 (1999).

In most, if not all, cases, proof of (1) probable cause that defendant committed assault with intent to kill while armed (AWIKWA) and (2) facts and circumstances of charged offense will be insufficient, without more, to establish by clear and convincing evidence that a defendant is dangerous and preventively detainable. D.C. Code 1981, §§ 22-503, 22-3202, 23-1322(e), 23-1325(a). *Pope v. United States*, 739 A.2d 819, 1999 D.C. App. LEXIS 242 (1999).

Preventive detention of defendant was not warranted, in an assault with intent to kill while armed (AWIKWA) case; though alleged attempted assassination was chilling, in that man shot was under a car, weight of evidence against defendant was marginal, defendant had no criminal record with exception of single expunged conviction, there was no evidence of recent drug or alcohol involvement, defendant apparently had unusually strong community support and ties, and defendant was not on probation, parole, or other supervised release at time of charged offense. D.C. Code 1981, §§ 22-503, 22-3202, 23-1322(e), 23-1325(a). *Pope v. United States*, 739 A.2d 819, 1999 D.C. App. LEXIS 242 (1999).

Defendant can never be presumed to be dangerous, as would subject defendant to preventive detention, solely on basis of finding of probable cause that he has committed assault

with intent to kill while armed (AWIKWA) or first-degree murder while armed (FDMWA). D.C. Code 1981, §§ 22-503, 22-3202, 23-1322(e), 23-1325(a). *Pope v. United States*, 739 A.2d 819, 1999 D.C. App. LEXIS 242 (1999).

In absence of statutory presumption based on finding of substantial probability, government's burden to prove by clear and convincing evidence that defendant is properly subject to preventive detention cannot be satisfied simply by reference to known facts regarding crime of which defendant has been accused; court's calculus must include not only the nature and circumstances of offense charged, but also, inter alia, weight of evidence against defendant, defendant's history and criminal record, if any, defendant's community ties and resources, whether defendant was on parole, probation, or release pending trial at time of charged offense, and danger that defendant's release would pose to any person in community. D.C. Code 1981, §§ 22-503, 22-3202, 23-1322(e), 23-1325(a). *Pope v. United States*, 739 A.2d 819, 1999 D.C. App. LEXIS 242 (1999).

Defenses.

An assault may be committed upon a child irrespective of whether there is submission or resistance thereto. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

Double jeopardy.

Conviction on one count of second-degree child sexual abuse while armed and three counts of first-degree child sexual abuse while armed did not violate Double Jeopardy Clause; sexual assaults took two hours, and involved various specific types of sexual activity. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Repeated acts of forced sexual intercourse, if committed in a single course of conduct, will not be converted into separate rapes, under Double Jeopardy Clause. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Trial court's imposition of two separate and concurrent sentences for defendant's conviction of assault with intent to commit rape and conviction of assault with intent to commit sodomy did not violate double jeopardy clause, even though assaults were committed against one complainant within short period of time and in confined area, where first assault ended when attempt at forced sodomy failed and assault with intent to commit rape was result of fresh impulse. D.C. Code 1981, §§ 22-501, 22-503, 22-3502; U.S. Const. Amend. 5. *Robinson v. United States*, 501 A.2d 1273, 1985 D.C. App. LEXIS 538 (1985).

Indictment and information.

Government's proof at trial that defendant and others shot into crowd of people at close

range did not impermissibly vary from indictment charging defendant with assault with intent to murder while armed, despite defendant's claim that he was charged with assaulting each individual with intent to "murder him," rather than random shooting, absent any indication that government switched theories of intent between grand jury proceedings and trial. D.C. Code 1981, § 22-503. *United States v. Richardson*, 167 F.3d 621, 1999 U.S. App. LEXIS 3011 (C.A.D.C. 1999), writ of certiorari denied by 528 U.S. 895, 120 S. Ct. 225, 145 L. Ed. 2d 189, 1999 U.S. LEXIS 6155, 68 U.S.L.W. 3230 (1999).

Assault with intent to commit sodomy (AWIS) was not lesser included offense of sodomy, and therefore, statutory bar on applying indecent acts with children statute to offenses covered by sodomy statute did not prohibit defendant's conviction of taking indecent liberties with minor child and enticing minor child for purpose of taking indecent liberties, in addition to his conviction of AWIS. D.C. Code 1981, §§ 22-503, 22-3501(a, b, d), 28-3502. *Hicks v. United States*, 658 A.2d 200, 1995 D.C. App. LEXIS 95 (1995).

As to crime of assault with intent to commit sodomy and sodomy, "necessarily includes" in D.C. Code § 22-104, governing imposition of longer sentences for persons convicted in past of any felony, may be construed by reference to fact of previous crime, not merely to statutory elements of that crime; more specifically, if and only if prior sodomy conviction is based solely on record of force or violence, that is, if there is no evidence that sodomy was consensual, then that sodomy conviction may be deemed to include assault for purpose of applying D.C. Code § 22-104 and finding assault with intent crime "necessarily included" within it. D.C. Code 1981, §§ 22-104(a), 22-503, 22-3502. *Brake v. United States*, 494 A.2d 646, 1985 D.C. App. LEXIS 405 (1985).

Instructions.

Note from jury, during deliberations in prosecution for assault with intent to kill while armed (AWIK/WA) and related offenses, demonstrated specific confusion as to the law and required re-instruction from trial court; jury's note indicated its belief that defendant had subjectively perceived need to act as he did in self-defense and had never intended to harm victim, consistent with court's self-defense instruction, but further indicated that it did not believe it could accept defendant's claim of self-defense because force used by defendant was excessive. *Alcindore v. United States*, 818 A.2d 152, 2003 D.C. App. LEXIS 92 (2003).

"Other crimes" evidence in form of testimony by defendant's sister on cross-examination by defense counsel that defendant had set fires before in his father's house was so prejudicial

that only immediate corrective instruction would suffice in lieu of mistrial, in prosecution for felony malicious destruction of property, alleging that defendant again set that house on fire. *Coleman v. United States*, 779 A.2d 297, 2001 D.C. App. LEXIS 183 (2001).

Instruction that jury could convict defendant of possession of firearm during crime of violence (PFCV) only if it also convicted him of assault with dangerous weapon (ADW) was not required to cure allegedly confusing verdict form, since defense counsel's equivocal statement regarding PFCV charge in verdict form, that it was "unclear" and "should relate to both counts involved," did not amount to objection on grounds of jury confusion. D.C. Code 1981, §§ 22-503, 22-3204(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

Instruction that jury could convict defendant of possession of firearm during crime of violence (PFCV) only if it also convicted him of assault with dangerous weapon (ADW) was not required, where neither of two notes sent by jury to trial judge gave any indication that jury was on verge of reaching inconsistent verdicts. D.C. Code 1981, §§ 22-503, 22-3204(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

Trial court's erroneous failure to give requested instruction that consent is a defense to charge of assault with intent to commit sodomy was harmless since there was neither direct nor persuasive evidence in record to suggest that complainant consented to defendant's behavior, and in view of jury's rejection of findings of consent to kidnapping and rape, offenses which took place both before and after the intervening sexual assault. D.C. Code 1981, §§ 22-503, 22-2101, 22-2801, 22-2901, 22-3502, 23-1327(a). *Jenkins v. United States*, 506 A.2d 1120, 1986 D.C. App. LEXIS 304 (1986), writ of certiorari denied by 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99, 1986 U.S. LEXIS 3765, 55 U.S.L.W. 3234 (1986).

Evidence required giving of requested instruction that consent is a defense to charge of assault with intent to commit sodomy. D.C. Code 1981, §§ 22-503, 22-3502. *Jenkins v. United States*, 506 A.2d 1120, 1986 D.C. App. LEXIS 304 (1986), writ of certiorari denied by 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99, 1986 U.S. LEXIS 3765, 55 U.S.L.W. 3234 (1986).

Trial court ruled properly in refusing to give a corroboration instruction on charge of crime of assault with intent to commit sodomy where it was clear that complainant, a 26-year-old full-time student and part-time computer operator, was a mature female. D.C. Code 1973, § 22-503. *Sweet v. United States*, 449 A.2d 315, 1982 D.C. App. LEXIS 407 (1982).

In prosecution for assaulting a 15-year-old girl, defendant was entitled to an instruction that, if jury had any reasonable doubt about any material point or question in the case, they must resolve such doubt in favor of defendant, and an instruction that, if jury had any reasonable doubt finally after considering evidence both for and against defendant as to defendant's guilt, jury must bring verdict of not guilty, was error. *Davenport v. U.S.*, 60 A.2d 226, 1948 D.C. App. LEXIS 160 (Cr.App. 1948).

Joint or separate trial.

Prosecution of defendant for various assaults was properly joined with prosecution of codefendant for perjury, where perjury charge was based on codefendant's allegedly false testimony before grand jury, in which he failed to implicate defendant in assaults; while codefendant's perjury was not inevitable result of defendant's crimes, it surely was a "sequel" to those crimes. *Criminal Rule 8(b)*. *Taylor v. United States*, 603 A.2d 451, 1992 D.C. App. LEXIS 49 (1992), writ of certiorari denied by 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105, 1992 U.S. LEXIS 5134, 61 U.S.L.W. 3259 (1992).

Juvenile offenders.

Juvenile may be charged with assault to commit murder under statute which provides for imprisonment of defendant convicted of assaulting another with intent to commit any offense not enumerated in either of two other assault statutes, and offense of assault with intent to commit murder falls within provision authorizing automatic transfer of juvenile offenders for prosecution as adults. D.C. Code 1981, §§ 16-2301(3)(A), 22-501 to 22-503. *United States v. Hobbs*, 594 A.2d 66, 1991 D.C. App. LEXIS 193 (1991).

"Attempt to commit murder" as used in statute allowing 16 and 17-year-olds so charged to be tried as adults without judicial transfer from family court to criminal division does not include "assault with intent to kill." D.C. Code 1981, §§ 16-2301(3)(A), 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

"Child" as used in the statute to determine whether individual should be tried as an adult in criminal court without judicial transfer excludes juvenile when he or she is charged with assault with intent to commit murder, but not when he or she is charged with assault with intent to kill. D.C. Code 1981, §§ 16-2301(3), (3)(A), 16-2307, 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Merger of offenses.

Aggravated assault while armed (AAWA) does not merge with assault with intent to murder while armed (AWIMWA); AAWA re-

quires proof of serious bodily injury, which AWIMWA does not, while AWIMWA requires proof of a specific intent to kill and malice, which AAWA does not. *Ginyard v. United States*, 816 A.2d 21, 2003 D.C. App. LEXIS 32 (2003), writ of certiorari denied by 538 U.S. 1066, 123 S. Ct. 2237, 155 L. Ed. 2d 1123, 2003 U.S. LEXIS 4218, 71 U.S.L.W. 3735 (2003).

Offenses of taking indecent liberties with minor child and enticing minor child for purpose of taking indecent liberties did not merge into offense of assault with intent to commit sodomy (AWIS), so as to preclude defendant's conviction on all three charges, as offenses required proof of different elements and AWIS was not "greater offense"; indecent liberties and enticement charges required proof that victim was under age 16 and that defendant's specific intent was to gratify his sexual desires, while AWIS charge required proof that defendant assaulted victim and that his specific intent was to commit sodomy, and AWIS did not carry larger penalty than other offenses. D.C. Code 1981, §§ 22-503, 22-3501(a, b), 22-3502. *Hicks v. United States*, 658 A.2d 200, 1995 D.C. App. LEXIS 95 (1995).

In determining whether offenses of taking indecent liberties with minor child, enticing minor child for purpose of taking indecent liberties, and assault with intent to commit sodomy (AWIS) merged, court was required to look only to elements of each offense, rather than facts of case as alleged in indictment or adduced at trial. D.C. Code 1981, §§ 22-503, 22-3501(a, b), 22-3502, 23-112. *Hicks v. United States*, 658 A.2d 200, 1995 D.C. App. LEXIS 95 (1995).

Conviction for assault with a dangerous weapon did not merge into convictions for assault with intent to kidnap while armed. When the plan to kidnap the victim went sour, and the victim broke free and ran, the offense of assault on the victim with intent to kidnap while armed had ended and the subsequent shooting of the victim invaded a separate interest, and thus constituted a separate offense. *United States v. Rodriguez*, 115 WLR 2729 (Super. Ct. 1987).

Nature and elements of offenses.

The assault contemplated by statute providing that whoever unlawfully assaults or threatens another in a menacing manner shall be fined or imprisoned is common-law assault. D.C. Code 1929, T. 6, § 29. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

The action of taxicab driver in exposing a private part of his body to child passenger and requesting the child to hold it constituted an "assault," irrespective of threat or danger of physical suffering or injury or child's knowledge of the nature of the act or of the danger, as

the injury suffered might be the fear, shame, humiliation, and mental anguish caused thereby. D.C. Code 1929, T. 6, § 29. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

Crime of assault "with intent to commit any other offense" occurs when defendant is shown to have assaulted one victim with intent to effectuate commission of another crime against second victim. D.C. Code 1981, § 22-503. *Battle v. United States*, 515 A.2d 1120, 1986 D.C. App. LEXIS 443 (1986).

Essential elements of "sodomy," applicable to charge of assault with intent to commit sodomy, are that defendant took sex organ of another person or animal into defendant's mouth or anus, or placed defendant's sexual organ in mouth or anus of another person or animal, or had carnal copulation with another person in opening of body other than sexual parts, with intent to do act described. D.C. Code 1981, §§ 22-503, 22-3502. *Robinson v. United States*, 501 A.2d 1273, 1985 D.C. App. LEXIS 538 (1985).

Preliminary proceedings.

Brady claim, arising from government's failure during pretrial discovery in aggravated armed assault prosecution to disclose victim's grand jury testimony purportedly showing that victim did not initially identify defendant with certainty and that police-sponsored showup procedure was suggestive, was effectively subsumed within ineffective assistance claim, where that grand jury testimony was apparently turned over to defense counsel at time of victim's direct examination and thus was disclosed in time for counsel to have moved for a mistrial or for suppression of victim's identification testimony. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Remand was necessary in prosecution for armed aggravated assault with intent to rob, for consideration of whether defense counsel was ineffective in failing to move for mistrial or seek suppression of victim's identification testimony upon receiving victim's grand jury testimony purportedly showing that victim did not initially identify defendant with certainty and that police-sponsored showup procedure was suggestive, where trial court had not considered suppression issue because defense strategy at trial was to present victim as aggressor and defendant as victim, rather than to challenge reliability of identification. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Presumptions and burden of proof.

In the crime of assault there are at least two elements or material facts to be proved, namely, the act itself and the unlawful intent. *Daven-*

port v. U.S., 60 A.2d 226, 1948 D.C. App. LEXIS 160 (Cr.App. 1948).

Review.

Fact that "other crimes" evidence in form of testimony that defendant had set fires before in his father's house was elicited on cross-examination by defense counsel did not preclude defendant from arguing that such testimony should be basis for reversal of his conviction for felony malicious destruction of property, alleging that defendant again set that house on fire; initial question that elicited response was designed to delve into witness's possible bias, it required simple yes or no response and did not invite inflammatory remark given, and even though defense counsel repeated witness's statement when questioning resumed, counsel had right to attempt to rehabilitate defendant by showing witness's bias, in light of trial court's ruling that it would not give instruction or declare mistrial at that time. *Coleman v. United States*, 779 A.2d 297, 2001 D.C. App. LEXIS 183 (2001).

Failure to give immediate corrective instruction upon erroneous admission of "other crimes" evidence in form of testimony that defendant had set fires before in his father's house could not be deemed harmless in prosecution for felony malicious destruction of property, alleging that defendant again set that house on fire; case against defendant was circumstantial, and defense expert testified at length about inadequacies of government investigation and proof to establish that fire was intentionally set or to have originated as government claimed. *Coleman v. United States*, 779 A.2d 297, 2001 D.C. App. LEXIS 183 (2001).

Dismissal of charge of assault with intent to kill while armed (AWIKWA) against defendant without prejudice approximately seven weeks after Court of Appeals issued order summarily reversing defendant's preventive detention and stating that opinion would follow did not render appeal moot, where, at time of Court's ruling, defendant was in detention, present opinion set forth legal basis for that ruling, and issue was capable of repetition but evaded review. D.C. Code 1981, §§ 22-503, 22-3202, 23-1325(a). *Pope v. United States*, 739 A.2d 819, 1999 D.C. App. LEXIS 242 (1999).

Question of whether, in an assault with intent to kill while armed (AWIKWA) case, a preventive detention order could rest solely on a probable cause finding plus circumstances of the charged crime was principally one of law, and Court of Appeals would review de novo the trial judge's disposition of it. D.C. Code 1981, §§ 22-503, 22-3202, 23-1325(a). *Pope v. United States*, 739 A.2d 819, 1999 D.C. App. LEXIS 242 (1999).

Trial judge did not abuse his discretion in holding that ten-year-old boy was competent to testify as witness in prosecution for assault of an indecent nature on the boy, notwithstanding that boy stated when preliminarily questioned that he did not know difference between right and wrong and did not know meaning of an oath. *Posey v. U.S.*, 41 A.2d 300, 1945 D.C. App. LEXIS 79 (Cr.App. 1945).

Verdict.

Where defendant was convicted of armed assault on police officer (AAPO) but acquitted of assault with dangerous weapon (ADW), his conviction of possession of firearm during crime of violence (PFCV) was not improper on grounds that jury might have convicted defendant of PFCV based on belief that AAPO was proper predicate offense to PFCV, rather than ADW as alleged in indictment; the indictment was read to jury at beginning of trial, prosecutor explained in closing argument that ADW was predicate offense, and trial court instructed jury that possession of weapon must have occurred at time when defendant was engaged in commission of crime of violence. D.C. Code 1981, §§ 22-503, 22-505(b), 22-3204(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

No conclusions as to jury's confusion in convicting defendant of possession of firearm during crime of violence (PFCV) but acquitting him of assault with dangerous weapon (ADW) could be drawn from markings on verdict form, since it was unknown who made notations or if notations had support of each juror, and determining why juror or jurors made notations would require sheer speculation. D.C. Code 1981, §§ 22-503, 22-505(b), 22-3204(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

Weight and sufficiency of evidence.

Finding of intent to rob was supported, in prosecution for assault with intent to rob while armed, by evidence that defendant told victim, "Do you think I'm fucking joking? Empty your pockets," and was not negated by fact that when victim held out the money, defendant did not immediately take it but kept on speaking. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Victim's identification testimony was corroborated, in prosecution for assault with intent to rob while armed, by medical evidence that pellets from shotgun had entered defendant's hand from the back instead of the palm in a manner consistent with victim's version of events, and by defendant's evasive police interview when questioned at hospital where he was

being treated. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Evidence that defendant was in possession of pistol and that he pointed pistol at police officer was sufficient to support jury verdict that defendant was guilty of possession of firearm during crime of violence (PFCV), even though he was acquitted of assault with dangerous weapon (ADW), the predicate offense for PFCV. D.C. Code 1981, §§ 22-503, 22-3204(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

Evidence that defendant grabbed victim and forced her into his car and then drove her three miles from point of abduction to empty lot, where he assaulted her with intent to commit sodomy and assaulted her with intent to commit rape, was sufficient to support separate kidnapping conviction. D.C. Code 1981, §§ 22-501, 22-503, 22-2101, 22-3502. *Robinson v. United States*, 501 A.2d 1273, 1985 D.C. App. LEXIS 538 (1985).

Rule in *Arnold* that, at least where complainant is a mature female, it should not be presumed that her testimony is inherently suspect and thus in need of corroboration is not only applicable in a prosecution for rape, but is also applicable in a prosecution for assault with intent to commit sodomy. D.C. Code 1973, § 22-503. *Sweet v. United States*, 449 A.2d 315, 1982 D.C. App. LEXIS 407 (1982).

Where defendant encountered complainant and persuaded him to leave public street in order to take a shortcut that led into a field, and thereafter drew a knife and compelled victim to accompany him to a secluded area about 100 feet from road, and then committed sodomy, defendant's conduct could not support separate convictions for both kidnapping and assault with intent to commit sodomy, and kidnapping conviction would be reversed, even though, after being sexually assaulted, victim ran from the place of attack and defendant pursued and recaptured him and brought him back to wooded area where he suffered multiple stab wounds before being able to make successful escape. D.C. Code §§ 22-503, 22-2101, 22-3202. *Morgan v. United States*, 402 A.2d 598, 1979 D.C. App. LEXIS 367 (1979).

Assuming that complainant's testimony that defendant sodomized him required some corroboration, charge of assault with intent to commit sodomy was adequately corroborated by testimony of witnesses concerning observation of complainant's flight from the scene and concerning certain statements made by defendant. D.C. Code § 22-503. *Morgan v. United States*, 402 A.2d 598, 1979 D.C. App. LEXIS 367 (1979).

§ 22-404. Assault or threatened assault in a menacing manner; stalking.

(a)(1) Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than \$1,000 or be imprisoned not more than 180 days, or both.

(2) Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than \$3,000 or be imprisoned not more than 3 years, or both. For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention.

(b) Repealed.

(c) Repealed.

(d) Repealed.

(e) Repealed.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 806; May 8, 1993, D.C. Law 9-269, § 2, 39 DCR 9014; Nov. 17, 1993, D.C. Law 10-53, § 2, 40 DCR 5446; Aug. 20, 1994, D.C. Law 10-151, § 105(d), 41 DCR 2608; May 16, 1995, D.C. Law 10-255, § 16, 41 DCR 5193; June 3, 1997, D.C. Law 11-275, § 3, 44 DCR 1408; Apr. 24, 2007, D.C. Law 16-306, § 207, 53 DCR 8610; Dec. 10, 2009, D.C. Law 18-88, § 302, 56 DCR 7413.)

Cross references. — Firearms control, registration certificates, prerequisites for issuance, see § 7-2502.03.

Section references. — This section is referred to in §§ 7-2502.03 and 23

Prior Codifications. — 1981 Ed., § 22-504. 1973 Ed., § 22-504.

Effect of amendments. — D.C. Law 16-306 rewrote subsec. (a), which had read as follows: "(a) Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than \$1,000 or be imprisoned not more than 180 days, or both."

D.C. Law 18-88 repealed subsecs. (b) to (e).

Emergency legislation. — For temporary amendment of section, see § 105(d) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 207 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 207 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 207 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 207 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 302 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 302 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 9-269. — Law 9-269, the "Anti-Stalking Temporary Amendment of 1992," was introduced in Council and assigned Bill No. 9-659. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 23, 1992, it was assigned Act No. 9-317 and transmitted to both Houses of Congress for its review. D.C. Law 9-269 became effective on May 8, 1993.

Legislative history of Law 10-53. — Law 10-53, the "Anti-Stalking Amendment Act of 1993," was introduced in Council and assigned Bill No. 10-42, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 1, 1993, and June 29, 1993, respectively. Signed by the

Mayor on July 16, 1993, it was assigned Act No. 10-46 and transmitted to both Houses of Congress for its review. D.C. Law 10-53 became effective on November 17, 1993.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 10-255. — Law 10-255, the “Technical Amendments Act of 1994,” was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective May 16, 1995.

Legislative history of Law 11-275. — Law 11-275, the “Second Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-909, which

was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-520 and transmitted to both Houses of Congress for its review. D.C. Law 11-275 became effective on June 3, 1997.

Legislative history of Law 16-306. — Law 16-306, the “Omnibus Public Safety Amendment Act of 2006,” was introduced in Council and assigned Bill No. 16-247, which was referred to Committee on the Judiciary. The Bill was adopted on first and second readings on June 6, 2006, and October 3, 2006, respectively. Signed by the Mayor on October 17, 2006, it was assigned Act No. 16-482 and transmitted to both Houses of Congress for its review. D.C. Law 16-306 became effective on April 24, 2007.

Legislative history of Law 18-88. — Law 18-88, the “Omnibus Public Safety and Justice Amendment Act of 2009,” as introduced in Council and assigned Bill No. 18-151, which was referred to the Committee on Public Safety and the Judiciary. The bill as adopted on first and second readings on June 30, 2009, and July 31, 2009, respectively. Signed by the Mayor on August 26, 2009, it was assigned Act No. 18-189 and transmitted to both Houses of Congress for its review. D.C. Law 18-88 became effective on December 10, 2009.

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Adequacy of representation.

Record on appeal from conviction for petit larceny and assault did not establish denial of effective assistance of counsel. D.C. Code §§ 22-504, 22-2202. *Bell v. United States*, 260 A.2d 690, 1970 D.C. App. LEXIS 200 (App. 1970).

Record did not show that defendant's trial counsel who declined to cross-examine either complainant or arresting officer ineffectively assisted defendant who himself testified and denied assault. D.C. Code §§ 22-504, 22-3205. *Scott v. United States*, 259 A.2d 353, 1969 D.C. App. LEXIS 351 (App. 1969).

Evidence did not sustain claim of ineffective assistance of counsel who presented all substantial defenses, made appropriate motions and objections, attempted to suppress evidence on charge of unlawful possession of pistol after conviction of felony, and was able to obtain acquittal on charge of threats to do bodily harm and directed verdict in defendant's favor on charge of assault by threatening in menacing manner. D.C. Code §§ 22-504, 22-507, 22-3203. *Gressette v. United States*, 256 A.2d 418, 1969 D.C. App. LEXIS 286 (App. 1969).

Fact that new counsel was appointed not more than 60 minutes before trial did not amount to ineffective assistance of counsel of defendant charged with simple assault, unlawful entry and petit larceny where no continuance was requested and defendant announced he was ready for trial, factual situation was not so complex as to necessitate any extensive investigation and there were no witnesses that defense could have called, new counsel was experienced and diligent and made no claim that he was hampered by appointment shortly before trial. D.C. Code 1967, §§ 22-504, 22-2202, 22-3102. *Tuttle v. United States*, 238 A.2d 590, 1968 D.C. App. LEXIS 131 (App. 1968).

Admissibility of evidence.

Assault victim's statements to officer qualified as excited utterances and, thus, were admissible pursuant to excited utterance exception to hearsay rule; officer arrived on the scene two to three minutes after the 911 call was made and officer spoke with victim immediately upon arrival, and officer's testimony about victim's mental and physical state upon her arrival made clear that victim was still in a state of nervous excitement due to the assault. *Phyllis Goodwine v. United States*, 990 A.2d 965, 2010 D.C. App. LEXIS 138 (2010).

Trial court error in admitting the victim's statements to police officer after she left her vehicle and sat on curb, in violation of the Confrontation Clause, was harmless, during

prosecution for assault; the victim's admissible statement to police officer, which were made while victim sat in her vehicle, identified defendant as her assailant and described the nature of the assault, the state offered seven pictures depicting the victim's injuries, and defendant admitted that he "smacked the stem out of [the victim's] mouth." *Lewis v. United States*, 938 A.2d 771, 2007 D.C. App. LEXIS 702 (2007).

Assault victim's statements to police officer, which were made after victim left her vehicle and sat down on the curb, were testimonial in nature, and thus their admission, during prosecution for assault, violated the Confrontation Clause; a second officer had arrived on the scene and had detained defendant, dissipating the emergency, and officer was questioning victim about past criminal conduct. *Lewis v. United States*, 938 A.2d 771, 2007 D.C. App. LEXIS 702 (2007).

Assault victim's initial statements to police officer, which were made while victim was sitting in her vehicle, were non-testimonial in nature, and thus their admission during prosecution for assault did not violate the Confrontation Clause; the primary purpose of officer's questioning was to enable him to effectively respond to an on-going emergency. *Lewis v. United States*, 938 A.2d 771, 2007 D.C. App. LEXIS 702 (2007).

Assault victim's statements to police officer were admissible under the excited utterance rule; officer arrived at the scene within minutes of receiving radio transmission of assault, when he arrived victim was "excited," "crying," "agitated," and "very, very upset," and the fact that victim made statements in response to police questioning did not establish reflection by victim. *Lewis v. United States*, 938 A.2d 771, 2007 D.C. App. LEXIS 702 (2007).

Trial court's failure to consider defendant's argument that evidence of alleged victim's past behavior was probative of his bias, did not result in manifest injustice in proceeding in which defendant sought to seal records relating to his arrest; alleged victim's termination from his previous job had taken place three years before assault for which defendant was arrested, and argument made on appeal, that alleged victim would have been motivated by that experience to lie in court in order to protect his present employment, was not so plain or obvious that judge should have raised it sua sponte. *Rose v. United States*, 879 A.2d 986, 2005 D.C. App. LEXIS 408 (2005).

Trial court did not abuse its discretion in concluding that witness's testimony as to defendant's reputation for truthfulness, when offered, was irrelevant in proceeding in which defendant sought to seal records relating to his arrest after government entered nolle prosequi to charges of simple assault and taking property without right; witness was called in defen-

dant's case-in-chief, before his credibility was even called into question by alleged victim's account, and defendant did not seek to call witness as a rebuttal witness. *Rose v. United States*, 879 A.2d 986, 2005 D.C. App. LEXIS 408 (2005).

General rule in civil cases for assault and battery, is that character of neither party is an issue and cannot be the subject of attack, unless it is first attacked or supported by the adversary. *Rose v. United States*, 879 A.2d 986, 2005 D.C. App. LEXIS 408 (2005).

Statement to police by assault victim constituted excited utterance, and thus, trial court did not abuse its discretion in admitting statement into evidence; statement was made in response to a startling event which caused the victim to be in a state of nervous excitement or physical shock, statement was within a reasonably short period of time after the event, and the statement was spontaneous and sincere. *Jones v. United States*, 829 A.2d 464, 2003 D.C. App. LEXIS 472 (2003).

Unsworn written statement by assault victim, in the absence of a detailed proffer, was not shown to be either prior to or inconsistent with her excited utterance within the meaning of the hearsay exception for prior inconsistent statements, and thus, was inadmissible at trial, where defendant failed to lay foundation for written statement's admission. *Jones v. United States*, 829 A.2d 464, 2003 D.C. App. LEXIS 472 (2003).

Trial court in assault case properly refused to admit police officer's report that arguably contained a prior inconsistent statement by the complaining witness regarding her injuries; defendant did not confront the witness with the prior statement and give her an opportunity to explain it, and while report might have been admissible under the business record exception to the hearsay rule, defendant failed to invoke that exception or, more importantly, to call any police witness to establish a proper foundation for admitting the report. *Johnson v. United States*, 800 A.2d 696, 2002 D.C. App. LEXIS 306 (2002).

Assault defendant's concern, that the Domestic Violence Unit of the Superior Court was structured so that a judge could be privy to information regarding intrafamily matters that would be inadmissible in a criminal trial, was purely hypothetical and failed to raise an arguable due process violation in his case. *Robinson v. United States*, 769 A.2d 747, 2001 D.C. App. LEXIS 64 (2001).

Evidence of victim's filing previous criminal complaint against defendant, which was dismissed for want of prosecution, was inadmissible in stalking prosecution as irrelevant, absent a showing that the prior complaint was false. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Probative value of psychologist's expert testimony on battered woman syndrome (BWS) was not substantially outweighed by its prejudicial effect, and thus, testimony was admissible in domestic violence prosecution. D.C. Code 1981, §§ 22-504, 22-3204(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Experienced psychologist who wrote and lectured widely on subject of domestic violence and who previously had been qualified as expert witness approximately 75 times was qualified to give expert testimony on battered woman syndrome (BWS) in domestic violence prosecution, despite claim that psychologist had severe feminist bias. D.C. Code 1981, §§ 22-504, 22-3204(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Psychologist's expert testimony on battered woman syndrome (BWS) was relevant, and prosecution laid sufficient foundation for its admission in domestic violence prosecution, even though psychologist did not examine or specifically diagnose victim. D.C. Code 1981, §§ 22-504, 22-3204(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Trial judge made sufficient inquiry, in domestic violence prosecution, to determine whether psychologist's proposed testimony on battered woman syndrome (BWS) satisfied Dyas requirements for admissibility of expert testimony, where judge held proceeding in limine with respect to proposed testimony and judge took judicial notice of, and adopted, transcript of Dyas hearing from case involving BWS testimony from psychologist. D.C. Code 1981, §§ 22-504, 22-3204(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Psychologist's expert testimony on battered woman syndrome (BWS) was beyond ken of lay trier of fact and would be helpful to jurors in their consideration of evidence in domestic violence prosecution, and thus, testimony was admissible. D.C. Code 1981, §§ 22-504, 22-3204(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Defendant put his state of mind and motive at issue in simple assault prosecution when he attempted to justify his use of force against his

wife as self-defense; therefore, evidence that defendant had previously assaulted wife was admissible under motive exception to usual rule that evidence of one crime is inadmissible to prove disposition to commit another crime, to show that defendant's malice toward wife, rather than fear of harm, prompted his acts. D.C. Code 1981, § 22-504. *Garibay v. United States*, 634 A.2d 946, 1993 D.C. App. LEXIS 303 (1993).

Testimony about facts underlying arrest warrant, when prosecutor allegedly knew and conceded that defendant was not suspected offender, was nevertheless admissible to explain circumstances surrounding defendant's arrest for simple assault following incident with metro transit police officers. D.C. Code 1981, § 22-504. *McDonald v. United States*, 496 A.2d 274, 1985 D.C. App. LEXIS 453 (1985).

Police officer's compelled immunized testimony, which was given during administrative police investigation of officer's alleged assault of arrestee, would be admissible in prosecution for perjury or false swearing. D.C. Code 1973, § 22-504; U.S. Const.Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Facts that police officer might have been suspected of lying, just as fact that he was suspected of having assaulted arrestee, did not of themselves establish any impermissible direct or indirect use of officer's compelled immunized testimony given during administrative police investigation. D.C. Code 1973, § 22-504; U.S. Const.Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

In prosecution of police officer for assaulting arrestee and obstruction of justice, prosecutorial motives were not probative of whether evidence sought to be introduced was obtained from legitimate independent source or whether officer's compelled immunized testimony given during administrative police investigation was improperly used as investigative lead or focused investigation on officer; officer's Fifth Amendment protections did not depend upon integrity and good faith of prosecuting authorities. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const.Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Fact that police officer gave no new information to police investigators meant that no leads could have been developed from officer's compelled immunized testimony given during administrative police investigation of officer's alleged assault of arrestee, and thus prohibition against using compelled testimony as investigative lead was not violated. D.C. Code 1973, § 22-504; U.S. Const.Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Fact that police officer had always been subject and focus of administrative police investigation of officer's assault of arrestee meant that officer's compelled immunized testimony given during investigation had not impermissibly caused investigation to focus on officer. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const.Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Trial court, in prosecution for assault with a deadly weapon and other crimes, did not abuse discretion in admitting, over objection, evidence of defendant's alleged flight from jurisdiction prior to trial, notwithstanding objection that any probative value was outweighed by possible prejudicial impact which testimony would have on jury. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In prosecution for assault and threats to do bodily harm, admission of defendant's prior conviction of manslaughter was not error, where at time prior conviction was introduced and during final instructions trial court informed jury that it should consider the conviction only in evaluating defendant's credibility. D.C. Code §§ 14-305(b)(1), 22-504, 22-507. *Davis v. United States*, 313 A.2d 884, 1974 D.C. App. LEXIS 342 (1974).

Exclusion of testimony as to victim's prior specific acts of violence, communicated to but not personally observed, by defendant who was accused of assault and claimed self-defense, was error. D.C. Code 1961, § 22-504. *King v. U.S.*, 177 A.2d 912, 1962 D.C. App. LEXIS 254 (Cr.App. 1962).

In simple assault prosecution, arresting officer's testimony, in response to question whether defendant had denied the assault, that denial took place in presence of defendant's parole officer constituted reversible error, and, when officer volunteered such information, court should have cautioned him and instructed jury to disregard the information or should have granted defendant's motion for mistrial. D.C. Code 1951, § 22-504. *Yeldell v. U.S.*, 153 A.2d 637, 1959 D.C. App. LEXIS 276 (Cr.App. 1959).

In assault prosecution of defendant who allegedly approached prosecution witness and placed his hand on witness' privates and squeezed them, the sexual nature of the alleged assault rendered admissible testimony by prosecution witness, who was an officer assigned to morals division of police department, that defendant had, after his arrest, admitted to officer the prior commission of acts of sodomy. D.C. Code 1951, § 22-504. *Dyson v. U.S.*, 97 A.2d 135, 1953 D.C. App. LEXIS 141 (Cr.App. 1953).

Arguments and conduct of counsel.

Prosecutor's comments during opening statement of stalking trial, asking the jurors to put

themselves in the victim's shoes and playing upon their own fears of being victimized, were improper. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Police officer did not act in bad faith in permitting destruction of paper towel used by victim to wipe her face of substance smeared by assailant; police officer told victim that she could discard paper towel when she asked him what to do with it. *Criminal Rule 16*; D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Destruction of paper towel used by simple assault victim to wipe her face of substance smeared on her face by defendant did not compel disallowance of defendant's assertion to witness about nature of substance; proof of crime did not depend upon whether substance was what defendant asserted it to be. *Criminal Rule 16*; D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Once defense counsel, in his closing remarks in prosecution for simple assault, attacked the complainant's motives for testifying, the door was opened for the prosecutor to defend the complainant's motives and to set the record straight. D.C. Code § 22-504. *Medina v. United States*, 315 A.2d 169, 1974 D.C. App. LEXIS 366 (1974).

Prosecutor's allusion, in simple assault case, to complainant's belief that he was coming to court for defendant's sentencing, rather than his retrial, was not necessary to an effective rebuttal of defense counsel's insinuations and was therefore improper, but, viewing the trial as a whole, including the weight of the Government's case against defendant, it could not be said that the judgment of the jury against defendant was substantially swayed by the error. D.C. Code § 22-504. *Medina v. United States*, 315 A.2d 169, 1974 D.C. App. LEXIS 366 (1974).

Refusal to declare a mistrial after prosecuting attorney stated in his summation that assaulting a correctional officer was basically no different from regular assault did not constitute error. D.C. Code §§ 22-504, 22-505. *Johnson v. United States*, 298 A.2d 516, 1972 D.C. App. LEXIS 312 (1972).

Prosecution's statement to jury that guilty verdict as to larceny would require guilty verdict as to assault was erroneous but was not plain error which affected substantial rights and, therefore, would not require reversal. D.C. Code 1961, §§ 22-504, 22-2202. *Harris v. United States*, 201 A.2d 532, 1964 D.C. App. LEXIS 245 (App. 1964).

Arrest.

Deputy United States marshal was legally justified in stopping and detaining plaintiff on

steps of courthouse for questioning in regard to a possible breach of courtroom security and in requesting a driver's license in an effort to obtain trustworthy identification from plaintiff, and once plaintiff forcefully grabbed deputy, probable cause to arrest plaintiff for assaulting and interfering with a federal officer in performance of his official duties existed, notwithstanding whether deputy was placed in fear or whether bodily injury was inflicted, and operated as a defense under common law of District of Columbia to deputy and United States, sued under theory of respondeat superior, for torts of assault, battery, false arrest and personal injury. 18 U.S.C. §§ 111, 1114, 3053; 18 U.S.C. §§ 1346(b), 2672, 2674, 2680(h); D.C. Code §§ 22-504, 23-501(2), 23-581(a)(1)(B). *Lucas v. United States*, 443 F. Supp. 539, 1977 U.S. Dist. LEXIS 13669 (1977), affirmed without opinion by 590 F.2d 356, 191 U.S. App. D.C. 225 (1979).

Defendant failed to establish equal protection claim that his arrest and prosecution for simple assault were due to his gender, as he did not show that those actions were motivated, at least in part, by his gender, and he did not make a prima facie showing that others similarly situated, i.e., women who committed crimes of domestic violence, were generally not arrested and prosecuted. *Robinson v. United States*, 769 A.2d 747, 2001 D.C. App. LEXIS 64 (2001).

Officer had probable cause to arrest defendant after observing him and another person engaged in what appeared to be sale of drugs. D.C. Code 1981, §§ 22-504, 33-541(a). *Allison v. United States*, 623 A.2d 590, 1993 D.C. App. LEXIS 95 (1993).

Claim that defendant's finger-pointing gesture from car and mouthing of word "pow" to undercover police officers in unmarked vehicle justified Terry stop as coming very close to being crime in itself did not establish officer's reasonable articulable suspicion for investigatory stop, where officer testified that he stopped car because he thought defendant may have gun, not because he thought gesture was itself a crime, and there was no evidence that defendants knew that individuals in vehicle were police officers. D.C. Code 1981, §§ 22-504, 22-507, 22-1121. *United States v. Bellamy*, 619 A.2d 515, 1993 D.C. App. LEXIS 18 (1993).

Information known to arresting officer, including description obtained, after initial erroneous description, from officer who was with victim, and arresting officer's observations that defendant appeared to match description was sufficient to support defendant's brief detention to allow victim to view defendant; therefore, victim's identification of defendant and arresting officer's seizure of helmet and statement by defendant during detention did not result from unlawful detention and arrest. D.C. Code 1981,

§ 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Police officers who had probable cause to arrest accused at about 10:15 p. m., following fellow apartment dweller's accusation that accused had pointed a gun at him and threatened to kill him, were not required to obtain an arrest warrant for the accused in light of the exigent nature of the circumstances. D.C. Code §§ 22-504, 22-3214(b); U.S. Const. Amend. 4. *United States v. Simpson*, 330 A.2d 756, 1975 D.C. App. LEXIS 305 (1975).

Police officer who had interviewed alleged assault victim and concluded that his complaint, to the effect that accused had pointed a gun at him and threatened to kill him, was genuine, had probable cause to believe that an armed assault had taken place and that accused had committed it, and had probable cause to arrest accused. D.C. Code §§ 22-504, 22-3214(b). *United States v. Simpson*, 330 A.2d 756, 1975 D.C. App. LEXIS 305 (1975).

Where police officers had received complaint that accused, who lived in the same apartment building as the complainant, had pointed a gun at him and threatened to kill him and where, upon knocking on accused's apartment door, accused answered the door, the entry of the police was permissible under the circumstances, even though not consented to. D.C. Code §§ 22-504, 22-3214(b); U.S. Const. Amend. 4. *United States v. Simpson*, 330 A.2d 756, 1975 D.C. App. LEXIS 305 (1975).

Where police officer had a conversation with victim of assault and petit larceny and proceeded in patrol car in search of the assailants, and stolen articles were in plain view of officer in defendant's hand and at his feet in the gutter, an arrest was authorized when officer saw the stolen articles. D.C. Code §§ 22-504, 22-2202, 23-306(c). *Thompkins v. United States*, 251 A.2d 636, 1969 D.C. App. LEXIS 231 (App. 1969).

Where defendant, charged with disorderly conduct and simple assault, subsequent to order of police officer to clear street corner walked away reluctantly and when about five feet from officer spoke obscene words in fairly loud voice, defendant's arrest was legal. D.C. Code 1961, §§ 22-504, 22-1107. *Duncan v. United States*, 219 A.2d 110, 1966 D.C. App. LEXIS 166 (App. 1966), remanded by 379 F.2d 148, 126 U.S. App. D.C. 371, 1967 U.S. App. LEXIS 6334 (1967).

Assaults resulting in death.

Category of misdemeanors which are dangerous in and of themselves and thus will support conviction for misdemeanor-manslaughter encompasses misdemeanors which bear an inherent danger of physical injury, including assault. D.C. Code 1981, § 22-504. *Comber v. United*

States, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Common law.

The assault contemplated by statute providing that whoever unlawfully assaults or threatens another in a menacing manner shall be fined or imprisoned is common law assault. D.C. Code 1951, § 22-504. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

The essence of the common law offense of assault is the intentional infliction of bodily injury or the creation of fear thereof. *Williams v. United States*, 887 A.2d 1000, 2005 D.C. App. LEXIS 644 (2005).

Assault is defined in accord with its common law elements as the unlawful use of force causing injury to another or the attempt to cause injury with the present ability to do so. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Construction with other laws.

Sexual-abuse statute's definition of "bodily injury," which is an "injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain," may be used to determine the evidence necessary to prove "injury" under the felony-assault statute's definition of "significant bodily injury," which is an "injury that requires hospitalization or immediate medical attention." In *Matter of R.P.*, 136 WLR 549 (Super. Ct. 2008).

Defenses.

Where plainclothes police officer was member of morals squad, conduct of officer just before alleged sexual assault was of crucial significance bearing on criminal responsibility of assailant. D.C. Code 1951, § 22-504. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Evidence failed to prove that force used by defendant in slapping his teenage daughter on the back of her neck and grabbing her by the shirt was unreasonable for purpose of exercising parental discipline, and thus was insufficient to disprove defendant's parental discipline defense in prosecution for assault; defendant testified that when he slapped daughter on the back of the head, he did so to discipline her and to urge her to the car, defendant also testified that when he grabbed daughter by the shirt, he did so in response to correct her statement that defendant did not love her and to tell her that he did love her, and daughter testified that she did not suffer any physical injuries from either incident. *Longus v. United*

States, 935 A.2d 1108, 2007 D.C. App. LEXIS 663 (2007).

Trial court properly rejected defendant's proffered self-defense argument in proceeding in which defendant sought to seal records relating to his arrest after government entered nolle prosequi to charges of simple assault and taking property without right; judge not only disbelieved defendant's contention that he never punched alleged victim, but also did not believe that he hit alleged victim in response to latter's aggression. *Rose v. United States*, 879 A.2d 986, 2005 D.C. App. LEXIS 408 (2005).

Defendant, who sought to seal records relating to his arrest after government entered nolle prosequi to charges of simple assault and taking property without right, was not precluded from making self-defense argument; although government contended that defendant was precluded from making self-defense argument since he denied ever hitting alleged victim, defendant was still allowed to submit, as alternative argument, that if finder of fact disbelieved his factual testimony and found that he did hit alleged victim, he was nonetheless not guilty on theory that he did so in self-defense. *Rose v. United States*, 879 A.2d 986, 2005 D.C. App. LEXIS 408 (2005).

In criminal cases, where the burden rests with the government and not the accused, if the sole evidence is the conflicting testimony of the accused and the accuser, the judge is permitted to reject a proffered self-defense argument. *Rose v. United States*, 879 A.2d 986, 2005 D.C. App. LEXIS 408 (2005).

Record supported trial court's rejection of defendant's claim of self-defense in trial for simple assault; based on testimonies of victim and her brother, defendant assaulted victim with flip-flop sandal after altercation had ended. *Stroman v. United States*, 878 A.2d 1241, 2005 D.C. App. LEXIS 376 (2005).

Privilege of parental discipline as defense to assault or cruelty to children has two components: (1) the force used by the defendant must have been used for the purpose of exercising parental discipline, and (2) the force must have been reasonable. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Government is not required, in simple assault prosecution involving alleged assault by parent on parent's own child, to prove malice in order to overcome parental discipline defense. *Newby v. United States*, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

Rule that one cannot invoke right of self-defense to justify assaultive behavior toward police officer is subject to two relatively narrow exceptions: (1) where defendant is charged with felony offense of assault on an officer, limited right of self-defense arises when defendant presents evidence that officer used excessive force in carrying out his duties, and (2) where

defendant charged only with misdemeanor offense of simple assault invokes right of self-defense against police officer. D.C. Code 1981, § 22-504. *Robinson v. United States*, 649 A.2d 584, 1994 D.C. App. LEXIS 204 (1994).

Once defendant raises defense of self-defense to offense of simple assault, government bears burden of proving beyond a reasonable doubt that, at the time of assault, complainant was a police officer engaged in official duties and that defendant did not act with justifiable and excusable cause. D.C. Code 1981, § 22-504. *Robinson v. United States*, 649 A.2d 584, 1994 D.C. App. LEXIS 204 (1994).

If defendant invokes right of self-defense to charge of simple assault of a police officer and government fails to prove that complainant was an officer engaged in official duties and that defendant did not act with justifiable and excusable cause, defendant is entitled to defend against use of any force under general right of self-defense. D.C. Code 1981, § 22-504. *Robinson v. United States*, 649 A.2d 584, 1994 D.C. App. LEXIS 204 (1994).

Generally, one cannot invoke right of self-defense to justify assaultive behavior toward police officer. D.C. Code 1981, §§ 22-504, 22-505. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

One can claim self-defense against police officer who was using excessive force in carrying out official duties, under exception to general rule precluding invocation of right of self-defense to justify assaultive behavior toward police officer, whether charge is simple assault or assault on police officer; if officer used excessive force and defendant responded with force that was "reasonably necessary under the circumstances" for self-protection, defendant will have acted with "justifiable and excusable cause" and government will have failed to prove its case. D.C. Code 1981, §§ 22-504, 22-505. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Exception to general rule precluding invocation of right of self-defense to justify assaultive behavior toward police officer, when defendant did not know or have reason to know that complainant was police officer, was available only when defendant was charged with simple assault; it was not available to defendant charged with assault on police officer. D.C. Code 1981, §§ 22-504, 22-505. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Since defendant's slap of his 13-year-old cousin was not an exercise of reasonable discipline, self-defense could not be at issue because defendant was the first aggressor. D.C. Code 1981, § 22-504. *Martin v. United States*, 452 A.2d 360, 1982 D.C. App. LEXIS 473 (1982).

When one is the aggressor in an altercation, he cannot rely upon the right of self-defense to

justify his first use of force. D.C. Code 1981, § 22-504. *Martin v. United States*, 452 A.2d 360, 1982 D.C. App. LEXIS 473 (1982).

Fact that police officer's compelled immunized testimony given during administrative police investigation of officer's alleged assault of arrestee was devoid of any helpful or incriminating evidence meant that it was not possible to assume that compelled testimony might have been improperly indirectly used in focusing investigation, deciding to prosecute or in planning trial strategy, such as cross-examination. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Even though defendant, who was charged with making threats in a menacing manner and with unlawfully possessing an automatic pistol, had been discharged from hospital as having recovered from a mental disorder less than two months before date of alleged crimes, usual presumption of defendant's sanity, under District of Columbia law, existed at the time of trial. D.C. Code 1951, §§ 22-504, 22-3203. *Williams v. U.S.*, 104 A.2d 828, 1954 D.C. App. LEXIS 135 (Cr.App. 1954).

A case of assault by a man touching another man's genital organ with invitation to homosexual act can be made out only by proof that complaining witness did not consent. D.C. Code 1951, § 22-504. *McDermett v. U.S.*, 98 A.2d 287, 1953 D.C. App. LEXIS 156 (Cr.App. 1953).

A police officer, by his own insidious conduct in patiently and cleverly encouraging and setting stage for furtive homosexual gesture by another man, charged with assault, placed himself in position of consenting to touching of his genital organ by such man, with invitation to homosexual act, and should not be heard to say, as prosecuting witness, that he was assaulted by accused. D.C. Code 1951, § 22-504. *McDermett v. U.S.*, 98 A.2d 287, 1953 D.C. App. LEXIS 156 (Cr.App. 1953).

A man who takes improper liberties with the person of another man without the latter's consent is guilty of assault, unless man so fondled is himself a deviate and responds favorably to the approach, in which case response would constitute consent and would nullify the offense. D.C. Code 1951, § 22-504. *Dyson v. U.S.*, 97 A.2d 135, 1953 D.C. App. LEXIS 141 (Cr.App. 1953).

Where 13 year old boy committed an indecent act upon a girl 4 years and 8 months old, act clearly constituted an assault, since child's acquiescence or submission was immaterial. D.C. Code 1940, § 22-504. *In re Lewis*, 88 A.2d 582, 1952 D.C. App. LEXIS 166 (Cr.App. 1952).

Though due process does not absolutely require appointment of counsel in all cases where person is deprived of his liberty because of unsound mind, where person charged with

criminal offense of assault was subjected to lunacy inquisition prior to trial, due process required that defendant be represented by counsel in spite of ostensible waiver of that right or privilege. D.C. Code, 1940, §§ 22-504, 24-301; U.S. Const. Amend. 6. *Evans v. U.S.*, 83 A.2d 876, 1951 D.C. App. LEXIS 228 (Cr.App. 1951).

Discovery.

Defendant failed to establish that photographs taken of victim at scene of assault, which the prosecution failed to produce, were material, as necessary to establish Brady violation; defense counsel failed to request details from government regarding its efforts to locate photographs, and defense counsel made no comment to assertion of trial court and prosecutor that there was no reason to believe there was anything exculpatory in photographs, but could have explored how that determination was made in absence of photographs. *Cook v. United States*, 828 A.2d 194, 2003 D.C. App. LEXIS 435 (2003).

In assault case, once the apparent existence of police notes was established by the complaining witness's testimony, and defense counsel moved for their production under the Jencks Act, the trial court had an affirmative duty, either by interrogation or by in camera inspection, to ascertain whether the notes were a Jencks Act statement in the government's possession. *Johnson v. United States*, 800 A.2d 696, 2002 D.C. App. LEXIS 306 (2002).

Double jeopardy.

Double jeopardy barred prosecution of defendant, who had previously been found guilty of contempt for violating provisions of civil protection order for assaulting his wife, on charge of assault. (Per Justice Scalia with one Justice concurring and three Justices concurring in the judgment.) U.S. Const. Amend. 5; D.C. Code 1981, § 22-504. *U.S. v. Dixon*, 113 S.Ct. 2849, 1993 U.S. LEXIS 4405 (U.S. Dist. Col. 1993).

Civil protection order previously issued against defendant charged with domestic violence offenses was quintessentially remedial, and did not implicate double jeopardy protections. U.S. Const. Amend. 5; D.C. Code 1981, § 22-504. *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Examination of witnesses.

In prosecution for stalking, defendant was properly precluded from recross-examining government's eyewitness regarding whether defendant had actually threatened her during an incident; scope of redirect examination, during which witness was asked if she felt threatened by defendant, was limited to matters

raised during cross-examination, and defendant had an opportunity during that cross-examination to ask particular question, but failed to do so. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Domestic abuse assault victim's consumption of alcohol before day of assault was extrinsic evidence that was irrelevant to issue of whether victim was intoxicated and abusive on day of assault, as claimed by defendant and defense witnesses and, thus, limiting impeachment of victim with evidence of her prior drinking habits did not interfere with defendant's right to present a defense. *U.S. Const. Amend. 6*; D.C. Code 1981, § 22-504. *Robinson v. United States*, 642 A.2d 1306, 1994 D.C. App. LEXIS 90 (1994).

Domestic abuse assault victim's general use of alcohol was not probative of victim's diminished sensory capacity; defense was given free rein to demonstrate that victim was intoxicated on night of assault and there was no suggestion that victim was intoxicated during trial. D.C. Code 1981, § 22-504. *Robinson v. United States*, 642 A.2d 1306, 1994 D.C. App. LEXIS 90 (1994).

In prosecution for assault, manner in which complaining witness reacted to a defense investigator was not an issue and, therefore, trial court did not abuse its discretion in limiting inquiry into that issue on cross-examination of complainant. D.C. Code § 22-504. *Mitchell v. United States*, 408 A.2d 1213, 1979 D.C. App. LEXIS 501 (1979).

In prosecution for offenses relating to assault which accused police officers allegedly participated in while on off-duty status, trial court did not abuse its discretion in asking government witness, who was on-duty officer called to scene of crime, to state his reason for concluding that there had been no assault and in seeking to elicit his definition of the term "assault" or in inquiring of police lieutenant, who investigated alleged crime, with regard to his conclusory statement that an accused, who had not passed on his notes of interviews with eyewitnesses to lieutenant, did not impede but actually aided investigation. D.C. Code §§ 4-176, 22-504, 22-703. *Womack v. United States*, 350 A.2d 381, 1976 D.C. App. LEXIS 453 (1976).

In prosecution for simple assault and obstructing justice, limiting cross-examination of complaining witness on issues of his credibility and bias was not abuse of discretion. D.C. Code §§ 22-504, 22-703. *Hall v. United States*, 343 A.2d 35, 1975 D.C. App. LEXIS 428 (1975).

Although goal of counsel of defendants charged with assault was to show victim's real background by examining him concerning his employment history and experience, ordering discontinuance of such line of questioning after a recitation that victim had worked at last

employment for eight months, before that for six months at another employment and still earlier at a third employment was justified to avoid needless preoccupation with collateral matters. D.C. Code 1951, § 22-504. *Rogers v. U.S.*, 174 A.2d 356, 1961 D.C. App. LEXIS 324 (Cr.App. 1961).

Indictment and information.

Admission of evidence that complainant was sprayed with mace was not a variance, requiring reversal of assault conviction, although defendant alleged that government had consistently represented prior to trial that it considered throwing of rocks and bottles, rather than defendant's use of mace, to be conduct underlying assault charge, where government did not specify in information means by which assault was committed and it had no obligation to do so. D.C. Code 1981, § 22-504(a). *Burgess v. United States*, 681 A.2d 1090, 1996 D.C. App. LEXIS 307 (1996).

Where complaint was filed charging defendant with felony, but grand jury returned ignoramus bill and felony complaint was dismissed, federal rule providing that prosecution shall terminate upon filing of dismissal by prosecutor did not preclude trial on information charging misdemeanor. Fed. Rules Crim. Proc. rule 48(a), 18 U.S.C.; D.C. Code 1961, §§ 22-504, 22-505. *United States v. Kennedy*, 220 A.2d 322, 1966 D.C. App. LEXIS 188 (App. 1966).

Where defendant was charged with committing "indecent assault" upon girl 4 years and 8 months old and laws in jurisdiction made an unlawful assault a misdemeanor and did not use term "indecent assault", addition of word "indecent" to charge could be treated as surplusage and neither added to nor detracted from the charge. D.C. Code 1940, § 22-504. *In re Lewis*, 88 A.2d 582, 1952 D.C. App. LEXIS 166 (Cr.App. 1952).

Instructions.

Defendant in robbery prosecution was entitled to instruction on assault, where he testified that there had been justifiable assault. Fed. Rules Crim. Proc. rule 31(c), 18 U.S.C.; D.C. Code 1961, § 22-504. *Broughman v. United States*, 361 F.2d 71, 1966 U.S. App. LEXIS 6330 (C.A.D.C. 1966).

Trial court's requirement in assault trial to give jury instruction on self-defense that had sufficient evidentiary support was not negated by facts that trial court informed jury that defendant's theory was self-defense and allowed defendant to argue self-defense in summation; jury learned nothing about legal meaning of self-defense, including concepts that could have been vital to jury's proper evaluation of evidence. *Hernandez v. United States*, 853 A.2d 202, 2004 D.C. App. LEXIS 374 (2004).

Defendant was entitled in assault trial to jury instruction on self-defense, even though government's evidence depicted multiple stabbing by defendant precipitated by victim's idle question of whether defendant had courage to stick knife into someone, where defendant's mother testified that, as little as half hour after incident, defendant returned home with injuries to his neck that appeared to mother as if someone had grabbed him around neck and choked him and that he had debris in his hair and on his back suggesting that he had been lying on his back, and pathology expert testified from record of victim's wounds that they could have been inflicted by someone lying on ground and stabbing upwards. *Hernandez v. United States*, 853 A.2d 202, 2004 D.C. App. LEXIS 374 (2004).

Jury instruction, which reminded jurors to perform their duties to apply law to evidence presented to them and which was given after prior issuance of anti-deadlock instruction and upon subsequent receipt of individual juror's note complaining of obstructionist juror on panel, was not improper second anti-deadlock instruction and did not improperly coerce verdict in assault prosecution; trial judge only reminded jurors to abide by oath that they had sworn to at beginning of trial. *Jones v. United States*, 999 A.2d 917, 2010 D.C. App. LEXIS 414 (2010).

Defendant's testimony that he participated in the crimes because he was instructed to do so at gunpoint by his cousin, and that he was afraid of his cousin because "he's shot at people," warranted instruction on the defense of duress, in prosecution for armed robbery, kidnapping while armed, assault, and burglary. *McClam v. United States*, 775 A.2d 1100, 2001 D.C. App. LEXIS 138 (2001).

Defendant was not entitled, in stalking prosecution, to a special unanimity jury instruction that differentiated between the "following" and the "harassing" elements of the offense, where the government agreed to present its case only on a "harassing" theory. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Defendant was not entitled, in stalking prosecution, to a special unanimity jury instruction with respect to events that occurred before and after victim and defendant reconciled; defendant's behavior constituted a continuing course of conduct. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Impartial juror could reasonably find that Metropolitan Transit Authority (MTA) Officer attacked defendant and that defendant defended himself, and, thus, defendant was entitled to instruction on self-defense in trial for assaulting officer, even though defendant professed his innocence and denied striking officer; officer testified that fight began when defen-

dant started swinging bottle at him after officer justifiably pulled defendant off bus, while defendant testified that, without any provocation whatsoever, officer tackled him from behind and wrestled him down, and that defendant struggled with officer only after officer had him on ground with officer's knee between defendant's shoulder blades. D.C. Code 1981, § 22-504. *Wilson v. United States*, 673 A.2d 670, 1996 D.C. App. LEXIS 58 (1996).

Evidence supported jury instructions on aiding and abetting in simple assault prosecution; victim testified that defendants had told them he was going to "have his as § kicked" and was going to be jumped, victim could not identify defendants as ones who kicked him but his girlfriend testified that defendants had kicked victim in head, and jury could therefore reasonably have believed that defendants had led group and threatened victim but, disbelieving girlfriend, could have found defendants had not kicked victim. D.C. Code 1981, § 22-504. *Bayer v. United States*, 651 A.2d 308, 1994 D.C. App. LEXIS 233 (1994).

Where only offense charged is simple assault, government is, as part of the instructions on that offense, entitled to limited self-defense instruction. D.C. Code 1981, § 22-504. *Robinson v. United States*, 649 A.2d 584, 1994 D.C. App. LEXIS 204 (1994).

Defendant charged with assaulting his girlfriend was not entitled to reinstruction on self-defense when trial court responded to jury question about general and specific intent; jury's request for additional instructions on intent was made 20 minutes after deliberations began and trial court invited jury to send out additional notes if confusion remained. D.C. Code 1981, § 22-504. *Robinson v. United States*, 642 A.2d 1306, 1994 D.C. App. LEXIS 90 (1994).

Denial of motion for mistrial which was based on government's failure to disclose identification made by victim who attended lineup and failed to identify defendant as assailant was not an abuse of discretion; government had informed defense counsel that victim did not identify defendant during lineup and that she would make no in-court identification, defense counsel made assertion in questioning victim that she had never identified defendant and victim responded that after leaving lineup she did, jury had opportunity to view lineup and observe that victim did not identify defendant, and court instructed jury to disregard victim's testimony to the contrary. D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Arresting officer's hearsay testimony in simple assault prosecution that people at courier office at which defendant was employed told officer that defendant was only one who arrived shortly before officer did and that someone said

that white motorcycle helmet belonged to defendant did not warrant mistrial; defendant's objection to the testimony was sustained and trial court instructed jury to disregard it. D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Photographs of victim and testimony of prosecution eyewitness indicating assault by defendant and testimony of defendant and his witnesses indicating objects thrown by victim at defendant could be credited by jury to find that victim was initial aggressor and that defendant committed assault and, therefore, entitled defendant to self-defense instruction. D.C. Code 1981, § 22-504. *Guillard v. United States*, 596 A.2d 60, 1991 D.C. App. LEXIS 246 (1991).

Trial judge deciding whether to give self-defense instruction in simple assault prosecution was required to determine if evidence raised issues as to whether defendant actually believed he was in imminent danger of bodily harm and had reasonable grounds for that belief. D.C. Code 1981, § 22-504. *Guillard v. United States*, 596 A.2d 60, 1991 D.C. App. LEXIS 246 (1991).

Defendant charged with assaulting police officer while armed was not entitled to self-defense instructions, where no lesser-included charge of simple assault was before jury and defendant did not claim that police officers used excessive force. D.C. Code 1981, §§ 22-504, 22-505, 22-3202. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

That Government chose to prosecute defendant for simple assault, rather than assault on police officer, for altercation involving police officer did not require that jury be instructed on general law of self-defense, rather than specific self-defense rights applicable when person using force is police officer engaged in official police duties. D.C. Code 1981, §§ 22-504, 22-505. *Speed v. United States*, 562 A.2d 124, 1989 D.C. App. LEXIS 135 (1989).

Evidence, including complainant's testimony that defendant had baseball bat in hand when two of them were standing in bedroom, that he put bat down when she screamed and that she thought he hit her with something, provided rational basis for finding that defendant assaulted complainant with his hands, but not with baseball bat, and thus, evidence warranted instruction on simple assault as lesser included offense to charge of assault with a dangerous weapon. D.C. Code 1981, §§ 22-502, 22-504. *Glymph v. United States*, 490 A.2d 1157, 1985 D.C. App. LEXIS 355 (1985).

In order to be entitled to a jury instruction on the right of one acting "in loco parentis" to use reasonable disciplinary measures, two issues must be fairly raised by the evidence: first, there must be evidence that the aggressor stood "in loco parentis" to the child, and second, there

must be evidence upon which a jury could conclude that reasonable discipline was used under the circumstances. D.C. Code 1981, § 22-504. *Martin v. United States*, 452 A.2d 360, 1982 D.C. App. LEXIS 473 (1982).

In prosecution for simple assault, there was no evidence that defendant stood "in loco parentis" to his 13-year-old cousin, the complainant; at best, the record reflected only that defendant helped on occasion with the basic running of the household; thus, defendant's requested instruction on the right of one standing "in loco parentis" to use reasonable discipline was rightly refused by the trial court. D.C. Code 1981, § 22-504. *Martin v. United States*, 452 A.2d 360, 1982 D.C. App. LEXIS 473 (1982).

In prosecution for simple assault, defendant's theory of defense, viz., that when he struck the victim, his young cousin, he was acting first as a disciplinarian "in loco parentis" and then in self-defense, was not fairly raised by the evidence, and defendant thus was not entitled to a jury instruction on such theory. D.C. Code 1981, § 22-504. *Martin v. United States*, 452 A.2d 360, 1982 D.C. App. LEXIS 473 (1982).

In prosecution of defendant on charge of assault on a police officer, evidence, which indicated that officer was wearing jeans and which was contradictory as to whether officer identified himself, was sufficient to support charge on lesser included offense of simple assault as requested by defendant. D.C. Code §§ 22-504, 22-505. *Petway v. United States*, 420 A.2d 1211, 1980 D.C. App. LEXIS 376 (1980).

In prosecution for assault on neighbor who had gone upon defendant's parking lot to retrieve pet cat which had escaped and had hidden in air shaft in defendant's building, charge that, if defendant acted in honest belief that there would be injury to his property by virtue of what took place and he used no more force than was necessary to prevent injury to his property, he would have right to do what he did was erroneous but was beneficial to complaining defendant since he had no right to eject neighbors. D.C. Code § 22-504. *Shehyn v. United States*, 256 A.2d 404, 1969 D.C. App. LEXIS 287 (App. 1969).

Testimony of assault victim that defendant and two other men were "after" him authorized instruction to jury on theory of aiding and abetting even if defendant's actions did not assume proportions of assault. D.C. Code 1951, §§ 22-105, 22-504. *Rogers v. U.S.*, 174 A.2d 356, 1961 D.C. App. LEXIS 324 (Cr.App. 1961).

In assault prosecution of defendant who allegedly approached prosecution witness and placed his hand on witness' privates and squeezed them, where defense was categorical denial of the touching, and record did not disclose that defendant requested instruction on accidental touching, trial court's failure to

instruct that accidental touching was good defense was not error, even though burden was on Government to show that alleged touching was not accidental or innocent. D.C. Code 1951, § 22-504. *Dyson v. U.S.*, 97 A.2d 135, 1953 D.C. App. LEXIS 141 (Cr.App. 1953).

Joint or separate trial.

Simple assaults, which were classic signature crimes with unusual modus operandi such that there was reasonable probability that one person committed all the offenses, were properly joined and defendant was not entitled to severance because evidence of each crime would have been admissible at separate trial of the other to prove identity and trial court was not required to find by clear and convincing evidence that defendant committed each assault before failing to sever the crimes; the four simple assaults charged involved assailant smearing substance on each victim's face and saying that it was sperm or semen. Criminal Rule 8(a); D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Inclusion of assault count against one individual may have resulted in some confusion and prejudice to defendant's case involving the murder of another individual on a different date; however, given the interest in judicial efficiency, and it could not be said that the trial court abused its discretion in refusing to sever the assault count. D.C. Code 1981, §§ 22-504, 22-2403, 22-3202. *Bowler v. United States*, 480 A.2d 678, 1984 D.C. App. LEXIS 571 (1984).

Judges, disqualification.

Assault defendant's motion to recuse trial judge for bias or prejudice was procedurally deficient for failure to file a certificate of good faith or an affidavit asserting the factual basis for the claim along with the recusal motion, although the defendant did object orally; defendant was charged with assault upon a police officer, and trial judge disclosed before start of trial that she was married to police officer and that her brother had once been Chief of Police. *York v. United States*, 785 A.2d 651, 2001 D.C. App. LEXIS 234 (2001).

Trial judge's recusal was not required in assault case in which one of the two complainants and other testifying government witnesses were police officers, notwithstanding that the judge was married to a police detective and, in addition, had a brother who had previously been the Chief of Police; judge's family relationships with police officers did not, in and of themselves, create an appearance of judicial bias warranting recusal, and there was no significant connections between the judge's relatives and the facts, parties or witnesses involved in the assault case. *York v. United*

States, 785 A.2d 651, 2001 D.C. App. LEXIS 234 (2001).

Judicial notice.

Trial court, in prosecution for stalking, appropriately took judicial notice of civil protection order issued by another Superior Court judge; order was relevant to prosecution of the charge, since it was entered during the period encompassed within the charge and was based on some of the same facts about which victim had testified. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Jurisdiction.

Trial court had territorial jurisdiction over prosecution for attempted threats to do bodily harm and intent-to-frighten assault; other than asserting that police officer victim never specified the jurisdiction where he was on duty on night offenses allegedly occurred, defendant has made no affirmative showing that the offenses occurred outside of the District of Columbia. *Joiner-Die v. United States*, 899 A.2d 762, 2006 D.C. App. LEXIS 218 (2006).

Even assuming that the Chief Judge of the Superior Court did not have authority to create a special unit to exclusively hear domestic violence cases, the trial court still had jurisdiction over defendant's prosecution for simple assault, as the alleged defect was not jurisdictional. *Robinson v. United States*, 769 A.2d 747, 2001 D.C. App. LEXIS 64 (2001).

Prosecution of defendant in the Domestic Violence Unit of the Superior Court for simple assault substantially satisfied criminal rule providing that misdemeanor prosecutions were to be conducted in the Misdemeanor Branch of the Criminal Division. *Robinson v. United States*, 769 A.2d 747, 2001 D.C. App. LEXIS 64 (2001).

Domestic Violence Unit of the Superior Court did not lack jurisdiction to prosecute defendant for simple assault, even though defendant contended that assignment of certain divorce, custody, paternity, and child support cases to that unit was explicitly proscribed by the Court Reorganization Act, in that such cases were within the exclusive jurisdiction of the Family Division; whether or not the Chief Judge lacked authority to assign such cases to the Domestic Violence Unit was irrelevant to defendant's case, as Chief Judge had authority to assign criminal misdemeanor cases to that unit. *Robinson v. United States*, 769 A.2d 747, 2001 D.C. App. LEXIS 64 (2001).

Juvenile adjudications.

Juvenile who participated in group that surrounded and attacked pedestrian was guilty of aiding and abetting an assault with intent to commit robbery, and not merely simple assault, though he may not himself have intended to rob victim, where defendant stood in close proxim-

ity as another group member put his hands into unconscious victim's pockets, removed item, and placed it in his own pockets, and where defendant subsequently participated in process of trying to remove victim from street, not as humane gesture but as part of his contribution to overall criminal scheme. D.C. Code 1981, §§ 22-501, 22-504. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Delinquency adjudications of juvenile defendant for assault and assault with intent to commit robbery, stemming from his participation in gang attack upon pedestrian who was knocked unconscious and whose pockets were searched as he lay unconscious, were both based solely on first count of two-count petition that charged him, first, with armed robbery and second, with armed assault with intent to kill; second charge could only have referred to shooting of victim by another gang member that occurred a brief but appreciable time after group attack, and given lack of evidence that defendant was involved in that shooting at all, and failure of trial court to mention shooting in its findings of fact, adjudication of delinquency against defendant was not based on that incident. D.C. Code 1981, §§ 22-501, 22-504, 22-2901, 22-3202. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Appropriate disposition of defendant's appeal of two delinquency adjudications, one for simple assault and one for assault with intent to commit robbery, after Court of Appeals found that simple assault merged into assault to commit robbery, was simply to affirm unvacated portion of judgment, where defendant, tried as a juvenile, had not received separate sentence for each offense but rather a single judgment of delinquency, where period of time for which defendant had been committed to Department of Human Services had expired, and where defendant at time of appeal was 21-years old and thus no longer subject to jurisdiction of juvenile court. D.C. Code 1981, §§ 16-2303, 16-2320(c), 22-501, 22-504; Juvenile Rule 32(b). In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Juvenile defendant's participation in incident in which pedestrian was surrounded by group of young men, punched in face and knocked unconscious, was urinated upon, and had his pockets searched as he lay on street constituted one offense of assault with intent to rob rather than two separate offenses of simple assault and assault with intent to rob, where these events occurred in rapid succession, where nature of defendant's participation remained the same during this time, and where all of the offenders in the group were acting pursuant to a plan to beat up would-be drug buyers; thus, two separate guilty verdicts based on this incident were redundant. D.C. Code

1981, §§ 22-501, 22-504. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Juvenile male's grasping of juvenile female's buttocks was a sexual touching supplying the element of violence or threat of violence necessary to support juvenile delinquency conviction for assault. D.C. Code 1981, § 22-504. In re A.B., 556 A.2d 645, 1989 D.C. App. LEXIS 50 (1989).

Alleged playfulness of juvenile male defendant's original encounter with juvenile female, which resulted in his grasping her buttocks, did not affect juvenile delinquency conviction for assault, as showing of lustful intent was not necessary. D.C. Code 1981, § 22-504. In re A.B., 556 A.2d 645, 1989 D.C. App. LEXIS 50 (1989).

Evidence sustained juvenile delinquency conviction for assault based on juvenile male's grabbing and squeezing of juvenile female's buttocks, where they were not of same peer group, victim testified she did not like her perpetrator, he blocked her from continuing on her way home stating he wanted "to squeeze [her] butt," did so and ran away, while being chased by emotional victim. D.C. Code 1981, § 22-504. In re A.B., 556 A.2d 645, 1989 D.C. App. LEXIS 50 (1989).

In absence of any corroboration of 12-year-old female's claim that 13-year-old male whom she encountered in the junior high school corridor had reached out and touched her vagina and then laughed and walked away, the boy could not be convicted of simple assault. D.C. Code § 22-504. In re L.A.G., 407 A.2d 688, 1979 D.C. App. LEXIS 467 (1979).

Trial court's finding that defendant, who was convicted of assault with a dangerous weapon and assault, who had a long record of offenses and poor employment record, who committed instant offense while serving sentence under Youth Act, and who was unlikely to receive any training under Youth Act that he could not receive under adult sentence, would derive "no benefit" from sentence under the Youth Act, satisfied requirements of statute pertaining to sentencing under another applicable statute of one otherwise eligible for sentencing under Youth Act. 18 U.S.C. § 5010(d); D.C. Code §§ 22-502, 22-504. Tuckson v. United States, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

Even though better course would have been for trial judge who conducted prior detention hearing on sodomy charge against 17-year-old defendant and heard prejudicial evidence regarding defendant's history of committing sexual attacks to recuse himself from subsequent fact-finding hearing on assault charge against defendant, where record revealed no untoward conduct by judge during fact-finding hearing and where there was no defense testimony and defendant's confession was received in evidence without objection, judge's decision not to recuse

himself did not require reversal. U.S. Const. Amend. 5; D.C. Code § 22-504. In re W.N.W., 343 A.2d 55, 1975 D.C. App. LEXIS 223 (1975).

Even though juvenile did not file notice of appeal from order denying application to reconsider order detaining him pending trial within two-day period provided for interlocutory appeals, appellate court had jurisdiction to review order by viewing it as final order, as to which such two-day limitation did not apply. D.C. Code §§ 11-721(a)(1), 16-2327, 16-2327(a, b), 22-504, 22-2801. In re M.L. DEJ., 310 A.2d 834, 1973 D.C. App. LEXIS 380 (1973).

Juvenile seeking summary reversal of order detaining him pending trial on charges of carnal knowledge and assault had burden of demonstrating that merits of claim so clearly warranted relief as to justify expedited action. D.C. Code §§ 16-2312(d), 16-2327, 22-504, 22-2801. In re M.L. DEJ., 310 A.2d 834, 1973 D.C. App. LEXIS 380 (1973).

Lesser included offense.

Simple assault is lesser included offense of assault on police officer. Gatlin v. United States, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

Even if assault was a lesser included offense of cruelty to a child, trial court did not commit reversible error by failing to submit assault charges to jury because defendant suffered no harm due to jury acquitting her on cruelty to a child charges. York v. United States, 803 A.2d 1009, 2002 D.C. App. LEXIS 392 (2002).

Trial court in bench trial could properly sua sponte raise issue of lesser-included offense of simple assault in prosecution for misdemeanor sexual abuse (MSA), and, after consulting with counsel and obtaining government's acquiescence, court could consider that lesser offense and convict defendant thereof. Mungo v. United States, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Non-violent sexual touching simple assault is lesser-included offense of misdemeanor sexual abuse (MSA); MSA includes all elements of non-violent sexual touching assault, plus at least one additional element of intent not found in latter, i.e., intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Mungo v. United States, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Evidence in bench trial for misdemeanor sexual abuse (MSA) supported consideration of lesser-included offense of simple assault; there was rational basis for concluding that defendant's acts, which allegedly involved touching victims' breasts, buttocks, and vaginal areas with spray can, were not undertaken with intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person, but would nonetheless be offensive to people of reasonable sensibility. Mungo v. United States,

772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Simple assault is lesser included offense of assault on police officer. D.C. Code 1981, §§ 22-504, 22-505(a). McDonald v. United States, 496 A.2d 274, 1985 D.C. App. LEXIS 453 (1985).

Assault was lesser included offense of taking indecent liberties with a minor child, and thus defendant could not be convicted of both offenses. D.C. Code §§ 22-504, 22-3501(a, c). Hall v. United States, 400 A.2d 1063, 1979 D.C. App. LEXIS 350 (1979).

Simple assault was not a lesser included offense of obstruction of justice and thus charge of simple assault did not merge into accused's conviction of obstruction of justice. D.C. Code §§ 22-504, 22-703. Hall v. United States, 343 A.2d 35, 1975 D.C. App. LEXIS 428 (1975).

Merger of offenses.

Convictions for assault with intent to kill while armed (AWIKWA) and aggravated assault while armed (AAWA), which both arose from same incident with one victim, did not merge under Blockburger test for merger based on principles of double jeopardy; each offense required proof of a fact that other one did not, in that AAWA required showing of facts that proved serious bodily injury while AWIKWA did not, and AWIKWA required proof of facts showing specific intent to kill while AAWA did not. Tolbert v. United States, 905 A.2d 186, 2006 D.C. App. LEXIS 435 (2006).

Convictions for attempted threats to do bodily harm and intent-to-frighten assault arising from same criminal transaction did not merge, so as to trigger double jeopardy protection; each of the two crimes required a proof of a fact that the other did not. Joiner-Die v. United States, 899 A.2d 762, 2006 D.C. App. LEXIS 218 (2006).

Conviction for mayhem merged with conviction for aggravated assault. Bodrick v. United States, 892 A.2d 1116, 2006 D.C. App. LEXIS 80 (2006).

Convictions for simple assault did not merge into convictions for attempted second-degree cruelty to children, as each offense required element of proof that other did not; statute criminalizing attempted second-degree cruelty to children prohibited attempts to inflict unnecessary or unreasonable mental pain and suffering or psychological harm, and, thus this statute could be violated without commission of an assault, an offense which, by definition, had to actually or potentially impair victim's bodily integrity. Alfaro v. United States, 859 A.2d 149, 2004 D.C. App. LEXIS 459 (2004).

Conviction for simple assault did not merge with conviction for attempted second-degree child cruelty; the child cruelty offense required proof that the act was committed upon a child while simple assault did not have the same

requirement, and simple assault required an act involving "force or violence" while child cruelty could be committed by "maltreating a child." *Bradley v. United States*, 856 A.2d 1157, 2004 D.C. App. LEXIS 434 (2004), writ of certiorari denied by 545 U.S. 1121, 125 S. Ct. 2923, 162 L. Ed. 2d 307, 2005 U.S. LEXIS 4785, 73 U.S.L.W. 3719 (2005).

Where defendant was charged with taking indecent liberties with a minor child and sodomy, where he was found guilty of taking indecent liberties and assault, the latter being a lesser included offense of sodomy, but where assault was found to be lesser included offense of taking indecent liberties with a minor child, facts that assault conviction was derived from sodomy indictment and that sodomy was not lesser included offense of indecent acts did not preclude merger of offenses and did not permit convictions of both indecent liberties and lesser included offense of assault. D.C. Code §§ 22-504, 22-3501(a, c). *Hall v. United States*, 400 A.2d 1063, 1979 D.C. App. LEXIS 350 (1979).

Convictions of both assault with dangerous weapon and simple assault were sustained where there were two separate assaults, each proved by different evidence, despite contention that conviction of simple assault should be vacated because it merged into conviction of assault with a dangerous weapon. D.C. Code §§ 22-502, 22-504. *Tuckson v. United States*, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

Nature and elements of offenses.

— Ability to execute intent, nature and elements of offenses.

Assault by recklessly causing significant bodily injury did not require proof that risk of injury was specifically directed at victim. *Flores v. United States*, 37 A.3d 866, 2011 D.C. App. LEXIS 792 (2011), writ of certiorari denied by 132 S. Ct. 1946, 182 L. Ed. 2d 801, 2012 U.S. LEXIS 2767, 80 U.S.L.W. 3581 (U.S. 2012).

Simple assault is lesser included offense of assault on police officer. *Gatlin v. United States*, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

Under expanded concept of common-law criminal assault, focus is not on defendant's actual ability or specific intent to inflict threatened harm, but, rather, focus is on defendant's apparent ability to accomplish threatened injury. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

— In general.

Under District of Columbia law, assault in a menacing manner consists of: (1) an act on the part of the accused (which need not result in injury); (2) the apparent present ability to injure the victim at the time the act is committed;

and (3) the intent to perform the act which constitutes the assault at the time the act is committed. *United States v. Barnes*, 295 F.3d 1354, 2002 U.S. App. LEXIS 14726 (C.A.D.C. 2002).

Under District of Columbia law, spitting on individual constitutes assault on that person. D.C. Code 1981, § 22-504. *Saidi v. Washington Metro. Area Transit Auth.*, 928 F. Supp. 21, 1996 U.S. Dist. LEXIS 7399 (1996).

To support a conviction of assault, the evidence must prove (1) a voluntary (2) act on the part of the defendant to harm another person, and (3) that at the time the defendant committed the act, he must have had the apparent ability to injure the person. *Long v. United States*, 940 A.2d 87, 2007 D.C. App. LEXIS 667 (2007), amended by 2008 D.C. App. LEXIS 88 (D.C. Feb. 28, 2008).

To establish intent-to-frighten assault, the government must prove: (1) that the defendant committed a threatening act that reasonably would create in another person a fear of immediate injury; (2) that, when he or she committed the act, the defendant had the apparent present ability to injure that person; and (3) that the defendant committed the act voluntarily, on purpose, and not by accident or mistake. *Joiner-Die v. United States*, 899 A.2d 762, 2006 D.C. App. LEXIS 218 (2006).

The essence of the common law offense of assault is the intentional infliction of bodily injury or the creation of fear thereof. *Alfaro v. United States*, 859 A.2d 149, 2004 D.C. App. LEXIS 459 (2004).

Simple assault consists of three elements: (1) an act on the part of the accused, which need not result in injury; (2) the apparent present ability to injure the victim at the time the act is committed; and (3) the intent to perform the act which constitutes the assault at the time the act is committed. *Bradley v. United States*, 856 A.2d 1157, 2004 D.C. App. LEXIS 434 (2004), writ of certiorari denied by 545 U.S. 1121, 125 S. Ct. 2923, 162 L. Ed. 2d 307, 2005 U.S. LEXIS 4785, 73 U.S.L.W. 3719 (2005).

Parent-child assaults may be prosecuted under misdemeanor simple-assault statute; there is no requirement that they be prosecuted exclusively under cruelty to children statute. *Newby v. United States*, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

Kinds of criminal assault recognized in the District of Columbia are "attempted-battery" assault, which requires proof of attempt to cause physical injury, and "intent-to-frighten" assault, which requires proof of intent either to cause injury or to create apprehension in victim by engaging in some threatening conduct; actual battery need not be attempted with respect to intent-to-frighten assault. D.C. Code 1981, § 22-504. *McGee v. United States*, 533 A.2d 1268, 1987 D.C. App. LEXIS 494 (1987).

Essential elements of assault are that there be an act on part of defendant, that at time defendant commits the act, defendant have apparent present ability to injure the victim, and that at time act is committed defendant have intent to perform the acts which constitute the assault. D.C. Code 1973, § 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

"Violence" in its ordinary meaning is not a necessary element of assault, for attempt to do unlawfully to another any bodily injury, however small, constitutes an assault. D.C. Code § 22-504. In re G., 396 A.2d 981, 1979 D.C. App. LEXIS 285 (1979).

Violence in its ordinary meaning is not a necessary element of assault, and attempt to do unlawfully to another any bodily injury however small constitutes an "assault". D.C. Code 1961, § 22-504. *Harris v. United States*, 201 A.2d 532, 1964 D.C. App. LEXIS 245 (App. 1964).

— Indecent assault, nature and elements of offenses.

Unless there is consent, a sexual touching is sufficiently offensive to constitute an assault. D.C. Code 1951, § 22-504. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Fact that police officer specifically denied being hurt, embarrassed or humiliated by alleged touching of his private parts did not negative assault. D.C. Code 1951, § 22-504. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Non-violent sexual touching is a distinct type of assault; the sexual nature of the conduct supplies the element of violence or threat of violence. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes "sexual touching," for purposes of an assault prosecution. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

In an assault prosecution based on non-violent sexual touching, the touching need only consist of a touching that could offend a person of reasonable sensibility. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Defendant's engaging in sexual intercourse with another mental patient at hospital was conduct which constituted an "assault," as its sexual nature supplied the element of violence or threat of violence, and, to establish the assault, the Government was not required to prove lack of consent, as consent is an affirmative defense to a charge of assault. D.C. Code 1981, § 22-504. *Goudy v. United States*, 495

A.2d 744, 1985 D.C. App. LEXIS 439 (1985), amended by 505 A.2d 461, 1986 D.C. App. LEXIS 281 (D.C. 1986).

Where circumstances surrounding incident in junior high school corridor wherein 13-year-old boy reached out and touched vagina of 12-year-old girl and then laughed and walked away did not tend to support an intention to do any bodily injury, however small, the incident could constitute an assault only if the sexual nature of the touching was taken into consideration. D.C. Code § 22-504. In re L.A.G., 407 A.2d 688, 1979 D.C. App. LEXIS 467 (1979).

A nonviolent action involving sexual misconduct may constitute an assault; the sexual nature of the conduct may supply the missing element of violence or threat of violence. D.C. Code § 22-504. In re L.A.G., 407 A.2d 688, 1979 D.C. App. LEXIS 467 (1979).

Missing element of violence necessary for conviction of simple assault was supplied by sexual nature of heterosexual contact with minor female. D.C. Code § 22-504. In re G., 396 A.2d 981, 1979 D.C. App. LEXIS 285 (1979).

Acts, on part of defendant who, having approached a man whom he did not know was an officer assigned to the morals division of the police department and asked man to light defendant's cigarette, placed his left hand on the officer's privates and squeezed them, constituted an "assault" within meaning of statute relating to unlawful assaults or threats. D.C. Code 1951, § 22-504. *Dyson v. U.S.*, 97 A.2d 135, 1953 D.C. App. LEXIS 141 (Cr.App. 1953).

— Intent and malice, nature and elements of offenses.

Defendant's general intent to throw his shoe, which struck the victim in victim's face, would not establish defendant's intent to use actual violence against the victim by striking victim with the shoe, as element of attempted-battery assault. *Williams v. United States*, 887 A.2d 1000, 2005 D.C. App. LEXIS 644 (2005).

In an attempted-battery assault case, the prosecution must prove, inter alia, an intention of using actual violence against the person. *Williams v. United States*, 887 A.2d 1000, 2005 D.C. App. LEXIS 644 (2005).

Assault requires general intent, which may be inferred from doing the act that constituted the assault. *Stroman v. United States*, 878 A.2d 1241, 2005 D.C. App. LEXIS 376 (2005).

Because assault is a general intent crime, there need be no subjective intention to bring about an injury. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Intent required for simple assault conviction may be inferred from doing the act which constituted the assault. D.C. Code 1981, § 22-504. *Macklin v. United States*, 733 A.2d 962, 1999 D.C. App. LEXIS 149 (1999).

To establish intent-to-frighten type of assault, government must offer proof that defendant intended either to cause injury or to create apprehension in victim by engaging in some threatening conduct; actual battery need not be attempted, and the requisite intent is the general intent to perform the acts which constitute the assault. D.C. Code 1981, § 22-504. *Mihav v. United States*, 618 A.2d 197, 1992 D.C. App. LEXIS 341 (1992).

Crime of assault requires that perpetrator have general intent to do act which constitutes threat, and does not require specific intent to cause injury or to frighten. D.C. Code 1981, § 22-504. *Smith v. United States*, 593 A.2d 205, 1991 D.C. App. LEXIS 180 (1991).

— Significant bodily injury, nature and elements of offenses.

Offense of assault with significant bodily injury was not a crime of violence, and thus, defendant should not have been charged with assault with significant bodily injury while armed or with a related count of possessing a firearm during a crime of violence (PFCV), which increased his potential term of imprisonment. *Colter v. United States*, 37 A.3d 282, 2012 D.C. App. LEXIS 63 (2012), writ of certiorari denied by 133 S. Ct. 554, 184 L. Ed. 2d 360, 2012 U.S. LEXIS 8443, 81 U.S.L.W. 3229 (U.S. 2012).

Victim's injuries met the "significant bodily injury" requirement of felony assault statute, where injury to victim's ear required four to six stitches and left a scar, and treatment was sought and administered with reasonable promptness. *In re R.S.*, 6 A.3d 854, 2010 D.C. App. LEXIS 605 (2010).

"Hospitalization," as used in the felony-assault statute's definition of "significant bodily injury," which is an "injury that requires hospitalization or immediate medical attention," means being placed in or admitted to a hospital for the diagnosis, care, or treatment of a bodily injury. In the Matter of R.P., 136 WLR 549 (Super. Ct. 2008).

Medical attention is "immediate," as used in the felony-assault statute's definition of "significant bodily injury," which is an "injury that requires hospitalization or immediate medical attention," when it occurs shortly after the physical injury was inflicted. In the Matter of R.P., 136 WLR 549 (Super. Ct. 2008).

"Medical attention," as used in the felony-assault statute's definition of "significant bodily injury," which is an "injury that requires hospitalization or immediate medical attention," includes medical care, diagnosis, or treatment of a bodily injury. In the Matter of R.P., 136 WLR 549 (Super. Ct. 2008).

"Hospitalization or immediate medical attention," as used in the felony-assault statute's definition of "significant bodily injury," which is

an "injury that requires hospitalization or immediate medical attention," is required when the severity of a bodily injury is such that hospitalization or medical attention is necessary to preserve the victim's health and wellbeing, e.g., to prevent long-term physical damage, possible disability, disfigurement, or severe pain. In the Matter of R.P., 136 WLR 549 (Super. Ct. 2008).

— Threats and stalking, nature and elements of offenses.

Petition for civil protection order (CPO) met requirement, for stating a claim under Intrafamily Offenses Act for issuance of CPO, of alleging that petitioner's former lover had committed a criminal offense against petitioner; petitioner fairly alleged that the former lover had stalked petitioner by making repeated, abusive, and threatening telephone calls to petitioner that were intended to frighten, torment, and annoy petitioner for the purpose of interfering with his personal and professional life. *Richardson v. Easterling*, 878 A.2d 1212, 2005 D.C. App. LEXIS 379 (2005).

Although assault is most often charged in circumstances involving violent behavior, it may also be premised on threatening behavior accompanied by an intent to frighten the victim. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Crime of stalking can be committed either by "following" or by "harassing" the victim. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Provision of stalking statute relating to conduct with intent to cause "emotional distress" was not unconstitutionally vague, since statute required proof of the elements of malice and willfulness, along with actus reus of "repeatedly following or harassing." D.C. Code 1981, § 22-504. *United States v. Smith*, 685 A.2d 380, 1996 D.C. App. LEXIS 233 (1996), writ of certiorari denied by 522 U.S. 856, 118 S. Ct. 152, 139 L. Ed. 2d 98, 1997 U.S. LEXIS 5273, 66 U.S.L.W. 3258 (1997).

Phrase "willfully, maliciously and repeatedly" contained in stalking statute modifies both following and harassing. D.C. Code 1981, § 22-504. *United States v. Smith*, 685 A.2d 380, 1996 D.C. App. LEXIS 233 (1996), writ of certiorari denied by 522 U.S. 856, 118 S. Ct. 152, 139 L. Ed. 2d 98, 1997 U.S. LEXIS 5273, 66 U.S.L.W. 3258 (1997).

Phrase "on more than one occasion" contained in stalking statute requires that the acts described have occurred at two or more distinct times. D.C. Code 1981, § 22-504. *United States v. Smith*, 685 A.2d 380, 1996 D.C. App. LEXIS 233 (1996), writ of certiorari denied by 522 U.S. 856, 118 S. Ct. 152, 139 L. Ed. 2d 98, 1997 U.S. LEXIS 5273, 66 U.S.L.W. 3258 (1997).

Terms “on more than one occasion,” “repeatedly,” and “course of conduct” contained in stalking statute are not meant to modify each other, but rather are separate requirements of the statute; stalking statute requires proof that defendant engaged in the conduct “on more than one occasion,” that he or she acted “repeatedly,” and that conduct was “course of conduct” in that it showed continuity of purpose. D.C. Code 1981, § 22-504. *United States v. Smith*, 685 A.2d 380, 1996 D.C. App. LEXIS 233 (1996), writ of certiorari denied by 522 U.S. 856, 118 S. Ct. 152, 139 L. Ed. 2d 98, 1997 U.S. LEXIS 5273, 66 U.S.L.W. 3258 (1997).

Stalking statute was not void for vagueness, since it defined the offense so ordinary people could understand what conduct was prohibited and it sufficiently limited the discretion of those who were responsible for enforcing it; statute required individual to engage in described conduct “willfully, maliciously and repeatedly,” definition of “harassing” contained reasonable person standard, and term “following” was easily understood and was not vague. D.C. Code 1981, § 22-504. *United States v. Smith*, 685 A.2d 380, 1996 D.C. App. LEXIS 233 (1996), writ of certiorari denied by 522 U.S. 856, 118 S. Ct. 152, 139 L. Ed. 2d 98, 1997 U.S. LEXIS 5273, 66 U.S.L.W. 3258 (1997).

Proof of threats in a menacing manner by words alone does not suffice under statute proscribing assault or threatened assault in a menacing manner. D.C. Code § 22-504. In re D. W. J., 293 A.2d 268, 1972 D.C. App. LEXIS 213 (1972).

— Use of weapons, nature and elements of offenses.

Defendant’s misdemeanor conviction under District of Columbia statute prohibiting assaults in a menacing manner was “misdemeanor crime of domestic violence,” and thus supported defendant’s conviction for possession of firearm and ammunition by person convicted of such misdemeanor, because District of Columbia statute had element of use or attempted use of force or threatened use of a deadly weapon, and victim of assault was mother of defendant’s son. *United States v. Barnes*, 295 F.3d 1354, 2002 U.S. App. LEXIS 14726 (C.A.D.C. 2002).

Fact that statute relating to assault with a dangerous weapon is grouped with other crimes which all require particular intent does not mean that assault with a dangerous weapon, unlike simple assault, should be viewed as requiring a similar intent where the statute was silent as to any requirement of intent, although in all other offenses to which reference was made the requirement was explicit. D.C. Code 1961, §§ 22-501 to 22-504. *Parker v. United States*, 359 F.2d 1009, 1966 U.S. App. LEXIS 6529 (C.A.D.C. 1966).

To point a dangerous weapon such as a pistol at another person in a menacing or threatening manner, or to use weapon such as a pistol in any manner that would reasonably justify the other person in believing that the weapon might be immediately used against him, constitutes an assault. D.C. Code 1981, § 22-504. *Robinson v. United States*, 506 A.2d 572, 1986 D.C. App. LEXIS 507 (1986).

Gist of assault with dangerous weapon is in character of weapon with which assault is made. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In determining whether weapon is a “dangerous weapon” under aggravated assault statute, trier of fact must consider whether object or material is known to be “likely to produce death or great bodily injury” in manner in which it is used, intended to be used, or threatened to be used. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Persons liable.

Aiding and abetting assault renders one guilty of crime even if he does not actively participate. D.C. Code 1951, §§ 22-105, 22-504. *Rogers v. U.S.*, 174 A.2d 356, 1961 D.C. App. LEXIS 324 (Cr.App. 1961).

Presumptions and burden of proof.

Before use of assault statute to cover conduct that appears to fall within bounds of misdemeanor statutes can be countenanced court must be certain that elements of assault had been established. D.C. Code 1951, §§ 22-504, 22-1112, 22-2701. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Prosecutor was not required to obtain leave of court to dismiss charge of simple assault, and once prosecutor moved to dismiss, trial court should have clarified prosecutor’s erroneous belief that leave of court was required and informed prosecutor that it lacked authority to either grant or deny motion because decision whether to prosecute charge lay with prosecutor. *Ferrell v. United States*, 990 A.2d 1015, 2010 D.C. App. LEXIS 137 (2010).

To prove simple assault, the government must prove beyond a reasonable doubt three elements: (1) an attempt, with force or violence, to injure another, (2) the apparent present ability to effect the injury, and (3) the intent to do the act constituting the assault. *Powell v. United States*, 916 A.2d 890, 2006 D.C. App. LEXIS 643 (2006).

Trial court did not abuse its discretion in summarily denying defendant’s motion to have arrest record sealed, where hearing would not result in evidence sufficient to meet clear and convincing standard required for sealing of arrest records; even though defendant filed

sworn statement, its description of events, which could be viewed as self-serving, was fully rebutted by officer's statement, and did little to explain apparently serious injury he inflicted on complainant, and defendant, who had burden of proof, did not seek discovery from government that could have yielded information of assistance in meeting that burden. *Burns v. United States*, 880 A.2d 258, 2005 D.C. App. LEXIS 407 (2005).

In a prosecution for simple assault, the government must prove, beyond a reasonable doubt, that the defendant made (1) an attempt, with force or violence, to injure another (2) with the apparent present ability to effect the injury and (3) with the intent to do the act constituting the assault. *Stroman v. United States*, 878 A.2d 1241, 2005 D.C. App. LEXIS 376 (2005).

To convict someone of simple assault, the government must prove (1) an act on the part of the defendant, (2) the apparent present ability to injure or frighten the victim, and (3) the intent to do the act that constituted the assault. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Once privilege of parental discipline is raised as defense to assault or cruelty to children, the government has the burden of refuting it by proving beyond a reasonable doubt that the parent's purpose in resorting to force against her child was not disciplinary or that the force she used was unreasonable. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Government does not need to prove malice to make out a prima facie case of the general intent crime of simple assault. *Newby v. United States*, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

In an assault prosecution based on non-violent sexual touching, the government need not prove that the victim actually suffered anger, fear, or humiliation. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

For conviction of simple assault, government must prove three elements: (1) attempt, with force or violence, to injure another; (2) apparent present ability to effect injury; and (3) intent to do act constituting the assault. D.C. Code 1981, § 22-504. *Macklin v. United States*, 733 A.2d 962, 1999 D.C. App. LEXIS 149 (1999).

Assault requires proof of either attempt to cause physical injury or attempt to frighten victim. D.C. Code 1981, § 22-504. *Allison v. United States*, 623 A.2d 590, 1993 D.C. App. LEXIS 95 (1993).

There are two types of assault: attempted battery assault, which requires proof of attempt to cause physical injury, and intent-to-frighten assault, which requires proof of threatening conduct intended either to injure or frighten the victim. D.C. Code 1981, § 22-504.

Mihav v. United States, 618 A.2d 197, 1992 D.C. App. LEXIS 341 (1992).

To support a conviction for assault, the government must prove an attempt or effort with force or violence to inflict bodily harm with apparent present intent to carry out this attempt or effort. D.C. Code § 22-504. *Jones v. United States*, 401 A.2d 473, 1979 D.C. App. LEXIS 351 (1979).

In a prosecution for assault, showing of violence is not necessary, and any attempt to do any bodily injury, however small, will suffice. D.C. Code § 22-504. *Hall v. United States*, 400 A.2d 1063, 1979 D.C. App. LEXIS 350 (1979).

In assault prosecution, it was incumbent upon Government to show that the act of the defendant was not accidental and that he had necessary criminal intent. D.C. Code 1951, § 22-504. *Dyson v. U.S.*, 97 A.2d 135, 1953 D.C. App. LEXIS 141 (Cr.App. 1953).

Public officers and public employees.

Officer who had identified himself to defendant did not assault defendant by pursuing him when defendant fled in response to officer's show of authority. D.C. Code 1981, § 22-504. *Allison v. United States*, 623 A.2d 590, 1993 D.C. App. LEXIS 95 (1993).

Correctional officer's off-duty conduct of agreeing to split cost of bag of heroin with former jail inmate and assaulting inmate when deal fell through and subsequent misdemeanor conviction based on the assault did not entitle the Department of Corrections to dismiss officer; under the Comprehensive Merit Personnel Act, officer could only be dismissed for "cause," and officer's conduct was not one of the twenty-one types of "cause" listed in the act. D.C. Code 1981, §§ 1-617.1(d)(1-21), 22-504. *District of Columbia Dept of Corrections v. Teamsters Union Local 246*, 554 A.2d 319, 1989 D.C. App. LEXIS 23 (1989).

Statute making it unlawful to assault, without justifiable and excusable cause, any officer of any penal or correctional institution does not contemplate a level of conduct measurably different from simple assault. D.C. Code §§ 22-504, 22-505. *Johnson v. United States*, 298 A.2d 516, 1972 D.C. App. LEXIS 312 (1972).

Questions of law or fact.

Whether an object or material which is not specifically designed as a dangerous weapon is a "dangerous weapon" under aggravated assault statute is ordinarily a question of fact to be determined by all circumstances surrounding assault. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

Whether defendant, charged with assault, public intoxication and disorderly conduct in violation of District of Columbia Code, had mental disease which should have excused him

from criminal responsibility was issue of ultimate fact for trier thereof. D.C. Code §§ 22-504, 22-1107, 25-128. *Dempsey v. United States*, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Weight to be given testimony of witnesses who related that conduct of defendant at time of alleged assault, public intoxication and disorderly conduct, in violation of District of Columbia Code, and shortly thereafter was bizarre and weight to be given testimony of government witness who related that defendant was intoxicated at time of alleged offenses and that assault was triggered by refusal to serve him beer was for trier of fact. D.C. Code §§ 22-504, 22-1107, 25-128. *Dempsey v. United States*, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Question of identification was one of fact for jury in prosecution for assault and for carrying a deadly weapon. D.C. Code §§ 22-504, 22-3204. *Durham v. United States*, 237 A.2d 830, 1968 D.C. App. LEXIS 127 (App. 1968).

Evidence that defendant jostled victim and fumbled with victim's trouser cuffs, and that there was impact at area of victim's hip pocket constituted sufficient evidence to send to jury on question of assault in case involving defendant who had allegedly taken wallet from victim's hip pocket. D.C. Code 1961, § 22-504. *Harris v. United States*, 201 A.2d 532, 1964 D.C. App. LEXIS 245 (App. 1964).

Even assuming that defendant might both deny offense of indecent assault on member of morals squad of police department and rely on apparent consent, evidence did not require finding as a matter of law that there had been apparent consent on part of police officer. D.C. Code 1951, §§ 11-776(b), 22-504. *Day v. U.S.*, 148 A.2d 462, 1959 D.C. App. LEXIS 233 (Cr.App. 1959).

Review.

— Determination and disposition, review.

Court of Appeals, on appeal from conviction for disorderly conduct and simple assault, was reluctant to determine whether police department form containing information as to time, place and date of offense, name of complainant, names and addresses of witnesses, and description of details of offense was producible under Jencks Act but would give trial court opportunity in first instance to decide issue of produceability under established guidelines. D.C. Code 1961, §§ 22-504, 22-1107; 18 U.S.C. § 3500. *Duncan v. United States*, 379 F.2d 148, 1967 U.S. App. LEXIS 6334 (C.A.D.C. 1967).

On appellate review of simple assault conviction of defendant who asserted parental discipline defense, according substantial deference to the trial court, Court of Appeals must consider whether the facts, when viewed in the

light most favorable to the government, are such that a reasonable fact finder could conclude that the government rebutted defendant's parental discipline defense by proving beyond a reasonable doubt that the use of force was not used in a reasonable manner for disciplinary purposes. *Powell v. United States*, 916 A.2d 890, 2006 D.C. App. LEXIS 643 (2006).

Whether the simple assault statute applied to parent-child assaults at all, and whether the government was required in prosecution involving such an assault to prove malice to overcome parental discipline defense, were questions of law over which appellate court's review was de novo. *Newby v. United States*, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

As trial court found every fact required for conviction of lesser included offense of assault, a predicate offense for insanity verdict was established, and thus judgment against defendant who had engaged in sexual intercourse with another mental patient had to be modified to state that defendant was adjudged not guilty by reason of insanity of lesser included offense of assault rather than not guilty of rape by reason of insanity. D.C. Code 1981, §§ 22-504, 22-2801. *Goudy v. United States*, 495 A.2d 744, 1985 D.C. App. LEXIS 439 (1985), amended by 505 A.2d 461, 1986 D.C. App. LEXIS 281 (D.C. 1986).

— Harmless or reversible error, review.

If trial court, in determining issue of producibility of police report form under Jencks Act, found that statement should have been made available, error in failing to require production of statement would not be harmless and would require new trial on charges of disorderly conduct and simple assault. D.C. Code 1961, §§ 22-504, 22-1107; 18 U.S.C. § 3500. *Duncan v. United States*, 379 F.2d 148, 1967 U.S. App. LEXIS 6334 (C.A.D.C. 1967).

Trial court's interjection of its opinion about sufficiency of evidence to support charge for simple assault in response to prosecutor's "motion" to dismiss, rather than clarifying prosecutor's apparent misunderstanding that he had to obtain leave of court to dismiss charge for lack of evidence and informing prosecutor that it lacked authority to either grant or deny motion, was plain error that affected defendant's substantial rights, in that, but for trial court's errors, defendant would have been excused, there was reasonable probability that prosecutor would have filed nolle prosequi papers, and trial court's substitution of its views for prosecutor's seriously affected fairness and integrity of proceedings. *Ferrell v. United States*, 990 A.2d 1015, 2010 D.C. App. LEXIS 137 (2010).

Error in trial court's determination that defendant's display of knife constituted use of excessive deadly force, thus precluding claim of

self-defense, was harmless, in bench trial for simple assault and attempted possession of prohibited weapon, in view of trial court's disbelief of defendant's story that he displayed weapon to deter onrushing attacker, and finding that defendant, not alleged attacker, was aggressor. *Douglas v. United States*, 859 A.2d 641, 2004 D.C. App. LEXIS 460 (2004).

Remand of assault case was required for the trial court to determine whether police notes should have been turned over to defendant under the Jencks Act for use in cross-examining complaining witness, as trial court failed to conduct a proper Jencks Act inquiry or grant defendant other suitable relief when government did not produce the notes on defendant's request after their existence became apparent during witness's testimony. *Johnson v. United States*, 800 A.2d 696, 2002 D.C. App. LEXIS 306 (2002).

Defendant was not entitled to a new trial on stalking charge due to prosecutor's improper comments during opening statement, in which she asked the jurors to put themselves in the victim's shoes and played upon their own fears of being victimized; defendant was not substantially prejudiced, as the remarks were not repeated, the trial court instructed the jury that the opening statement was not evidence, the evidence against defendant was strong, and his defense was weak. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Victim's testifying unresponsively during direct examination that defendant slashed her car's tires did not warrant reversal of stalking conviction, on contention testimony was prejudicial evidence of uncharged criminal conduct; comment was brief and was immediately followed by a curative instruction. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Even if admission of evidence that complainant was sprayed with mace was variance on the ground that government had consistently represented prior to trial that it considered throwing of rocks and bottles to be the conduct underlying assault charge, reversal of assault conviction was not required absent a demonstration of prejudice. D.C. Code 1981, § 22-504(a). *Burgess v. United States*, 681 A.2d 1090, 1996 D.C. App. LEXIS 307 (1996).

Error in denying defendant's request for self-defense instruction in trial for assaulting officer of Metropolitan Transit Authority (MTA) was not harmless, even though defendant denied that he assaulted officer, where defendant admitted that he was present during altercation and that he struggled with officer. D.C. Code 1981, § 22-504. *Wilson v. United States*, 673 A.2d 670, 1996 D.C. App. LEXIS 58 (1996).

Any error in limiting impeachment of domestic abuse assault victim's testimony with ex-

trinsic evidence about her prior drinking habits was not prejudicial given that defense was able to present considerable evidence showing that victim had been drinking on night of assault and lied on cross-examination; jury simply rejected defense suggestion that victim was drunk on evening of assault. D.C. Code 1981, § 22-504. *Robinson v. United States*, 642 A.2d 1306, 1994 D.C. App. LEXIS 90 (1994).

Prosecutor's alleged misstatement of evidence did not result in prejudice and, thus, did not constitute reversible error in simple assault prosecution; trial court sustained defense objection and prosecutor adequately corrected alleged misstatement. D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Prosecutor's alleged inflammatory argument, which was within allowable bounds and not outright expression of prosecutor's opinion, did not constitute reversible error in simple assault prosecution. D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

In assault prosecution, trial court's pursuit of inquiry as to whether any member of jury panel had any independent knowledge of facts of case did not constitute error particularly in light of publicity which case had received. D.C. Code 1981, § 22-504. *Musgrove v. United States*, 441 A.2d 980, 1982 D.C. App. LEXIS 281 (1982).

In assault prosecution against policeman, trial court's refusal to ask some of proposed voir dire questions which focused on prospective jurors' attitudes toward police brutality did not constitute reversible error in light of fact that jurors' feelings about police misconduct were explored to some extent. D.C. Code 1981, § 22-504. *Musgrove v. United States*, 441 A.2d 980, 1982 D.C. App. LEXIS 281 (1982).

In assault prosecution, trial court erred reversibly in admitting citizen complaint form prepared two weeks after alleged incident in light of fact that complaint form was neither signed by complainant nor was in his handwriting and, did not use complainant's own language or quote him, case was close one and there was greater likelihood that defendant was prejudiced by erroneous admission of exhibit. D.C. Code 1981, § 22-504. *Musgrove v. United States*, 441 A.2d 980, 1982 D.C. App. LEXIS 281 (1982).

Where assault victim was cross-examined as to whether he had informed treating physician that he had been hit in face by a cane or stick, victim's testimony that he remembered telling doctor he had been stomped and kicked on but that he didn't remember telling doctor that he was beaten in face with a stick was not clearly inconsistent with medical history, which defense counsel introduced through testimony of treating physician, that victim was also hit by cane, or stick, of some sort in the face, and that

might have been what victim told physician; thus, refusal to give requested instruction on use of prior inconsistent statements for purpose of impeachment was not prejudicial. D.C. Code § 22-504. *Marksman v. United States*, 275 A.2d 241, 1971 D.C. App. LEXIS 294 (1971).

Where government witness, who was in witness room throughout trial, was there to testify that defendant had made threatening statements against victim prior to assault, testimony which the government asserted in its opening statement would be forthcoming, proper procedure would have been for the government to have called witness to testify in its case in chief rather than as rebuttal witness; however, procedure did not require reversal where prosecutor did not act by design but rather inadvertently and any prejudice was rectified by court's allowing defendants to recall any witness they wished in surrebuttal. D.C. Code § 22-504. *Marksman v. United States*, 275 A.2d 241, 1971 D.C. App. LEXIS 294 (1971).

While testimony as to one defendant interfering with arrest of other defendant and being charged with disorderly conduct may have had no relevance to alleged assault for which defendant was charged, error in its admission was harmless. D.C. Code § 22-504. *Davis v. United States*, 272 A.2d 106, 1971 D.C. App. LEXIS 261 (App. 1971).

Failure of trial judge to sua sponte order continuance when counsel was assigned to represent defendant on date of trial did not constitute error requiring reversal of convictions for attempted petit larceny, assault and carrying a deadly weapon. D.C. Code §§ 22-103, 22-504, 22-3204. *Smith v. United States*, 235 A.2d 574, 1967 D.C. App. LEXIS 207 (App. 1967).

— In general.

Failure to file timely notice of appeal deprived the District of Columbia Court of Appeals of jurisdiction over a direct appeal. D.C. Code §§ 22-504, 22-507; D.C. Code Court of Appeals Rules, rule 27(b). *Hines v. United States*, 237 A.2d 827, 1968 D.C. App. LEXIS 124 (App. 1968).

Defendant who was convicted of indecent assault and whose sentence was suspended with requirement that defendant give his personal recognizance or bond not to repeat the offense could appeal as a matter of right rather than by application for appeal, notwithstanding statute providing that where penalty imposed is less than \$50 review shall be by application. D.C. Code 1951, §§ 11-772(a), 22-504. *Thomas v. U.S.*, 129 A.2d 852, 1957 D.C. App. LEXIS 338 (Cr.App. 1957).

Defendant convicted of indecent assault had a right of appeal notwithstanding that imposition of sentence was suspended and that defendant was required to give his personal recogni-

zance or bond not to repeat the offense. D.C. Code 1951, §§ 11-757, 11-776(b), 22-504. *Thomas v. U.S.*, 129 A.2d 852, 1957 D.C. App. LEXIS 338 (Cr.App. 1957).

— Nonjury or bench trial, review.

In prosecution wherein trial judge, sitting without jury, found that defendant was guilty of simple assault but not guilty of possession of prohibited weapon and wherein trial judge explained that he found victim's testimony concerning assault incredible, it was probable that lenity, rather than confusion, led to defendant's acquittal on the one charge, and his conviction for assault would not be reversed. D.C. Code 1981, §§ 22-504, 22-1211, 22-3214(b). *Haynesworth v. United States*, 473 A.2d 366, 1984 D.C. App. LEXIS 327 (1984).

Where judge hearing case without jury had opportunity visually to inspect knife, which was included in record, and it appeared that blade exceeded requisite length by fraction of inch, denying defense the opportunity to demonstrate in court by measuring instrument that blade was not beyond requisite length was not error even if cutting edge of blade measured less than requisite length. D.C. Code §§ 22-504, 22-3214(b). *McIntyre v. United States*, 283 A.2d 814, 1971 D.C. App. LEXIS 241 (1971).

— Presentation and reservation of grounds for review.

By making general motion at close of all evidence for judgment of acquittal, defendant in prosecution for simple assault preserved for appellate review her claims that misdemeanor simple assault statute did not apply at all to assaults by parents on their own children and that, assuming applicability of statute to such assaults, government was required to prove parent acted with malice in order to overcome "parental discipline" defense; each claim was in reality a challenge to sufficiency of evidence to sustain conviction. *Newby v. United States*, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

Trial court did not commit plain error in stalking prosecution by not sua sponte excluding, as evidence of uncharged criminal conduct, victim's testimony that she was upset when she heard that defendant was calling her friends for her unlisted number because she thought defendant was incarcerated; victim's comment was merely mentioned in passing, the comment contained no further information about the supposed incarceration, and government had a very strong case against defendant. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

There was no error, plain or otherwise, in trial court's not sua sponte excluding, as evidence of uncharged criminal conduct, testimony of government's witness that defendant "didn't come to school regular," as failure to

"come to school regular" was not a crime. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Trial court did not commit plain error in stalking prosecution by not sua sponte excluding, as evidence of uncharged criminal conduct, victim's testimony that defendant slapped her face during a visit to her house; given the strength of the government's case and the weakness of the defense, any possible harm was too trivial to worry about. *Washington v. United States*, 760 A.2d 187, 2000 D.C. App. LEXIS 234 (2000).

Any error for the trial court not to have, sua sponte, declared in prosecution for assault that a deferred sentencing agreement usurped the adjudicative power of the court in violation of the separation of powers doctrine, was not plain error, where defendant, who previously pleaded guilty, was sentenced after the prosecution revoked the agreement after it determined that defendant violated a condition of the agreement. D.C. Code 1981, § 22-504. *Browner v. United States*, 745 A.2d 354, 2000 D.C. App. LEXIS 57 (2000).

Under the plain error standard, defendant's due process rights were not violated, in prosecution for assault, by the revocation of a deferred sentence agreement by the prosecution upon its determination that defendant violated the agreement by committing a subsequent assault, where defendant, after executing the deferred sentencing agreement, readily admitted his guilt with respect to the first assault and never sought to withdraw his guilty plea, defendant did not argue that the court had no authority to sentence him under the agreement, and defendant did not contend that his sentence as to the first assault would have been lighter, or not imposed at all, had the agreement not been terminated without a prior judicial determination of his guilt concerning the second assault. D.C. Code 1981, § 22-504. *Browner v. United States*, 745 A.2d 354, 2000 D.C. App. LEXIS 57 (2000).

Assuming that psychologist's proposed expert testimony on battered woman syndrome (BWS) was subject to Frye standard for admissibility of scientific evidence, defendant could not demonstrate lack of requisite consensus, where defendant made no claim at trial that there were scientists who dissented from BWS methodology, and theory on which defendant relied was presented for first time on appeal. D.C. Code 1981, §§ 22-504, 22-3204(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Defendant was required to demonstrate plain error to prevail on claim that trial judge did not make sufficient inquiry, in domestic

violence prosecution, to determine whether psychologist's proposed testimony on battered woman syndrome (BWS) satisfied *Dyas* requirements for admissibility of expert testimony, where counsel failed to object to basic procedure utilized by judge in determining whether psychologist should be permitted to testify. D.C. Code 1981, §§ 22-504, 22-3204(b); Criminal Rule 52(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Admission of psychologist's expert testimony on battered woman syndrome (BWS) in domestic violence prosecution was not plainly wrong and did not result in or threaten miscarriage of justice; contrary to defendant's thesis, testimony was not "junk science." D.C. Code 1981, §§ 22-504, 22-3204(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Defendant waived claim that convictions for assault with dangerous weapon (ADW) and assault violated double jeopardy clause because civil protection order (CPO) was previously issued against him, where defendant failed to raise defense in trial court. U.S.C. Const. Amend. 5; D.C. Code 1981, § 22-504. *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Trial court's failure, in domestic violence prosecution, to give limiting instruction regarding use of psychologist's expert testimony on battered woman syndrome (BWS) was not plain error, where, on direct examination, psychologist testified that she had not met defendant or victim and that she had no opinion regarding defendant's guilt, and, on cross-examination, defendant elicited from psychologist, even more forcefully, exactly what testimony psychologist did not give. D.C. Code 1981, §§ 22-504, 22-3204(b); Criminal Rules 30, 52(b). *Nixon v. United States*, 728 A.2d 582, 1999 D.C. App. LEXIS 54 (1999), writ of certiorari denied by 528 U.S. 1098, 120 S. Ct. 841, 145 L. Ed. 2d 707, 2000 U.S. LEXIS 465, 68 U.S.L.W. 3432 (2000).

Jury instruction defining simple assault, providing that where complainant is police officer, government must also prove that complainant, at time of assault, was member of police force, operating in District of Columbia, and that at time of acts, defendant knew or had reason to believe complainant was member of police force, engaged in official police duties, was not plain error where jury was instructed to require proof of an additional element not re-

quired to sustain conviction for simple assault, and defendant's chance of acquittal was enhanced by instruction. D.C. Code 1981, § 22-504. *Robinson v. United States*, 649 A.2d 584, 1994 D.C. App. LEXIS 204 (1994).

Jury reinstructions, stating that general right of self-defense was applicable to both offenses of assault on a police officer (APO) and simple assault and that government had to prove beyond a reasonable doubt that defendant had not acted in self-defense, were not plain error where defendant was afforded greater right of self-defense than that to which he was entitled by law. D.C. Code 1981, §§ 22-504, 22-505. *Robinson v. United States*, 649 A.2d 584, 1994 D.C. App. LEXIS 204 (1994).

Under facts of prosecution for assault with dangerous weapon, kidnapping, and other charges, it was not plain error to elicit testimony concerning complainant's fear of a gun or to reiterate this testimony in Government's closing argument even though it was the "pipe," and not the gun, which constituted a dangerous weapon, as evidence, although irrelevant to charge of assault with a dangerous weapon, was relevant to the kidnapping charge, as defendant was acquitted, not convicted, of charges to which questioned testimony was relevant, and as prosecutor made clear in his closing argument that it was the pipe and not the gun which constituted the dangerous weapon. D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In a case involving alleged assault with umbrella with pipe attached, trial court's failure to instruct jury on lesser included offense of simple assault did not constitute "plain error." D.C. Code 1973, §§ 22-502, 22-504. *Williamson v. United States*, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In prosecution in which defendant was convicted of assault with a dangerous weapon and assault, admission of police officer's testimony that bullet fragment was given to him by woman who resided in apartment was not plain error affecting substantial rights. D.C. Code §§ 22-502, 22-504. *Tuckson v. United States*, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

In prosecution in which defendant was convicted of assault with a dangerous weapon and assault, prosecutor's remarks in closing argument regarding the finding of a bullet fragment in apartment into which defendant fled merely drew permissible inferences from evidence presented, and did not rise to the level of plain error. D.C. Code §§ 22-502, 22-504. *Tuckson v. United States*, 364 A.2d 138, 1976 D.C. App. LEXIS 373 (1976).

In prosecution wherein defendant was convicted of assault, there was no plain error in court's instructions to the jury which would

enable defendant to raise error on appeal for the first time. D.C. Code 1951, § 22-504; Municipal Court Rules, Criminal Division, rule 18. *Hale v. U.S.*, 114 A.2d 74, 1955 D.C. App. LEXIS 252 (Cr.App. 1955).

Action of court in finding defendant guilty of assault, without giving defendant's attorney an opportunity to examine defendant on redirect examination or to call defendant's witnesses who had been previously sworn, was reversible error, though no objection was made at the time by defendant's counsel. D.C. Code 1940, § 22-504. *Varrella v. U.S.*, 64 A.2d 310, 1949 D.C. App. LEXIS 156 (Cr.App. 1949).

Right to trial by jury.

The trial court's failure to sua sponte empanel a jury for defendant's simple assault trial, since a conviction would subject defendant to deportation under federal immigration law, did not constitute plain error; simple assault was not a jury-demandable offense, and the collateral consequence of deportation did not transform the petty offense of simple assault to a serious offense. *Fretes-Zarate v. United States*, 40 A.3d 374, 2012 D.C. App. LEXIS 136 (2012).

Defendants were not entitled to jury trial, in prosecution for assault; facts showed violation of two statutes, which were simple assault and assault on a police officer; prosecution could elect to charge defendants under either statute, and prosecution elected to charge defendants with non-jury demandable simple assault offense. *Gatlin v. United States*, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

A person charged with simple assault, a misdemeanor with a maximum penalty of 180 days in jail, is not entitled to a jury trial. *York v. United States*, 785 A.2d 651, 2001 D.C. App. LEXIS 234 (2001).

Possibility that defendant might lose his job as a police officer did not convert petty crime of simple assault into a "serious crime" that entitled defendant to jury trial; termination did not follow automatically upon conviction of assault. *Smith v. United States*, 768 A.2d 577, 2001 D.C. App. LEXIS 52 (2001).

Simple assault is not serious crime, such that defendant would have right to jury trial, on basis that assault was jury triable at common law; relevant statute supersedes common law. U.S. Const. Art. 3, § 2, cl. 3; Amend. 6; D.C. Code 1981, §§ 22-504, 49-301. *Day v. United States*, 682 A.2d 1125, 1996 D.C. App. LEXIS 184 (1996), writ of certiorari denied by 520 U.S. 1170, 117 S. Ct. 1435, 137 L. Ed. 2d 542, 1997 U.S. LEXIS 2284, 65 U.S.L.W. 3692 (1997).

Neither assault nor destruction of property were "serious crimes" which entitled defendant to a jury trial under Sixth Amendment, where District of Columbia legislature had reduced the crimes to petty offenses. D.C. Code 1981,

§§ 22-403, 22-504(a). *Burgess v. United States*, 681 A.2d 1090, 1996 D.C. App. LEXIS 307 (1996).

Without a showing of an intentional and systematic exclusion of some recognizable group from the jury panel, defendant had no right to complain of the composition of the particular panel assigned for his assault case. D.C. Code § 22-504; 18 U.S.C. § 1861 et seq. *Medina v. United States*, 315 A.2d 169, 1974 D.C. App. LEXIS 366 (1974).

The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Search and seizure.

Office of courier company by which defendant was employed was open to those who walked in, as arresting officer did, and, thus, defendant did not have expectation of privacy in open office in which arresting officer seized defendant's motorcycle helmet. D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Trial court was plainly wrong in finding that Government had not carried its burden to affirmatively prove that arrestee's second statement and all subsequently obtained evidence, upon which Government proposed to prosecute police officer for assaulting arrestee and obstruction of justice, were derived from legitimate source wholly independent of officer's compelled immunized testimony given during administrative police investigation, and thus error occurred in suppressing such evidence. D.C. Code 1973, §§ 17-305(a), 22-504, 22-703; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Government had met its burden at suppression hearing of establishing that arrestee's second statement and all subsequently obtained evidence, upon which Government proposed to prosecute police officer for assaulting arrestee and obstruction of justice, were derived from Government's independent knowledge of arrestee's identity and not from officer's compelled immunized testimony given during administrative police investigation, and thus error occurred in suppressing such evidence. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

In finding that government had sustained its burden at suppression hearing of establishing that its evidence was obtained independently of police officer's compelled immunized testimony given during administrative police investigation of incident in which officer allegedly deliberately kicked handcuffed arrestee in stomach

while he was laying on ground, and concerning which officer was subsequently charged with assault and obstruction of justice, Court of Appeals noted that there was nothing to suggest that government needed officer's compelled testimony to help make out its case, even though at time such testimony was given, government did not yet have knowledge of incriminating evidence, but only of its source, arrestee. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Trial court, which had suppressed arrestee's second statement and all subsequently obtained evidence, upon which Government proposed to prosecute police officer for assaulting arrestee and obstruction of justice, as having been derived from officer's compelled immunized testimony given during administrative police investigation, incorrectly found that there was no evidence that police investigators were going to go back to arrestee under any circumstances, given investigator's testimony that he would have made inquiries on arrestee's first statement that assault was accidental, regardless of whether he had officer's compelled testimony. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Trial court, which had suppressed arrestee's second statement and all subsequently obtained evidence, upon which Government proposed to prosecute police officer for assaulting arrestee and obstruction of justice, as having been derived from officer's compelled immunized testimony given during administrative police investigation, incorrectly concluded that compelled testimony was impermissibly used in decision to prosecute. D.C. Code 1973, § 22-504; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Police, who had learned of armed assault committed by accused, and who, before entering accused's apartment, heard close of squeaky door, were entitled to make an arrest and effect a limited search for weapons incident thereto and for their own safety, and .38 revolver found in stove which was readily accessible to the three people in the room was admissible against the accused, subsequently identified by the victim, even though the accused was a functional cripple and was not arrested until the pistol had been seized. D.C. Code §§ 22-504, 22-3214(b); U.S. Const. Amend. 4. *United States v. Simpson*, 330 A.2d 756, 1975 D.C. App. LEXIS 305 (1975).

Speedy trial rights.

Dismissal of assault charge because of 22-month delay between arrest and trial date was

not error in view of assertion of faded memories of eye witnesses and anxiety on part of defendant, who felt that police had a vendetta against him and moved his business from the area. D.C. Code § 22-504; U.S. Const. Amend. 6. *United States v. Ellis*, 408 A.2d 971, 1979 D.C. App. LEXIS 494 (1979).

Validity.

Stalking statute which criminalized certain conduct, such as harassing, that could in certain situations include speech was not substantially overbroad in light of its legitimate purpose; harassing did not rise to level of criminality until it was undertaken "willfully, maliciously, and repeatedly," harassing had to be engaged in with intent to cause emotional distress or to place another person in reasonable fear of death or bodily injury, and statute stated that constitutionally protected activity was not included within meaning of statute. U.S. Const. Amend. 1; D.C. Code 1981, § 22-504. *United States v. Smith*, 685 A.2d 380, 1996 D.C. App. LEXIS 233 (1996), writ of certiorari denied by 522 U.S. 856, 118 S. Ct. 152, 139 L. Ed. 2d 98, 1997 U.S. LEXIS 5273, 66 U.S.L.W. 3258 (1997).

Stalking statute was not overbroad as applied to defendant; while certain of defendant's actions could have appeared to be constitutionally protected when viewed separately, when such activities were repeated and combined with criminal intent necessary to violate stalking statute, they were no longer protected. D.C. Code 1981, § 22-504. *United States v. Smith*, 685 A.2d 380, 1996 D.C. App. LEXIS 233 (1996), writ of certiorari denied by 522 U.S. 856, 118 S. Ct. 152, 139 L. Ed. 2d 98, 1997 U.S. LEXIS 5273, 66 U.S.L.W. 3258 (1997).

Felony-assault statute, which requires "significant bodily injury," defined as an "injury that requires hospitalization or immediate medical attention," is not void for vagueness and does not violate due process. In the Matter of R.P., 136 WLR 549 (Super. Ct. 2008).

Verdict.

A defendant charged with assault may be convicted of that offense even though the evidence establishes that he or she committed an actual battery. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Jury did not necessarily find that defendant intended to frighten victim, which was element of intent-to-frighten assault, by finding defendant guilty of possession of prohibited weapon with intent to use it unlawfully. D.C. Code 1981, §§ 22-504, 22-3214(b). *McGee v. United States*, 533 A.2d 1268, 1987 D.C. App. LEXIS 494 (1987).

Acquittal of codefendant did not void defendant's conviction of obstructing justice and simple assault. D.C. Code §§ 22-504, 22-703. *Hall*

v. United States, 343 A.2d 35, 1975 D.C. App. LEXIS 428 (1975).

Where there was evidence that defendant not only struck officer with nightstick but also hit him and engaged in general scuffling, finding that defendant was not guilty of charge involving possession of nightstick did not preclude conviction on charge of simple assault. D.C. Code §§ 22-504, 22-3214(b). *Matthews v. United States*, 267 A.2d 826, 1970 D.C. App. LEXIS 316 (App. 1970), writ of certiorari denied by 404 U.S. 884, 92 S. Ct. 221, 30 L. Ed. 2d 166, 1971 U.S. LEXIS 820 (1971).

Weight and sufficiency of evidence.

— In general.

Testimony of complaining witness in prosecution for assault was sufficiently corroborated. D.C. Code 1951, § 22-504. *Konvalinka v. U.S.*, 287 F.2d 346, 1961 U.S. App. LEXIS 5475 (C.A.D.C. 1961).

Great caution should be applied in considering testimony of arresting officer in cases where alleged assault is nonviolent sexual touching which by its nature left no traces and to which there were no other witnesses. D.C. Code 1951, §§ 22-504, 22-1112, 22-2701. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Evidence in support of claimed nonviolent sexual touching was not sufficient to support conviction under general assault statute. D.C. Code 1951, § 22-504. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Trial court's disagreement with prosecutor's belief that it lacked sufficient evidence to support charge for simple assault, as justification for dismissing case, impermissibly intruded on prosecutor's executive authority to determine whether to prosecute case or not. *Ferrell v. United States*, 990 A.2d 1015, 2010 D.C. App. LEXIS 137 (2010).

Evidence was sufficient to support conviction for assault; trial court credited the testimony of victim, which was corroborated by the cut on her thumb and the police officer's recovery of the knife from the crime scene, and trial court also discredited defendant's version of events, which provided the only support for her claim of self-defense. *Davis v. United States*, 984 A.2d 1255, 2009 D.C. App. LEXIS 639 (2009).

Conviction for simple assault was supported by evidence that defendant entered his wife's car unbidden during a heated conversation, that wife flipped open her mobile telephone to make a call, that defendant grabbed and broke phone's fliptop in attempt to stop her, and that circumstances of the encounter made defendant's actions seem particularly threatening. *Watson v. United States*, 979 A.2d 1254, 2009 D.C. App. LEXIS 452 (2009).

Evidence was sufficient to show that defendant came into contact with victim, so as to support a conviction for assault; victim testified that defendant pushed him, and a detective testified to having seen defendant push victim. *Dunn v. United States*, 976 A.2d 217, 2009 D.C. App. LEXIS 258 (2009).

Evidence was sufficient to support assault conviction; evidence showed that two police officers saw the bleeding laceration on the victim's face and heard him accuse defendant of cutting him, officers heard defendant make statements which appeared to be an attempt to explain her reasons for injuring victim, and defendant readily admitted that she cut victim when she swung her arm in his direction. *Long v. United States*, 940 A.2d 87, 2007 D.C. App. LEXIS 667 (2007), amended by 2008 D.C. App. LEXIS 88 (D.C. Feb. 28, 2008).

Evidence was sufficient to support conviction for assault; defendant admitted that he "smacked the stem out of [the victim's] mouth," victim identified defendant as her assailant, and the state admitted seven photographs that depicted the victim's injuries. *Lewis v. United States*, 938 A.2d 771, 2007 D.C. App. LEXIS 702 (2007).

Evidence was insufficient to disprove defendant's parental discipline defense, in prosecution for simple assault; defendant prohibited his 16-year-old daughter from leaving residence, when daughter disobeyed defendant, he sought to enforce his command that she not leave by restraining her, there was sparse evidence as to how and when daughter's injuries were sustained during course of the extended altercation with defendant, and, while government offered some evidence to rebut the defense, it was based on an abbreviated set of facts and framed within erroneous legal argument that in order for parental discipline to be reasonable, it must have been applied only in reaction to imminent danger. *Powell v. United States*, 916 A.2d 890, 2006 D.C. App. LEXIS 643 (2006).

Evidence was sufficient to support convictions for attempted threats to do bodily harm and intent-to-frighten assault; police officer testified that after he asked defendant to move his vehicle from an area in front of the night club, defendant exited his vehicle, with an angry look on his face, reached into his front jacket pocket and used cuss words to state a threat. *Joiner-Die v. United States*, 899 A.2d 762, 2006 D.C. App. LEXIS 218 (2006).

Attempted-battery assault requires proof of an attempt to cause a physical injury, which may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person. *Williams v. United States*,

887 A.2d 1000, 2005 D.C. App. LEXIS 644 (2005).

Evidence was sufficient to support conviction for simple assault; victim testified that after altercation between her and defendant had ended, defendant ran up to her and hit her in head with flip-flop sandal, and victim's brother testified that bystander was restraining victim in attempt to end fight when defendant hit victim with flip-flop. *Stroman v. United States*, 878 A.2d 1241, 2005 D.C. App. LEXIS 376 (2005).

Evidence supported conviction for assault; victim testified that defendant reached over the police officers and punched him in his shoulder area with fist. *Gatlin v. United States*, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

Evidence supported conclusions that force used by parent in striking sixteen-year-old daughter with a wooden dowel exceeded limits of reasonableness as discipline for not attending child's day-care luncheon and that privilege of parental discipline was not satisfied as defense to simple assault or attempted cruelty to children; although the child had a history of poor behavior, the beating warranted trip to emergency room, and judge as fact-finder heard physician's testimony and viewed photographs of the injuries. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Evidence was sufficient to support defendant's conviction for simple assault; police officer who responded to the scene testified that defendant matched the description given to police dispatcher, that defendant stated that he headbutted victim, and that victim had injuries to her lower lip, was crying, and had a shaky voice. *Jones v. United States*, 829 A.2d 464, 2003 D.C. App. LEXIS 472 (2003).

Sufficient evidence supported defendant's assault convictions; six year old victim testified that defendant held his hands behind his back and told his classmates to hit him, two students and a teacher's aide corroborated his story, and school principal testified that defendant admitted the incident to him. *York v. United States*, 803 A.2d 1009, 2002 D.C. App. LEXIS 392 (2002).

That the jury might have thought the evidence insufficient to convict on the felony charge of second degree cruelty to a child, which requires "a grave risk of bodily injury to a child," did not make its verdict acquitting defendant inconsistent with the finding of misdemeanor assault by the trial judge, which was supported by sufficient evidence. *York v. United States*, 803 A.2d 1009, 2002 D.C. App. LEXIS 392 (2002).

Conviction for simple assault was sufficiently supported by evidence that defendant touched victims' breasts, buttocks, and vaginal areas with spray can. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Evidence was sufficient to prove beyond reasonable doubt that assault defendant was not acting in self-defense when he sprayed criminal complainant with pepper spray, as evidence showed that defendant provoked incident, and trial court did not credit defendant's testimony that complainant threatened to beat him. D.C. Code 1981, § 22-504. *Snell v. United States*, 754 A.2d 289, 2000 D.C. App. LEXIS 111 (2000).

Defendant's conviction for simple assault was supported by evidence that defendant struck police officer with his left elbow when officer was attempting to place defendant's hand in handcuff and that defendant was hostile to officer after defendant struck officer. D.C. Code 1981, § 22-504. *Macklin v. United States*, 733 A.2d 962, 1999 D.C. App. LEXIS 149 (1999).

Evidence was sufficient to support defendant's conviction for assaulting officer of Metropolitan Transit Authority (MTA), and, thus, there was no bar to new trial following determination that trial court erred in denying defendant's request for self-defense instruction, where police officer testified that fight began when defendant started swinging bottle at him after officer justifiably pulled defendant off bus, even though defendant testified that, without any provocation whatsoever, officer tackled him from behind and wrestled him down, and that defendant struggled with officer only after officer had him on ground with officer's knee between defendant's shoulder blades. D.C. Code 1981, § 22-504. *Wilson v. United States*, 673 A.2d 670, 1996 D.C. App. LEXIS 58 (1996).

Evidence in assault prosecution was sufficient to establish that defendant committed an act which constituted assault and had necessary criminal intent; evidence indicated that the defendant initiated conversation with complainant and instructed him to "get out of here" while approaching complainant with a knife. D.C. Code 1981, § 22-504. *Mihav v. United States*, 618 A.2d 197, 1992 D.C. App. LEXIS 341 (1992).

Evidence was sufficient to sustain conviction for simple assault; all witnesses identified motorcycle used by defendant from photographs, two complainants knew license plate which traced it to defendant; one witness positively identified defendant as person who committed offense against her, and other complaining witnesses gave descriptions of their assailant consistent with defendant's appearance. D.C. Code 1981, § 22-504. *Cantizano v. United States*, 614 A.2d 870, 1992 D.C. App. LEXIS 266 (1992).

Evidence that defendant, a police officer, struck handcuffed burglary suspect during course of escorting detainee to and placing him in police transport vehicle was sufficient to sustain conviction of simple assault. D.C. Code 1981, § 22-504. *Annetti v. United States*, 600 A.2d 387, 1991 D.C. App. LEXIS 337 (1991).

Assault conviction was sufficiently supported by evidence that arrestee spat in officer's face. D.C. Code 1981, § 22-504. *Ray v. United States*, 575 A.2d 1196, 1990 D.C. App. LEXIS 134 (1990).

Evidence was insufficient to sustain defendant's conviction of assault, where jury was instructed only on theory of attempted-battery assault, and Government presented no evidence that defendant displayed handgun in attempt to harm anyone or that he either fired handgun or attempted to fire it. D.C. Code 1981, § 22-504. *McGee v. United States*, 533 A.2d 1268, 1987 D.C. App. LEXIS 494 (1987).

While Government's case was not strong, evidence presented against defendant met threshold requirement for withstanding a motion for judgment of acquittal on assault charge. D.C. Code 1981, § 22-504. *Musgrove v. United States*, 441 A.2d 980, 1982 D.C. App. LEXIS 281 (1982).

Corroboration was not required to sustain conviction of male for simple assault upon 12-year-old girl, although element of force and violence necessary to conviction was supplied by sexual nature of the act. D.C. Code § 22-504. *In re G.*, 396 A.2d 981, 1979 D.C. App. LEXIS 285 (1979).

Evidence, including police officer's testimony that two accused, who were off duty police officers, approached while such officer held victim on ground and that officer could "feel punches being thrown" and another officer's testimony that victim was beaten when third accused, who was also off duty police officer, gave assurances that there was no need for the other officer's services was sufficient to sustain first accused's conviction of two counts of simple assault, second accused's conviction of one count of simple assault and third accused's conviction of aiding and abetting commission of simple assault and obstruction of justice. D.C. Code §§ 4-176, 22-504, 22-703. *Womack v. United States*, 350 A.2d 381, 1976 D.C. App. LEXIS 453 (1976).

Evidence did not sustain holding that juvenile, who told 13-year-old complainant that juvenile and another would kill him or get someone else to "jump him" if he did not go through broken window and remove certain items from ground-floor apartment and who later received money which the complainant obtained after being made to sell the items, threatened complainant in a menacing manner within meaning of statute proscribing assault or threatened assault in a menacing manner. D.C. Code § 22-504. *In re D. W. J.*, 293 A.2d 268, 1972 D.C. App. LEXIS 213 (1972).

Evidence, including eyewitness testimony by two police officers that defendant bumped into complaining witness and stealthily removed wallet from her handbag, that he quickly passed wallet to an accomplice, who hurried

from scene, and that victim of crime reacted in an emotional manner on discovering her loss, was sufficient to support convictions of petit larceny and of assault. D.C. Code §§ 22-504, 22-2202. *Riley v. United States*, 291 A.2d 190, 1972 D.C. App. LEXIS 396 (1972).

Evidence supported conviction of assault, public intoxication and disorderly conduct in violation of District of Columbia Code. D.C. Code §§ 22-504, 22-1107, 25-128. *Dempsey v. United States*, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Evidence that heavy bag of coins was taken from victim's hand supported a finding of an interference with person of another sufficient to constitute an assault. D.C. Code § 22-504. *Mahoney v. United States*, 243 A.2d 684, 1968 D.C. App. LEXIS 173 (App. 1968).

Evidence sustained defendant's conviction for disorderly conduct and simple assault. D.C. Code 1961, §§ 22-504, 22-1107. *Duncan v. United States*, 219 A.2d 110, 1966 D.C. App. LEXIS 166 (App. 1966), remanded by 379 F.2d 148, 126 U.S. App. D.C. 371, 1967 U.S. App. LEXIS 6334 (1967).

Evidence supported conviction of appealing defendants of assault and of attempted petit larceny, since court could conclude that defendants were associated with principal offender in the venture and made a conscious effort to help it succeed. D.C. Code 1961, §§ 11-776(b), 22-105, 22-504, 22-2202. *Williams v. United States*, 190 A.2d 269, 1963 D.C. App. LEXIS 222 (App. 1963).

Evidence sustained conviction for assault. D.C. Code 1961, § 22-504. *Williams v. United States*, 190 A.2d 269, 1963 D.C. App. LEXIS 222 (App. 1963).

Evidence supported conviction of defendant, who at no time struck or pushed assault victim during altercation between victim, defendant and two others, and who could not be said by victim to have joined the other two in searching victim's pockets, for assault either on theory that concert of action by defendant and the other two threatened or menaced the victim or that defendant aided and abetted the other two. D.C. Code 1951, §§ 22-105, 22-504. *Rogers v. U.S.*, 174 A.2d 356, 1961 D.C. App. LEXIS 324 (Cr.App. 1961).

In prosecution for assault of a homosexual nature upon a child, child's accusation against defendant must be treated with great caution and government's proof must be of the most convincing kind. D.C. Code 1951, § 22-504. *Konvalinka v. U.S.*, 162 A.2d 778, 1960 D.C. App. LEXIS 230 (Cr.App. 1960).

Evidence sustained conviction for assault. D.C. Code 1951, § 22-504. *Hensley v. U.S.*, 155 A.2d 77, 1959 D.C. App. LEXIS 314 (Cr.App. 1959).

Evidence did not sustain conviction for indecent assault upon a police officer. D.C. Code

1951, § 22-504. *Thomas v. U.S.*, 129 A.2d 852, 1957 D.C. App. LEXIS 338 (Cr.App. 1957).

Evidence sustained conviction for assault. D.C. Code 1951, 22-504. *Goodman v. U.S.*, 118 A.2d 517, 1955 D.C. App. LEXIS 269 (Cr.App. 1955).

Assault conviction, predicated upon homosexual overture, was sustained. D.C. Code 1951, § 22-504. *Henderson v. U.S.*, 117 A.2d 456, 1955 D.C. App. LEXIS 218 (Cr.App. 1955).

Evidence was sufficient to sustain conviction for assault. D.C. Code 1951, § 22-504. *Ingram v. U.S.*, 110 A.2d 693, 1955 D.C. App. LEXIS 158 (Cr.App. 1955).

Testimony of complaining witness in prosecution for assault need not be corroborated. D.C. Code 1951, § 22-504. *Ingram v. U.S.*, 110 A.2d 693, 1955 D.C. App. LEXIS 158 (Cr.App. 1955).

Evidence showed that victim suffered injuries that required "hospitalization or immediate medical attention" within the meaning of the felony-assault statute's definition of "significant bodily injury"; juvenile used his closed fists to repeatedly punch victim in his face, victim suffered a fractured nose, contusions and abrasions to his face, a painful shoulder injury, and a deep cut or gash to his nose, victim bled profusely from his nose and had trouble breathing, paramedics examined victim and decided to take him to a hospital for immediate medical attention, and victim was diagnosed and treated at the hospital. In the *Matter of R.P.*, 136 WLR 549 (Super. Ct. 2008).

— Obstructing justice, weight and sufficiency of evidence.

Evidence in prosecution for obstructing justice and simple assault was sufficient to support a finding that alleged assault was intended to prevent further cooperation of the complaining witness in a criminal case. D.C. Code §§ 22-504, 22-703. *Hall v. United States*, 343 A.2d 35, 1975 D.C. App. LEXIS 428 (1975).

— Sentence and punishment, weight and sufficiency of evidence.

The rule of lenity did not require the imposition of concurrent sentences for defendant's convictions for simple assault and attempted second-degree child cruelty; offenses were distinct and did not merge for sentencing purpose, and statute provided for consecutive sentences for two or more offense that arose out of a single criminal act. *Bradley v. United States*, 856 A.2d 1157, 2004 D.C. App. LEXIS 434 (2004), writ of certiorari denied by 545 U.S. 1121, 125 S. Ct. 2923, 162 L. Ed. 2d 307, 2005 U.S. LEXIS 4785, 73 U.S.L.W. 3719 (2005).

— Weapons, weight and sufficiency of evidence.

Any noncompliance with procedural rules in connection with delayed production of an allegedly exculpatory recording of a 911 call made

from the scene was harmless in juvenile proceeding on charge of felony assault; trial court as the finder of fact made it clear that the failure to mention guns during the call would not be dispositive and was not that important or prejudicial, and the denial of the need for an ambulance did not control the existence of a "significant bodily injury." In re R.S., 6 A.3d 854, 2010 D.C. App. LEXIS 605 (2010).

Evidence was sufficient to support conviction for aggravated assault while armed (AAWA); victim testified that defendant stabbed him with a knife in his abdomen and chest, and, according to physician who treated victim, injuries caused by stabbing were life threatening. Tolbert v. United States, 905 A.2d 186, 2006 D.C. App. LEXIS 435 (2006).

Defendant's mere display of knife in order to allegedly deter onrushing attacker did not constitute excessive use of deadly force as matter of law, for purposes of defendant's claim that he acted in self-defense, in trial for simple assault and attempted possession of prohibited weapon. Douglas v. United States, 859 A.2d 641, 2004 D.C. App. LEXIS 460 (2004).

Defendant's conviction for assault with a deadly weapon was required to be reduced to simple assault, where there was no evidence that defendant struck victim with any sort of weapon and witness did not see what object, if any, defendant might have used to strike victim. Bailey v. United States, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Evidence was sufficient to sustain conviction for carrying a pistol without a license arising from incident in which defendant, a security guard who did not have license to carry pistol, deviated from traveling to work to threaten complaining witness with gun. D.C. Code 1981,

§§ 22-504, 22-3204. Shivers v. United States, 533 A.2d 258, 1987 D.C. App. LEXIS 484 (1987).

There was sufficient evidence before the jury to prove beyond a reasonable doubt the elements of simple assault, where defendant stood 30 or 40 yards away from police officer and pointed a gun at him, which was later found to contain live ammunition. D.C. Code 1981, § 22-504. Robinson v. United States, 506 A.2d 572, 1986 D.C. App. LEXIS 507 (1986).

For government to prove assault with dangerous weapon, it must prove elements of simple assault plus crucial fourth element, that defendant committed an assault with a dangerous weapon and to sustain conviction, government must prove each of these elements beyond a reasonable doubt. D.C. Code 1973, §§ 22-502, 22-504. Williamson v. United States, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In prosecution for assault with a dangerous weapon, government does not have to prove an attempted battery in every case where an assault is not committed with weapon that is dangerous "per se"; thus, appropriate inquiry for jury is, as it has been in the past: did defendant commit assault, that is, was his threatening act coupled with an apparent ability to injure the victim, and did he commit that assault with a dangerous weapon. D.C. Code 1973, §§ 22-502, 22-504. Williamson v. United States, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

In prosecution for aggravated assault, fact that Government did not introduce extra testimony concerning seriousness of the injuries that weapon, i.e., umbrella with pipe attached, could inflict would not preclude jury from reasonably concluding that weapon which was exhibited in court was "dangerous." D.C. Code 1973, §§ 22-502, 22-504. Williamson v. United States, 445 A.2d 975, 1982 D.C. App. LEXIS 354 (1982).

§ 22-404.01. Aggravated assault.

(a) A person commits the offense of aggravated assault if:

(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or

(2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.

(b) Any person convicted of aggravated assault shall be fined not more than \$10,000 or be imprisoned for not more than 10 years, or both.

(c) Any person convicted of attempted aggravated assault shall be fined not more than \$5,000 or be imprisoned for not more than 5 years, or both.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 806a, as added Aug. 20, 1994, D.C. Law 10-151, § 202, 41 DCR 2608.)

Prior Codifications. — 1981 Ed., § 22-504.1.

Emergency legislation. — For temporary addition of section, see § 202 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in

Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Comments of counsel.
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Double jeopardy.
Extreme physical pain.
Instructions.
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Pleas.
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Remand.
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Weight and sufficiency of evidence.

Admissibility of evidence.

Defendant's failure to object to trial court's failure to strike, *sua sponte*, government's allegedly self-vouching statements during its cross-examination of defendant's wife about whether law enforcement, during its investigation, had asked her whether she had any information that would help defendant rendered the issue subject to review for plain error on appeal, in prosecution for assault with intent to kill while armed, aggravated assault while armed, possession of a firearm during a crime of violence, carrying a pistol without a license, and malicious destruction of property. *Shelton v. United States*, 26 A.3d 216, 2009 D.C. App. LEXIS 752 (2011).

Error, under the Confrontation Clause, in admitting victim's hearsay testimonial statements to police officers at fire station and hospital after the stabbing was not harmless beyond a reasonable doubt, in prosecution for assault, though it was undisputed that defendant had stabbed the victim; defendant claimed that he stabbed the victim in self-defense after grabbing knife from victim, but victim's hear-

say statements to police indicated that the stabbing was without provocation and a witness testified that it was defendant, not victim, who was armed with a knife, and two notes from jury asked whether ownership of knife was relevant to assault charges, suggesting that at least one juror might have thought defendant was not armed. *Zanders v. United States*, 999 A.2d 149, 2010 D.C. App. LEXIS 408 (2010).

Trial judge's error during bench trial in excluding proposed testimony of defense witness, due to judge's anticipatory assessment that witness was not credible, was not harmless beyond a reasonable doubt in delinquency proceeding; it was understandable that minor witness would lie to judge when challenged about what she herself had said outside courtroom, but it did not necessarily follow that witness would lie under oath when giving testimony as a fact witness about actions of others, witness's proposed testimony did not reflect evidentiary decision on merely collateral matter or issue on which there already had been ample cross-examination, and judge already knew that witness's proposed testimony would be exculpatory, giving juvenile's counsel little incentive to make proffer of witness's testimony. *In re D.E.*, 991 A.2d 1205, 2010 D.C. App. LEXIS 148 (2010).

Corroborating circumstances did not clearly indicate the trustworthiness of an alleged statement of a third party that he shot victim, and thus the statement was not admissible as a declaration against penal interest; third party made the statement eight months after the shooting and to defendant's counsel, who was not a close friend or relative, third party had a motive to provide a false confession given his friendship with defendant and his belief that defendant's counsel would not tell anyone about his confession, and, *inter alia*, third party gave varying accounts of the shooting. *Ingram v. United States*, 976 A.2d 180, 2009 D.C. App. LEXIS 263 (2009).

Other crimes evidence about the bags of suspected marijuana which the police recovered from defendant's person and from his car's console, next to the gun, more than six weeks after the shooting of victim was admissible in prosecution of defendant for aggravated assault while armed (AAWA) and related firearms offenses; bags directly connected defendant to the gun that was found in the console of the car he was driving at the time of his arrest, and that gun was later linked to the shooting of victim through ballistics evidence which confirmed that the bullet taken from victim's foot was fired from the gun found in the console of the car, and the degree of prejudice that defendant might face if jury concluded that he also possessed drugs was minimal. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

Trial judge's error in barring the shooter-identification portion of putative eyewitness's excited utterance, on grounds that the eyewitness was not available for cross-examination, was not harmless, during prosecution for aggravated assault while armed; eyewitness's hearsay statement identified someone else as the shooter, the government's case against defendant was less than overwhelming, and, before it finally found defendant guilty, the jury deliberated for four days and sent three notes, one after receiving an anti-deadlock instruction, stating that it was unable to reach a unanimous verdict. *Simmons v. United States*, 945 A.2d 1183, 2008 D.C. App. LEXIS 122 (2008).

Although trial judge did not abuse his discretion in finding that putative eyewitness's hearsay statements were admissible as an excited utterance, during prosecution for aggravated assault while armed, judge erred as a matter of law in barring the shooter-identification portion of that excited utterance because the declarant was not available for cross-examination; judge's hypothesized possibilities, that the putative eyewitness might have been intoxicated or otherwise impaired, or biased in defendant's favor, would not justify excluding the man's excited utterance, even if they were true. *Simmons v. United States*, 945 A.2d 1183, 2008 D.C. App. LEXIS 122 (2008).

Trial judge did not abuse his discretion in finding that putative eyewitness's hearsay statements were admissible as an excited utterance, during prosecution for aggravated assault while armed; witness described the elderly eyewitness as being in a state of considerable distress, pacing back and forth, mumbling to himself, and looking and acting so patently "scared and upset" that she was moved to ask this total stranger whether he was "okay," the shooting of victim in the head certainly was a serious enough occurrence to excite and shock an elderly bystander, witness

came upon the elderly eyewitness at the scene of the shooting only minutes after it happened, and the totality of the circumstances reasonably suggested that the elderly declarant's remarks were a spontaneous reaction to the exciting event, rather than the result of reflective thought. *Simmons v. United States*, 945 A.2d 1183, 2008 D.C. App. LEXIS 122 (2008).

Message complainant left on defendant's answering machine in which she complained about having to pay for damage she caused to defendant's car when she threw brick at it was not relevant, in trial for aggravated assault, to show that defendant did not work and was "sponging off" complainant. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

Exclusion of complainant's message left on defendant's answering machine in which she commented about defendant's sexual relationships with other women and said that he "think[s] with [his] head in [his] pants," was not abuse of discretion, in trial for aggravated assault; even assuming message was relevant to impeach victim's testimony that she was not jealous, and had motive to fabricate charges, message was cumulative of other message that trial court determined was admissible to impeach same testimony and evidence that she had thrown brick through his car window when he refused to hang up while talking to another girlfriend. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

Trial court had discretion to allow defendant to introduce otherwise inadmissible exculpatory hearsay in order to remedy a perceived Brady violation that impeded defendant from presenting the declarant's exculpatory testimony at trial, in prosecution for aggravated assault while armed (AAWA) and other offenses. *Odum v. United States*, 930 A.2d 157, 2007 D.C. App. LEXIS 396 (2007).

Evidence of uncharged prior threats and assaultive conduct that victim testified defendant had committed against her was admissible under motive exceptions to general rule precluding admission of evidence of uncharged crimes against accused, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); defendant's threats and assaultive conduct toward victim during month preceding offenses charged, in an unsuccessful attempt to coerce her into continuing their relationship, was indicative of defendant's motive to engage in assaultive conduct against victim that formed basis for charges. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Probative value of evidence of uncharged prior threats and assaultive conduct that victim testified defendant had committed against her outweighed its prejudicial effect, in prose-

cution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW). *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

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Evidence of complainant's past acts of violence to show the reasonableness of the defendant's fear of the complainant, in addition to reputation evidence for that purpose, were admissible in prosecution for aggravated assault while armed. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Evidence of victim's reputation for violence to prove she was the first aggressor was inadmissible in prosecution for aggravated assault while armed. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Except in homicide cases (where the person alleged to have been the aggressor is unavailable for questioning), neither evidence of the victim's prior violent acts nor evidence of reputation for violence can be admitted for the purpose of proving that the victim was the first aggressor. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Evidence of the defendant's knowledge of the victim's reputation for violence is admissible to support a self-defense claim, because it tends to support the contention that the accused acted from an honest and reasonable apprehension of imminent bodily harm because of the information imparted to him about the complainant. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

To support a self-defense claim, the accused may show prior acts of violence committed by the victim about which the accused knew, because such evidence is relevant to the reasonableness of the accused's fear of the victim. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Officer's testimony regarding a nontestifying eyewitness's statement that she saw defendant stab victim was not offered to prove the truth of the matter asserted and was not hearsay in assault prosecution. *Anderson v. United States*,

857 A.2d 451, 2004 D.C. App. LEXIS 425 (2004).

Prosecution's reference to defendant's testimony regarding evidence of crime for which defendant was not on trial, for the purpose of attacking defendant's credibility, was proper in assault prosecution; defendant's testimony was already before jury without objection, defendant's testimony that he "did not recall" stabbing someone in an earlier incident was relevant to defendant's credibility on his claim of self-defense in assault case, jury was instructed that government's questions were not evidence, and jury was instructed that it could not convict defendant for any bad acts he had committed in the past. *Anderson v. United States*, 857 A.2d 451, 2004 D.C. App. LEXIS 425 (2004).

Any error in admission of 911 tape on grounds that caller did not have personal knowledge of statement was harmless error in assault prosecution; defendant knew in advance of discrepancy between statement and caller's grand jury testimony, caller was present at trial and was fully cross-examined, caller admitted on 911 tape that she did not see the assault, defendant admitted to conduct referred to on tape, and victim testified as to what occurred. *Anderson v. United States*, 857 A.2d 451, 2004 D.C. App. LEXIS 425 (2004).

Probative value of evidence of officer's testimony regarding witness's adoption of another eyewitness's account was not substantially outweighed by danger of unfair prejudice in assault prosecution; questioning was to rehabilitate government's witness, the other eyewitness was barely mentioned, government cut off any additional testimony regarding other eyewitness, and government did not refer to other eyewitness in its subsequent arguments. *Anderson v. United States*, 857 A.2d 451, 2004 D.C. App. LEXIS 425 (2004).

The trial court's restriction of defense counsel's closing argument to prevent counsel from referring to what occurred during grand jury proceedings was not an abuse of discretion, during prosecution for aggravated assault while armed; evidence concerning the procedure of the grand jury was not in evidence. *Haley v. United States*, 799 A.2d 1201, 2002 D.C. App. LEXIS 312 (2002).

Trial court followed the correct course of action, in prosecution for aggravated assault while armed and assault with a dangerous weapon, when it prevented a recalcitrant witness from being called to the stand in front of the jury for the sole purpose of his refusing to answer the government's questions, and in holding a contempt hearing of the witness out of the presence of the jury; though witness did not assert a Fifth Amendment privilege or any valid reason for refusing to testify, it was likely that the jury would speculate as to the possible reasons for the refusal. *Martin v. United States*,

756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Comments of counsel.

Prosecutor's remarks in opening and closing statements were not improper, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); challenged statements in opening, describing defendant as man who could not let go and who had almost cost victim her life, did not go beyond permissible bounds, and use of words "ram" and "kill" in closing argument were not improper since victim testified that defendant used very words on day of offenses. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

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Prosecutor's improper comment during rebuttal argument, to effect that defense was asking jury "to accept the word of a convicted thief and a convicted drug dealer," even when viewed in context of prosecutor's other improper remarks, did not result in defendant suffering substantial prejudice, and thus defendant was not entitled to have his convictions for aggravated assault while armed and assault with a dangerous weapon overturned on this ground. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor's comment during rebuttal argument, to effect that defense was asking jury "to accept the word of a convicted thief and a convicted drug dealer" was improper, in prosecution for aggravated assault while armed and assault with a dangerous weapon; while prosecutor was entitled to remind jury of defendant's convictions during closing argument as part of her challenge to his credibility, given that defendant had testified and had been impeached with prior convictions for receiving stolen property, shoplifting, and distribution of marijuana, there was significant distinction between citing defendant's prior convictions as bearing on his credibility and castigating defendant as a criminal. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L.

Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor's improper comments during rebuttal argument, including that defendant had clearly made false statements because he knew that he was guilty, and that he had something to hide did not warrant reversal, in prosecution for aggravated assault while armed and assault with a dangerous weapon; defendant voiced no objection that trial court's curative instruction following prosecutor's improper comments were inadequate to remedy impropriety to which it had been directed, and government's case against defendant was strong. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor's comments during rebuttal closing argument regarding defendant, including that defendant had clearly made false statements because he knew that he was guilty, and that he had something to hide, were unquestionably improper, in prosecution for aggravated assault while armed and assault with a dangerous weapon; comments did not constitute discussion of the evidence at all and articulated only the prosecutor's unsupported, not wholly coherent, but nonetheless forceful, assertions that defendant had been lying to avoid admitting his guilt. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Prosecutor did not engage in argument of facts not in evidence when she argued that sideways nature of victim's stab wound was consistent with victim's version of events, rather than defendant's version that he had stabbed victim in self-defense when victim "leaped" on him, in prosecution for aggravated assault while armed and assault with a dangerous weapon, as surgeon who had operated on victim testified that instead of going "directly backward," victim's knife wound had gone "across the neck" from left to right. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Confrontation of witnesses.

Even if trial court's refusal to allow defendant to ask additional questions to victim following cross-examination regarding presence of other individuals other than defendant at time of shooting violated defendant's right of confrontation, consistent with victim's grand jury testimony, which was allegedly inconsistent with testimony on direct examination that

there were no other individuals present when he was shot, such violation did not prejudice defendant, in trial for assault with intent to kill while armed and related weapons offenses, in view of extensive, independent evidence of defendant's guilt. *Timms v. United States*, 25 A.3d 29, 2011 D.C. App. LEXIS 377 (2011).

Defendant adequately preserved for appellate review claim that admission of certificates of no record (CNR) without giving defendant opportunity to confront author or authors violated defendant's right of confrontation, in trial for assault with intent to kill while armed and related weapons offenses, even though he did not raise argument until after Government had admitted evidence and rested its case, where trial court still had opportunity to consider claim and granted effective relief at that point by instructing jury to disregard certificates. *Timms v. United States*, 25 A.3d 29, 2011 D.C. App. LEXIS 377 (2011).

Trial court's limitation on defense counsel's cross-examination of the complainant to three of her prior acts of violence did not amount to plain or constitutional error in prosecution for aggravated assault while armed; defense counsel was permitted to introduce through the defendant and three other witnesses at least 10 prior violent acts committed by the complainant. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Defendant was not denied his right of confrontation, in prosecution on offenses including assault with intent to murder while armed, when government implied in opening statement that alleged accomplice would give testimony indicating that he furnished gun with which defendant allegedly fired shots, then failed to present that testimony after alleged accomplice invoked privilege against self-incrimination in connection with a self-incriminating letter he had written; limiting instruction to jury to disregard remarks in opening statement about that witness' anticipated testimony adequately protected defendant's rights. *Ginyard v. United States*, 816 A.2d 21, 2003 D.C. App. LEXIS 32 (2003), writ of certiorari denied by 538 U.S. 1066, 123 S. Ct. 2237, 155 L. Ed. 2d 1123, 2003 U.S. LEXIS 4218, 71 U.S.L.W. 3735 (2003).

Trial court's holding criminal contempt hearing of recalcitrant witness outside the presence of the jury, in prosecution for aggravated assault while armed and assault with a dangerous weapon, did not deprive defendant of his Sixth Amendment right of confrontation, as the contempt hearing was not part of the prosecution of the defendant, but a proceeding against the witness. *Martin v. United States*, 756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Double jeopardy.

Defendant could not be convicted for both assault with intent to kill while armed and

aggravated assault while armed, under District of Columbia statutes, consistent with Double Jeopardy Clause, even though each statute contained elements other statute did not; both statutes were part of common statutory scheme, and Congress did not intend double penalty for single assaultive act. D.C. Code 1981, §§ 22-501, 22-504.1. *United States v. McLaughlin*, 164 F.3d 1, 1998 U.S. App. LEXIS 31488 (C.A.D.C. 1998), writ of certiorari denied by 526 U.S. 1079, 119 S. Ct. 1485, 143 L. Ed. 2d 567, 1999 U.S. LEXIS 2792, 67 U.S.L.W. 3642 (1999).

Conviction under federal statute criminalizing retaliation against witnesses, victims and informants, and District of Columbia statute criminalizing aggravated assault, did not violate Double Jeopardy Clause; retaliation provision required intent to retaliate, not present in aggravated assault provision, while aggravated assault provision required proof of serious bodily injury and that perpetrator was armed, while retaliation statute required only proof of bodily injury, and there was no indication that Congress intended both provisions to apply. U.S. Const. Amend. 5; 18 U.S.C. § 1513(b); D.C. Code 1981, § 22-504.1. *United States v. McLaughlin*, 164 F.3d 1, 1998 U.S. App. LEXIS 31488 (C.A.D.C. 1998), writ of certiorari denied by 526 U.S. 1079, 119 S. Ct. 1485, 143 L. Ed. 2d 567, 1999 U.S. LEXIS 2792, 67 U.S.L.W. 3642 (1999).

Defendant's successive acts of possessing a firearm during three armed assaults did not merge under Double Jeopardy Clause, and thus three counts of possessing a firearm during commission of a violent or dangerous crime (PFCV) were not multiplicitous; defendant at each stage of assaults presumptively was able to desist from violence against another victim but chose not to do so, in that defendant demanded money from first victim and, while struggling to seize money, struck him in face with gun, next turned to second victim and, instead of leaving scene, demanded money and ultimately struck him in forehead, and then, instead of leaving, saw third victim trying to move away and shot him. *Reeves v. United States*, 902 A.2d 88, 2006 D.C. App. LEXIS 427 (2006), writ of certiorari denied by 549 U.S. 983, 127 S. Ct. 464, 166 L. Ed. 2d 322, 2006 U.S. LEXIS 7930, 75 U.S.L.W. 3206 (2006).

Defendant's convictions for aggravated assault while armed (AAWA) and assault with intent to kill while armed (AWIKWA), arising from shooting of occupant of vehicle, did not merge under Blockburger test prohibiting duplicative prosecution for same offense pursuant to double jeopardy principles, where elements of proof and underlying facts were not the same for AAWA and AWIKWA. U.S. Const. Amend. 5; D.C. Code 1981, §§ 22-501, 22-504.1, 22-3202. *Nixon v. United States*, 730 A.2d 145, 1999 D.C.

App. LEXIS 88 (1999), writ of certiorari denied by 528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

Extreme physical pain.

Where a finding of serious bodily injury, as element of aggravated assault, is based on extreme physical pain, the level of pain must be exceptionally severe if not unbearable. In re P.F., 954 A.2d 949, 2008 D.C. App. LEXIS 328 (2008).

For a victim to suffer “extreme physical pain,” for purposes of “serious bodily injury” element of aggravated assault while armed (AAWA), the level of pain must be exceptionally severe, if not unbearable. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

To show that a victim suffered extreme physical pain, such as would satisfy the serious-bodily-injury element of aggravated assault, a victim need not use the specific word “extreme” to describe her pain, and even absent graphic descriptions of suffering from the victim herself or other witnesses, a reasonable juror may be able to infer that pain was extreme from the nature of the injuries and the victim’s reaction to them. *Swinton v. United States*, 902 A.2d 772, 2006 D.C. App. LEXIS 350 (2006).

Extremity of a victim’s pain, for purposes of the serious-bodily-injury element of aggravated assault, must be established by probative evidence, not left to the jury’s untethered speculation. *Swinton v. United States*, 902 A.2d 772, 2006 D.C. App. LEXIS 350 (2006).

For a victim to suffer “extreme physical pain,” such as would satisfy the serious-bodily-injury element of aggravated assault, the level of pain must be exceptionally severe if not unbearable. *Swinton v. United States*, 902 A.2d 772, 2006 D.C. App. LEXIS 350 (2006).

Evidence was insufficient to show that victim endured extreme physical pain, for purpose of determining whether victim suffered serious bodily injury as required for aggravated assault, even though there was no dispute that victim suffered significant pain, as she testified that she “hurt bad” and screamed in pain when defendant hit her, and victim’s bruises were undoubtedly both painful in themselves and evidence of pain; nothing indicated that victim complained of great physical pain to any person who saw her after incident, and, at hospital after incident, victim did not receive any pain medication, was not prescribed any, and was simply told to treat bruises with ice packs. *Swinton v. United States*, 902 A.2d 772, 2006 D.C. App. LEXIS 350 (2006).

Instructions.

Clearly erroneous aiding and abetting instruction in prosecution for aggravated assault

affected defendants’ substantial rights and amounted to plain error, where there was reasonable probability of different outcome had jury been properly instructed on mens rea element of offense; there was evidentiary support for reasonable doubt, prosecutor rebutted attack on one witness’ credibility by shifting to theory of aiding and abetting liability in closing argument, previous jury had deadlocked when asked to convict defendants as principals, and timeline of deliberations supported conclusion that jurors relied on reiteration of erroneous instruction in breaking deadlock. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

For purposes of plain error review, giving of jury instruction which allowed conviction of aggravated assault as aiders and abettors without requiring finding of either mens rea element set forth in applicable statute constituted clear error. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

Instruction defining “serious bodily injury,” as element of aggravated assault, was not plain error based on syntactical error requiring proof of “substantial risk of” each statutorily enumerated physical injury, when “substantial risk of” phrase applied only to “death” and not other physical injury, where instruction was never objected to, jury did not appear confused, and trial court did not otherwise invite misapplication. *Timms v. United States*, 25 A.3d 29, 2011 D.C. App. LEXIS 377 (2011).

“Attitude and conduct of jurors” instruction, which impliedly informed jury that they fail test of responsible service if they do not overcome their opinions and reach agreement on verdict, while erroneous and should not have been given, did not rise to level of plain error requiring reversal of convictions for assault with intent to kill while armed. *Timms v. United States*, 25 A.3d 29, 2011 D.C. App. LEXIS 377 (2011).

Requested instruction on circumstances in which initial aggressor may recover the right of self-defense was warranted in prosecution for aggravated assault while armed in which defendant claimed that he was an innocent victim of alleged victim’s schizophrenic paranoia and drug-induced rage, where alleged victim testified that defendant came to collect a drug debt, and defendant testified that he “backed up” when alleged victim pulled a knife on him. *Murphy-Bey v. United States*, 982 A.2d 682, 2009 D.C. App. LEXIS 506 (2009).

Trial court’s error in formulating erroneous reinstruction on aggravated assault which expanded the definition of “serious bodily injury” was not harmless; although evidence might well support the verdict of a properly instructed jury that the victim suffered serious bodily injury, that did not mean the jury was compelled so to find, and jury returned its verdict

only 18 minutes after being reinstructed, and given the very brief passage of time between the erroneous instruction and the verdict, appellate court could only conclude that the instructional error substantially swayed the jury's verdict. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

Aggravated assault instruction which permitted jury to find "serious bodily injury" if it determined that the victim sustained injury involving not just a substantial risk of death, but a substantial risk of unconsciousness, extreme physical pain, disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty expanded the definition of "serious bodily injury" and, thus, was not an accurate statement of the law and was erroneous; such an instruction contradicted what the legislature intended in fashioning a crime that increased twenty-fold the maximum prison term for a simple assault. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

Trial court's instructional error incorrectly defining "serious bodily injury," an element of aggravated assault while armed (AAWA), did not result in *per se* reversal; if there was sufficient evidence to convict based upon the instruction given, then, necessarily, the verdict satisfied one of the Nixon elements of serious bodily injury. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Trial court's instruction defining "serious bodily injury," an element of aggravated assault while armed (AAWA), was incorrect, where trial court failed to instruct the jury on two of the Nixon prongs, i.e., extreme pain and unconsciousness. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Trial court acted within its discretion at trial for aggravated assault while armed when it rejected defendant's proposed jury instruction on self-defense and, instead, gave instruction on self-defense that was very similar to standard instruction; proposed instruction was a summary of defendant's testimony rather than a statement of legal principles, and trial court allowed defendant to argue proposed instruction as a theory during closing argument. *Payne v. United States*, 932 A.2d 1095, 2007 D.C. App. LEXIS 478 (2007).

In prosecution for malicious disfigurement and aggravated assault, trial court should have linked self-defense instruction to specific charge of aggravated assault, upon co-defendant's request. *Jones v. United States*, 893 A.2d 564, 2006 D.C. App. LEXIS 92 (2006).

Trial court's definition of "serious bodily injury" element of aggravated assault while armed (AAWA), in which court defined term as an injury that "causes serious impairment of physical condition," constituted an impermissible broadening of the meaning of term; definition untethered "impairment" from the specificity or concreteness that it possesses when linked to the functions of a bodily member, organ or mental faculty, and definition connoted a level of generality not conveyed by companion terms of substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement. *Jenkins v. United States*, 877 A.2d 1062, 2005 D.C. App. LEXIS 338 (2005).

Trial court's failure to instruct the jury on the elements of "serious bodily injury" did not amount to plain error in prosecution for aggravated assault while armed; the point was conceded by defense counsel in closing argument, and the State produced ample evidence of the seriousness of the injuries in question. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Defendant was entitled in assault trial to jury instruction on self-defense, even though government's evidence depicted multiple stabbing by defendant precipitated by victim's idle question of whether defendant had courage to stick knife into someone, where defendant's mother testified that, as little as half hour after incident, defendant returned home with injuries to his neck that appeared to mother as if someone had grabbed him around neck and choked him and that he had debris in his hair and on his back suggesting that he had been lying on his back, and pathology expert testified from record of victim's wounds that they could have been inflicted by someone lying on ground and stabbing upwards. *Hernandez v. United States*, 853 A.2d 202, 2004 D.C. App. LEXIS 374 (2004).

Trial court's requirement in assault trial to give jury instruction on self-defense that had sufficient evidentiary support was not negated by facts that trial court informed jury that defendant's theory was self-defense and allowed defendant to argue self-defense in summation; jury learned nothing about legal meaning of self-defense, including concepts that could have been vital to jury's proper evaluation of evidence. *Hernandez v. United States*, 853 A.2d 202, 2004 D.C. App. LEXIS 374 (2004).

Trial courts must instruct juries on the definition of serious bodily injury in aggravated assault cases. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Defendant was not entitled to instruction on simple assault as lesser included offense of aggravated assault while armed (AAWA); defendant was, at minimum, an aider and abettor

of co-defendant, whom victim clearly saw standing in front of him with pistol pointed at his stomach, and thus there was no rational basis for jury to find that weapon was not used in assault, regardless of whether victim was ever struck. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Error in failing to instruct on definition of “serious bodily injury” element of aggravated assault while armed (AAWA) was not plain error requiring reversal of conviction; jury was instructed on each element of AAWA, there was no reason to believe jury would have voted to acquit, given victim’s testimony that he lost consciousness, and thus substantial rights were not affected. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Trial court erred in failing to provide jury with definition of “serious bodily injury,” but error was not plain error warranting reversal of conviction for aggravated assault, even assuming that the law regarding the necessity of proving the “seriousness” of the victim’s injury was “settled” at the time of trial and was clearly contrary to the law at the time of appeal, where there was no miscarriage of justice nor any undermining of the fairness and integrity of the judicial proceedings; trial court had completely enumerated all elements of the crime, and evidence of the seriousness of the bodily injury to the victim was ample. *Riddick v. United States*, 806 A.2d 631, 2002 D.C. App. LEXIS 529 (2002).

Error in failing to instruct jury on definition of “serious bodily injury” was harmless, in prosecution for aggravated assault while armed, where jury’s finding of guilt as to malicious disfigurement while armed, which required finding of permanent disfigurement, left no doubt that if jury had been instructed on definition of “serious bodily injury,” it would have found protracted and obvious disfigurement, as element of malicious disfigurement while armed. *Hudson v. United States*, 790 A.2d 531, 2002 D.C. App. LEXIS 8 (2002).

Trial court’s failure to instruct jury, in prosecution for aggravated assault, on definition of “serious bodily injury,” although error, and arguably in contravention of settled law, did not implicate any substantial right and was not plain error, absent any indication that jury misunderstood elements of offense or that instruction given misled or confused jury, where definition was not integral part of any element of offense, trial court did not omit any element of offense from final instructions, and evidence that victim suffered protracted loss of vision in his left eye was sufficient to prove serious bodily injury, given that victim was legally blind in his right eye. *Wilson v. United States*, 785 A.2d 321, 2001 D.C. App. LEXIS 240 (2001).

Trial court’s failure to instruct jury, in prosecution for aggravated assault, on definition of “serious bodily injury,” was arguably in contravention of settled law for purposes of plain error analysis; competent prosecutors and judges reading aggravated assault statute should have known that the words “serious bodily injury” were significant and did not mean simply any type of injury, no matter how small. *Wilson v. United States*, 785 A.2d 321, 2001 D.C. App. LEXIS 240 (2001).

Assuming that trial court’s failure to instruct jury, in prosecution for aggravated assault, on definition of “serious bodily injury” affected some substantial right enjoyed by defendant, such error did not amount to plain error, where defendant could demonstrate neither actual innocence nor any impact on fairness, integrity, or public reputation of his trial; defendant admitted to cutting victim’s eyeball during an altercation, and evidence was sufficient to support finding of serious bodily injury. *Wilson v. United States*, 785 A.2d 321, 2001 D.C. App. LEXIS 240 (2001).

Trial judge’s jury instruction, in prosecution for aggravated assault while armed and assault with a dangerous weapon, that the jury could give evidence of the court’s holding recalcitrant witness in contempt such weight as it deemed fair, was inappropriate and an unnecessary accommodation of defense counsel’s request to have the court take judicial notice of the contempt, in that witness’s failure to testify had no probative value. *Martin v. United States*, 756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Trial court committed reversible error by failing to instruct the jury that “serious bodily injury,” as element of aggravated assault while armed, “involved a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” D.C. Code 1981, §§ 22-504.1, 22-3202. *Gathy v. United States*, 754 A.2d 912, 2000 D.C. App. LEXIS 128 (2000).

Trial court should have instructed the jury that “serious bodily injury,” as element of aggravated assault while armed, “involved a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” D.C. Code 1981, §§ 22-504.1, 22-3202. *Gathy v. United States*, 754 A.2d 912, 2000 D.C. App. LEXIS 128 (2000).

Jury trial rights.

To distinguish “serious” from “petty” offenses, for purposes of determining whether a defendant is entitled to a jury trial under the Sixth Amendment, court looks to objective standards such as may be observed in laws and practices

of community taken as a gauge of its social and ethical judgments. U.S.C. Const.Amend. 6. *Burgess v. United States*, 681 A.2d 1090, 1996 D.C. App. LEXIS 307 (1996).

Neither assault nor destruction of property were “serious crimes” which entitled defendant to a jury trial under Sixth Amendment, where District of Columbia legislature had reduced the crimes to petty offenses. D.C. Code 1981, §§ 22-403, 22-504(a). *Burgess v. United States*, 681 A.2d 1090, 1996 D.C. App. LEXIS 307 (1996).

Lesser included offenses.

Assault with a dangerous weapon (ADW) is a lesser included offense of aggravated assault while armed (AAWA). *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Aggravated assault while armed (AAWA) does not merge with assault with intent to murder while armed (AWIMWA); AAWA requires proof of serious bodily injury, which AWIMWA does not, while AWIMWA requires proof of a specific intent to kill and malice, which AAWA does not. *Ginyard v. United States*, 816 A.2d 21, 2003 D.C. App. LEXIS 32 (2003), writ of certiorari denied by 538 U.S. 1066, 123 S. Ct. 2237, 155 L. Ed. 2d 1123, 2003 U.S. LEXIS 4218, 71 U.S.L.W. 3735 (2003).

Conviction for aggravated assault while armed merged with conviction for malicious disfigurement while armed. *Hudson v. United States*, 790 A.2d 531, 2002 D.C. App. LEXIS 8 (2002).

Assault with a dangerous weapon is a lesser included offense of aggravated assault while armed. D.C. Code 1981, §§ 22-504.1, 22-3202. *Gathy v. United States*, 754 A.2d 912, 2000 D.C. App. LEXIS 128 (2000).

On remand following reversal of aggravated assault while armed conviction, due to instructional error on element of “serious bodily injury,” trial court would be required to enter a judgment of conviction against defendant for lesser-included offense of assault with a dangerous weapon; there was no dispute that defendant used a beer bottle to commit the assault, and there was no other evidence upon which the jury could have rested its finding that defendant committed the assault “while armed.” D.C. Code 1981, §§ 22-504.1, 22-3202. *Gathy v. United States*, 754 A.2d 912, 2000 D.C. App. LEXIS 128 (2000).

Merger of offenses.

Offenses of attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW) merged; elements of proof that jury was instructed to consider for attempted AAWA and ADW overlapped, serious bodily injury, the only element distinguishing ADW from AAWA, was not required to prove attempted AAWA, and when

resulting serious bodily injury was eliminated as element of proof for attempted AAWA, offense contained no element that ADW did not. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Offenses of attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW) merged; elements of proof that jury was instructed to consider for attempted AAWA and ADW overlapped, serious bodily injury, the only element distinguishing ADW from AAWA, was not required to prove attempted AAWA, and when resulting serious bodily injury was eliminated as element of proof for attempted AAWA, offense contained no element that ADW did not. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Aggravated assault by punching victim in face and aggravated assault while armed by forcing bottle into victim’s rectum were separated by fresh impulse, and thus convictions did not merge; defendant first forced bottle into victim’s rectum and then removed it, victim saw bottle and began to scream, and defendant’s second impulse, separated by “fork in road,” was punching victim in face. *Jones v. United States*, 853 A.2d 146, 2004 D.C. App. LEXIS 370 (2004).

Pleas.

Dismissal of indictment for felony threats and assault with dangerous weapon was not warranted due to allegedly false testimony presented to grand jury by two eyewitnesses; trial judge knew from proceedings that indictment had been based on testimony by at least two other witnesses who also testified at trial, and circumstances of witnesses’ inconsistent stories, including letter immunity each had received, were fully arrayed before jury under instructions directing it to scrutinize carefully the testimony of an admitted perjurer and to consider such inconsistencies in evaluating credibility. *Jones v. United States*, 893 A.2d 564, 2006 D.C. App. LEXIS 92 (2006).

By asking that aggravated assault defendant remain incarcerated, government breached its duty to strictly comply with terms of plea agreement that defendant’s sentence would be suspended and he would be placed on probation; government’s breach was material, whether or not its allocation actually influenced the sentencing judge. *Roy v. United States*, 772 A.2d 837, 2001 D.C. App. LEXIS 115 (2001).

Aggravated assault defendant was entitled to withdraw guilty plea in order to remedy government’s material breach of plea agreement; specific performance of agreement over defendant’s objection was not instead the preferred remedy, as the value of the plea bargain changed, where defendant negotiated for a rec-

ommendation that his imprisonment cease after eleven months, and he spent a total of over four years in prison when appeal was decided. *Roye v. United States*, 772 A.2d 837, 2001 D.C. App. LEXIS 115 (2001).

Defendant was not entitled to evidentiary hearing on postsentencing motion to withdraw guilty pleas to second-degree burglary and aggravated assault; defendant's claims of ineffective assistance of counsel were vague and conclusory, and failed to assert how trial counsel was ineffective and otherwise warranted no relief. U.S. Const. Amend. 6; D.C. Code § 22-504.1, 22-1801(b), 23-110(c); Criminal Rule 23(e). *Southall v. United States*, 716 A.2d 183, 1998 D.C. App. LEXIS 127 (1998).

Sufficient factual basis existed for defendant's guilty plea to aggravated assault; though defendant claimed that he did not intend to assault complainant when he entered her dwelling, but only the person allegedly in complainant's company, government made unchallenged proffer at time of plea that defendant smashed complainant in face with a shovel, knocking out complainant's teeth once inside. D.C. Code 1981, § 22-504.1. *Southall v. United States*, 716 A.2d 183, 1998 D.C. App. LEXIS 127 (1998).

Defendant's guilty pleas to second-degree burglary and aggravated assault were not coerced; trial court took steps to assure that defendant understood his rights, terms of agreement, factual basis for plea, and that plea was voluntarily entered. D.C. Code 1981, § 22-504.1, 22-1801(b), 23-110. *Southall v. United States*, 716 A.2d 183, 1998 D.C. App. LEXIS 127 (1998).

Preliminary proceedings.

Brady claim, arising from government's failure during pretrial discovery in aggravated armed assault prosecution to disclose victim's grand jury testimony purportedly showing that victim did not initially identify defendant with certainty and that police-sponsored showup procedure was suggestive, was effectively subsumed within ineffective assistance claim, where that grand jury testimony was apparently turned over to defense counsel at time of victim's direct examination and thus was disclosed in time for counsel to have moved for a mistrial or for suppression of victim's identification testimony. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Presumptions and burden of proof.

In order to show that a victim suffered serious bodily injury, as required to support a charge for aggravated assault, the government must prove (1) the complainant suffered a serious physical disfigurement, (2) that was protracted, in that it remained beyond a very brief recovery period, and (3) the disfigurement had

a degree of genuine prominence sufficient to make it obvious. *Jackson v. United States*, 970 A.2d 277, 2009 D.C. App. LEXIS 69 (2009).

In order to sustain a verdict for aggravated assault, the government must prove, by the appropriate standard, that the accused purposely caused serious bodily injury to the complainant. *Jackson v. United States*, 970 A.2d 277, 2009 D.C. App. LEXIS 69 (2009).

To secure a conviction for aggravated assault, either armed or unarmed, the government must establish that the defendant caused "serious bodily injury." *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

The extremity of the victim's pain, for purposes of the serious bodily injury element of aggravated assault, must be established by probative evidence, a burden which falls to the government, and not left to the factfinder's untethered speculation. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

To show that a victim suffered extreme physical pain, such as would satisfy the serious bodily injury element of aggravated assault, a victim need not use the specific word "extreme" to describe her pain; rather, the severity of the pain may be inferred from the nature of the injuries and the victim's reaction to them. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

To prove an attempt to commit the offense of aggravated assault while armed (AAWA), government must prove that accused: (1) intended to commit that particular crime; (2) did some act towards its commission; and (3) and failed to consummate its commission. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

To prove aggravated assault while armed (AAWA), government must prove beyond a reasonable doubt that accused, while armed: (1) by any means, knowingly or purposely caused serious bodily injury to another person, or (2) under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engaged in conduct which created a grave risk of serious bodily injury to another person, and thereby caused serious bodily injury. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Protracted and obvious disfigurement.

To be "protracted and obvious disfigurement," for purposes of "serious bodily injury" element of aggravated assault while armed (AAWA), a scar must be a serious permanent or physical disfigurement, meaning that the person is appreciably less attractive or that a part of his body is to some appreciable degree less useful or functional than it was before the injury. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of

certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Remand.

Since simultaneous convictions of both the greater and the lesser included offenses would not be permissible, the trial court acted properly in not sentencing defendant on the lesser assault with a dangerous weapon (ADW) count, but given appellate court's holding that the aggravated assault while armed (AAWA) conviction had to be reversed, it would be entirely permissible for the trial court on remand to impose an appropriate sentence for ADW. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

Review.

Court of appeals would exercise its discretion to reverse defendants' convictions of aggravated assault while armed (AAWA), where essential element of offense was contested and was not found by the jury, thereby necessarily affecting integrity of proceeding and impugning public reputation of judicial proceedings in general; evidence about defendants' participation in assault was controverted by testimony of two defense witnesses, and defendants presented plausible argument that they might have been wrongly convicted of aggravated assault on aiding and abetting theory without a jury determination that they had requisite mens rea. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

Trial court's failure, prior to its ruling and instruction, to strike government's reference to prior bad acts was not plain error, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); court ruled prior to prosecutor's opening statement that government could introduce most of prior bad acts evidence, and defendant had not demonstrated that prosecutor strayed from parameters of court's ruling, and thus, mentioning of prior bad acts evidence during prosecutor's opening statement was not plain error. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Trial court's error in amending judgment and commitment order outside of defendant's presence, to add provision for supervised release to his sentence, was harmless in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW); sentence correction affected only mandatory release provision, court was aware of requirement to impose release term at time of sentencing, being mistaken only as to its term, and in denying motion to reduce, made clear that original sentence was lenient, leaving no reasonable possibility that court would

have reduced term of incarceration further. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Trial court's impermissibly broad definition of "serious bodily injury" element of aggravated assault while armed (AAWA), which occurred when court defined term as an injury that "causes serious impairment of physical condition," was likely to have had a substantial influence on verdict, and thus constituted reversible error; while the evidence was sufficient to permit a properly instructed jury to convict defendant, the evidence was not overwhelming or particularly strong as to any of the proper components of definition of "serious bodily injury." *Jenkins v. United States*, 877 A.2d 1062, 2005 D.C. App. LEXIS 338 (2005).

Trial court's impermissibly broad definition of "serious bodily injury" element of aggravated assault while armed (AAWA), which occurred when court defined term as an injury that "causes serious impairment of physical condition," did not rise to level of constitutional error to be tested under Chapman harmless error standard, where trial court instructed the jury on each element of the offense and provided guidance, albeit partially erroneous, on the meaning of "serious bodily injury." *Jenkins v. United States*, 877 A.2d 1062, 2005 D.C. App. LEXIS 338 (2005).

Prosecutor's comments during rebuttal argument, with respect to alleged victim's testimony, including that victim had been honest about what had happened, as well as similar comments regarding state's witness, including that his testimony had been "incredibly straightforward," some of which might have been infelicitous, were relatively innocuous, in prosecution for aggravated assault while armed and assault with a dangerous weapon, as it was likely that jury understood prosecutor to be arguing merely that particular testimony she cited evinced that victim and state's witness were credible. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Defendant, convicted of aggravated assault while armed, was estopped from questioning the sufficiency of the evidence of the complainant's injuries to constitute "serious bodily injury" on appeal, where defense counsel conceded that issue during closing argument at trial. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Jury's inconsistent verdict of acquitting defendant of possession of a prohibited dangerous weapon charge while convicting defendant of aggravated assault while armed charge did not warrant reversal, since sufficient evidence was presented at trial for a reasonable jury to find defendant guilty of aggravated assault while

armed. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Error in refusing to admit evidence of the complainant's reputation for violence in the community to show the reasonableness of the defendant's fear of the complainant was harmless in prosecution for aggravated assault while armed, given the abundance of specific acts of violence by the complainant introduced into evidence by several defense witnesses, including testimony by the defendant that the complainant had attacked her on previous occasions. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Remand was necessary in prosecution for armed aggravated assault with intent to rob, for consideration of whether defense counsel was ineffective in failing to move for mistrial or seek suppression of victim's identification testimony upon receiving victim's grand jury testimony purportedly showing that victim did not initially identify defendant with certainty and that police-sponsored showup procedure was suggestive, where trial court had not considered suppression issue because defense strategy at trial was to present victim as aggressor and defendant as victim, rather than to challenge reliability of identification. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Assuming that evidence and jury instruction plainly amended language of indictment charging defendant with aggravated assault, by applying to and quoting from subsection of aggravated assault statute other than that under which defendant was charged, such amendment posed no risk to fairness, integrity or public reputation of judicial proceedings and was not plain error, where indictment included citation that encompassed both subsections of aggravated assault statute, and evidence amply supported defendant's conviction. *Smith v. United States*, 801 A.2d 958, 2002 D.C. App. LEXIS 366 (2002), writ of certiorari denied by 537 U.S. 1011, 123 S. Ct. 479, 154 L. Ed. 2d 413, 2002 U.S. LEXIS 8233, 71 U.S.L.W. 3318 (2002).

Trial court's failure sua sponte to give unanimity instruction in prosecution for aggravated assault with respect to two subsections of applicable statute was not plain error, where conviction was based on single incident and statute permitted conviction based on either of the two mens rea bases presented to jury. *Smith v. United States*, 801 A.2d 958, 2002 D.C. App. LEXIS 366 (2002), writ of certiorari denied by 537 U.S. 1011, 123 S. Ct. 479, 154 L. Ed. 2d 413, 2002 U.S. LEXIS 8233, 71 U.S.L.W. 3318 (2002).

Defendant charged with aggravated assault failed to preserve for appellate review his contention that trial court's failure to instruct jury on definition of "serious bodily injury"

amounted to reversible error, where defendant neither requested such instruction nor failed to object to instructions as given. *Wilson v. United States*, 785 A.2d 321, 2001 D.C. App. LEXIS 240 (2001).

Court of Appeals would consider defendant's argument that evidence was insufficient to sustain conviction for aggravated assault while armed, though issue was raised for the first time in an appellate reply brief; in case decided after the parties filed their briefs, Court adopted definition of "serious bodily injury," as set forth in the sexual abuse statute, for the purposes of the aggravated assault statute, and the government was not substantially prejudiced, in that it had the opportunity to argue the sufficiency of the evidence and to file a supplemental brief on the subject. D.C. Code 1981, §§ 22-504.1, 22-3202, 22-4101(7). *Gathy v. United States*, 754 A.2d 912, 2000 D.C. App. LEXIS 128 (2000).

Defendant's timely written submission to trial court questioning restitution component of sentence for second-degree burglary and aggravated assault could properly be considered challenge to correctness of restitution element of sentence, and denial of that motion was properly before Court of Appeals for review. D.C. Code 1981, §§ 16-711(a), 22-504.1, 22-1801(b); Criminal Rule 35(a). *Southall v. United States*, 716 A.2d 183, 1998 D.C. App. LEXIS 127 (1998).

Sentence and punishment.

Defendant had right to be present when trial court amended judgment and commitment order to add provision for supervised release to his sentence, in prosecution for attempted aggravated assault while armed (attempted AAWA) and assault with a dangerous weapon (ADW). *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Serious bodily injury.

"Serious bodily injury," as required to support a conviction for aggravated assault, is construed to mean injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function. *Jackson v. United States*, 970 A.2d 277, 2009 D.C. App. LEXIS 69 (2009).

Complainant's injuries from assault and robbery, namely superficial lacerations that were closed with staples, did not rise to level of serious bodily injury, as required to support conviction for aggravated assault; injuries did not cause risk of death, did not render complainant unconscious, and did not cause extreme pain or protracted and obvious disfigurement. *Jackson v. United States*, 970 A.2d 277, 2009 D.C. App. LEXIS 69 (2009).

Aggravated assault victims typically require urgent and continuing medical treatment and, often, surgery, carry visible and long-lasting, if not permanent scars, and suffer other consequential damage, such as significant impairment of their faculties. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

Injuries such as knife or gunshot wounds are not per se “serious bodily injury,” as required for aggravated assault conviction. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

To establish serious bodily injury through proof of protracted and obvious disfigurement, for purposes of offense of aggravated assault, the government has to prove: (1) that the victim suffered a serious physical disfigurement, (2) that the disfigurement was protracted in that it remained beyond a brief recovery period, and (3) that the disfigurement had a degree of genuine prominence sufficient to make it obvious. *Jackson v. United States*, 940 A.2d 981, 2008 D.C. App. LEXIS 8 (2008).

Serious bodily injury, an element of aggravated assault while armed (AAWA), usually involves a life-threatening or disabling injury, but the court must also consider all the consequences of the injury to determine whether the appropriate “high threshold of injury” has been met. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

The fact that an individual suffered from knife or gunshot wounds does not make that injury a per se “serious bodily injury,” an element of aggravated assault while armed (AAWA). *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

“Serious bodily injury,” an element of aggravated assault while armed (AAWA), encompasses bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

In the offense of aggravated assault, the jury may infer from a description of the nature and extent of injuries that an individual has suffered serious bodily injury as defined by statute. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

“Serious bodily injury,” which is required to be shown to prove aggravated assault while armed, is bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

“Serious bodily injury,” as element of aggravated assault while armed (AAWA), is bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Victim’s bruises were not sufficiently severe or extensive to be disfiguring, as required for bruises to involve protracted and obvious disfigurement and thus constitute “serious bodily injury” for purposes of aggravated assault; bruises were on victim’s left arm and inner thighs, numbered three or four, and were a few or several centimeters in diameter. *Swinton v. United States*, 902 A.2d 772, 2006 D.C. App. LEXIS 350 (2006).

For purposes of aggravated assault while armed charge, the weapon used need not be a conventional weapon, but can be any instrument that the defendant uses as a weapon and which can cause serious bodily injury. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Jury may infer from description of nature and extent of injuries that individual has suffered “serious bodily injury,” within meaning of offense of aggravated assault. *Anderson v. United States*, 857 A.2d 451, 2004 D.C. App. LEXIS 425 (2004).

For aggravated assault, “serious bodily injury” means bodily injury that involves substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of function of bodily member, organ, or mental faculty. *Anderson v. United States*, 857 A.2d 451, 2004 D.C. App. LEXIS 425 (2004).

“Serious bodily injury,” as element of aggravated assault, is bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. *Riddick v. United States*, 806 A.2d 631, 2002 D.C. App. LEXIS 529 (2002).

Definition of “serious bodily injury” appearing in sexual abuse statute was consistent with that followed in majority of jurisdictions, and thus, Court of Appeals would adopt it for purpose of determining whether Government met its burden to prove “serious bodily injury” un-

der aggravated assault statute, which did not define “serious bodily injury.” D.C. Code 1981, §§ 22-504.1, 22-3202, 22-4101(7). *Nixon v. United States*, 730 A.2d 145, 1999 D.C. App. LEXIS 88 (1999), writ of certiorari denied by 528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

Weight and sufficiency of evidence.

Aiding and abetting instruction in prosecution for aggravated assault which allowed conviction if defendants participated in “a crime” or “the crime,” but specifically told jurors that defendants did not need to have intent “to commit the particular crime committed by the principal offender,” was insufficient to convey to jury that to convict defendants as aiders and abettors, they were required to be found to have had requisite mens rea element of aggravated assault, and thereby allowed jury to find defendants guilty of aggravated assault without mens rea element required by statute. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

In light of the mens rea required for aggravated assault, when the government prosecutes a defendant under an aiding-and-abetting theory of criminal liability, in addition to proving that the aider and abettor participated in the assault, the government must prove also that the aider and abettor himself intended to cause serious bodily injury or acted with extreme indifference to human life because he knew either that the principal would commit an assault with such intent, or that the principal would intentionally engage in an assaultive act that actually created a grave risk of serious bodily injury. *Perry v. United States*, 36 A.3d 799, 2011 D.C. App. LEXIS 687 (2011).

There was sufficient evidence that victim suffered a protracted loss or impairment of the function of a bodily member, such that she experienced requisite “serious bodily injury” to support juvenile’s adjudication of delinquency based on aggravated assault; victim testified that, immediately following the attack, she could not see for about two months and that, at the time of the hearing, six months after the attack, her left eye had not recovered well like her right eye, and she still suffered from sharp pains in her left eye. In re D.E., 991 A.2d 1205, 2010 D.C. App. LEXIS 148 (2010).

Evidence was sufficient to support conviction for aggravated assault; witnesses testified that defendant repeatedly and forcefully struck victim with his fists, and defendant assaulted victim at the same time that two other co-defendants assaulted victim. *Owens v. United States*, 982 A.2d 310, 2009 D.C. App. LEXIS 503 (2009), writ of certiorari denied by 131 S. Ct. 258, 178 L. Ed. 2d 171, 2010 U.S. LEXIS 7014, 79 U.S.L.W. 3202 (U.S. 2010).

Despite the contradictions in testimony regarding the identity of the shooter, there was ample evidence to support the jury’s finding of defendant’s guilt for aggravated assault while armed (AAWA) and assault with dangerous weapon (ADW); victim testified that he had known defendant since childhood, and eight days after the shooting, detective showed victim an array of photographs, and victim identified defendant as his assailant, and officer stated that he discovered victim soon after the shooting and overheard victim speaking to his brother when he identified defendant by a nickname and described the car that defendant was driving. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

A victim’s statements regarding pain are not alone sufficient to support a finding of serious bodily injury, as required for aggravated assault. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

Evidence was insufficient to show that injuries sustained by victim following juvenile’s attack caused victim extreme physical pain, and thus amounted to serious bodily injury, as required to sustain adjudication of guilt on aggravated assault charge; at no time after the attack did victim state she was in extreme pain, nor did she ever lose consciousness or claim to have felt faint as a result of her injuries, victim walked away from the scene of the attack on her own accord, victim gave no indication that her pain was severe or unbearable when reporting attack to officer, and there was no evidence that victim sought immediate medical care. *Scott v. United States*, 954 A.2d 1037, 2008 D.C. App. LEXIS 377 (2008).

Evidence during prosecution for aggravated assault while armed was insufficient as a matter of law to establish that victim suffered either “extreme physical pain” or “protracted and obvious disfigurement”; victim was not shot or stabbed by defendant during the assault, she suffered no broken bones, no perforated organs or other internal injuries, and no severed muscles, tendons, or nerves, she bled only a moderate amount, and she never needed surgery, lost consciousness, or had to be admitted to the hospital after receiving outpatient treatment, all of her wounds except the laceration to her right ear were superficial, described by her own treating physicians as “skin deep,” “relatively minor,” “not very bad,” and “not very serious,” and record contained no reliable clues regarding the size, shape, and color of the scars and the extent to which, if at all, the scars may have been noticeable. *Jackson v. United States*, 940 A.2d 981, 2008 D.C. App. LEXIS 8 (2008).

Evidence was insufficient to support finding that victim faced a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the functions of any bodily organ, for purposes of “serious bodily

injury” element of aggravated assault while armed (AAWA); there was no expert testimony presented regarding the effects of victim’s knife wounds, or whether the wounds were life-threatening, and the evidence failed to demonstrate if the wounds or incisions from the surgery physically scarred victim and the extent of the scarring, if any. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Evidence supported finding that victim suffered extreme physical pain from the multiple stab wounds he received, sufficient to satisfy the threshold required for a conviction of aggravated assault while armed (AAWA); victim testified that he told an officer that he was in pain and that he could not breathe, he also testified that his muscles hurt, his chest was in pain, and he kept thinking that he was going to die, and his medical records indicated that, upon his arrival at the hospital, victim complained of shortness of breath related to pain. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Evidence was sufficient to support defendant’s conviction for assault with a dangerous weapon (ADW), as an aider and abettor; there was uncontroverted evidence that defendant was with co-defendant, the victim’s attacker, not only from the beginning of the fight, but throughout, each of the victims testified that defendant was the one who initiated the confrontation, and evidence showed that defendant was the first to draw his knife, thereby encouraging the other members of his group to do the same. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Evidence was insufficient to support findings that two victims suffered extreme physical pain, for purposes of “serious bodily injury” element of aggravated assault while armed (AAWA); neither victim testified as to how much pain, if any, he felt, and although at trial detective testified that all the victims were in pain and that each was given pain medication, this evidence was not enough to satisfy the showing of extreme pain that the statute required. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Evidence was insufficient to support finding that victim faced a substantial risk of death, or suffered from either protracted and obvious

disfigurement or protracted loss or impairment of the function of a bodily member as a result of the stabbing wound he received from defendant, for purposes of “serious bodily injury” element of aggravated assault while armed (AAWA); though victim testified that defendant stabbed him in his arm and cut his wrist, medical records described the upper arm wound as “without complication” and the wrist wound as “superficial,” requiring only stitches, and the record was void of any evidence of the medical, consequential or lasting effects of the wounds inflicted on victim. *Bolanos v. United States*, 938 A.2d 672, 2007 D.C. App. LEXIS 700 (2007), writ of certiorari denied by 553 U.S. 1072, 128 S. Ct. 2517, 171 L. Ed. 2d 799, 2008 U.S. LEXIS 4463, 76 U.S.L.W. 3629 (2008).

Evidence was insufficient to show that complainant suffered “serious bodily injury,” as required to support conviction for aggravated assault; although complainant suffered sprained wrist and bruises to body and to kidney, injuries were not life threatening or disabling. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

Evidence was sufficient to show that victim suffered serious bodily injury, as required for conviction for aggravated assault while armed; victim was stabbed 16 times with defendant’s scissors and, as a result, bled from his back, hands, and shoulder, victim could no longer move and was losing consciousness when he arrived at hospital, two bones in victim’s left hand were broken, victim wore a cast for four months and missed 11 months of work, which was evidence of protracted loss or impairment of his arm, and victim also testified that he attended physical therapy for three months, developed arthritis, and developed multiple scars. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

Sufficient evidence supported defendant’s conviction for attempted aggravated assault while armed (attempted AAWA); victim testified that defendant drove his van at her vehicle and forced her onto shoulder of road, and according to victim, defendant actually threatened to “ram” her, beat her and kill her, and thus, jury could conclude reasonably that it was likely that victim would have sustained serious bodily injuries if she had not successfully avoided collision while fleeing from defendant, who had threatened her life and was, by his action, attempting to cause her to have accident. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Evidence was sufficient to establish that the nature of victim’s three gunshot wounds, one of which broke a vertebra and lodged inside his body, constituted serious bodily injury, as required to sustain conviction for aggravated assault while armed, even though victim was not in critical condition, was not paralyzed, and did

not receive emergency surgery; victim nearly lost consciousness, indicated that he was in pain, and suffered from an impairment of the function of his right leg, victim was at risk of paralysis if his spine started to swell in the area where the bullet had lodged, and bullet was only an inch from victim's aorta. *Freeman v. United States*, 912 A.2d 1213, 2006 D.C. App. LEXIS 654 (2006).

Evidence was insufficient to show that victim's bruises, even if disfiguring, were protracted and obvious, as required for bruises to involve protracted and obvious disfigurement and thus constitute "serious bodily injury" for purposes of aggravated assault, even though victim testified that she was "still bruised up" five months after incident; testimony did not establish whether or how long her bruises, which numbered three or four and were a few or several centimeters in diameter at time of hospital examination shortly after incident, remained prominent or even visible. *Swinton v. United States*, 902 A.2d 772, 2006 D.C. App. LEXIS 350 (2006).

Evidence that defendant threatened to burn victim by setting bed on fire if victim did not leave, and that defendant actually tried to ignite bed clothes with lighter, was sufficient to support conviction for felony threats and assault with dangerous weapon. *Jones v. United States*, 893 A.2d 564, 2006 D.C. App. LEXIS 92 (2006).

Evidence was sufficient to show that the injury to victim, after being stabbed multiple times by defendant, involved extreme pain and serious protracted disfigurement, as required to establish "serious bodily injury" element of aggravated assault while armed; victim sustained stab wounds to the stomach, chest and arm in addition to minor nicks from defendant's knife attack, victim testified that he screamed when stabbed and that he was bleeding profusely, officer testified that when he arrived at the scene he observed that victim had a lot of blood on his shirt and that victim appeared to be disoriented and in a great deal of pain, victim underwent surgery and was hospitalized for five days, and victim had scarring as a result of the stabbings. *Jenkins v. United States*, 877 A.2d 1062, 2005 D.C. App. LEXIS 338 (2005).

Sufficient evidence supported convictions for aggravated assault while armed and assault with a dangerous weapon; during argument between defendant and victim, defendant plunged knife deep into victim's neck, and victim required emergency surgery to repair two life-threatening lacerations to his right carotid artery. *Finch v. United States*, 867 A.2d 222, 2005 D.C. App. LEXIS 19 (2005), writ of certiorari denied by 544 U.S. 1055, 125 S. Ct. 2313, 161 L. Ed. 2d 1100, 2005 U.S. LEXIS 4294, 73 U.S.L.W. 3685 (2005).

Sufficient evidence supported conclusion that victim suffered "serious bodily injury," as necessary to sustain conviction for aggravated assault while armed; victim was stabbed multiple times on both arms and in the vagina, wounds resulted in a four-day hospitalization, and a total of 72 stitches, and victim testified that the wounds caused her a great deal of ongoing pain. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Evidence was sufficient to support conviction for aggravated assault while armed; issue of who was the first aggressor came down to a credibility contest between complainant and defendant, and even if the jury had believed that the complainant attacked defendant first, the evidence of the injuries suffered by the complainant from stabbing, coupled with the fact that defendant suffered none of consequence, permitted the jury to find that defendant forfeited her right of self-defense by using excessive force. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Evidence was sufficient to support finding that victim suffered serious bodily injury, thus supporting conviction for aggravated assault; victim testified that stabbing was very painful, victim was taken to surgery because knife had gone through kidney, surgery resulted in a six to eleven inch scar, victim underwent second surgery due to complications, victim testified that defendant jumped on her face, victim's nose and sinus bone were broken, and physician testified that long term effects of such injuries could be painful conditions including sinus infections and sinusitis. *Anderson v. United States*, 857 A.2d 451, 2004 D.C. App. LEXIS 425 (2004).

Sufficient evidence supported convictions for armed carjacking, armed robbery, aggravated assault while armed (AAWA), assault with a dangerous weapon (ADW), possession of a firearm while committing a crime of violence, and carrying a pistol without a license; victim was able to determine defendants' relative heights and complexions, although they masked their faces, officer apprehended defendant after he fled from car bearing license number of car reported stolen only a few minutes earlier, and wearing very shoes identified as those stolen from victim's feet, and defendant's girlfriend testified that defendants brought into her apartment several person items belonging to victim. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Sufficient evidence supported conclusion that victim suffered "serious bodily injury," as necessary to sustain conviction for aggravated assault while armed (AAWA); victim testified that he lost consciousness from multiple blows to his head, from which could be concluded that there was not merely substantial risk of unconsciousness, but actual loss of consciousness, thus

placing his injuries squarely within statutory definition of "serious bodily injury." *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Evidence was sufficient to support defendant's convictions for aggravated assault and malicious disfigurement while armed; jury was well within its authority in rejecting defendant's claim that he acted in self-defense in seriously burning victim with an electric iron, and it likewise had ample grounds on which to conclude that her injuries constituted disfigurement. *Burton v. United States*, 818 A.2d 198, 2003 D.C. App. LEXIS 135 (2003).

Evidence was insufficient, in prosecution for armed aggravated assault arising from incident in which shotgun carried by defendant fired and shot victim through the palm after victim shoved gun with his hand, to support a finding that defendant knowingly or purposefully caused serious bodily injury; evidence was entirely consistent with an argument that gun discharged accidentally when victim struck it in attempt to divert it from himself. *Perry v. United States*, 812 A.2d 924, 2002 D.C. App. LEXIS 741 (2002).

Evidence established that defendant, at a minimum, aided and abetted the assault with intent to kill while armed and the aggravated assault while armed; victim testified that defendant retrieved the knife that was used against her, that he alternately beat and "stomped" on her, and that he held her arms while the other assailants brutally attacked her, and defendant was smeared with blood when he was arrested. *Riddick v. United States*, 806 A.2d 631, 2002 D.C. App. LEXIS 529 (2002).

Evidence established "serious bodily injury," as element of aggravated assault; victim recounted how she moaned in pain, cried, and screamed for help during and immediately after being stabbed with broken stick and piece of glass, officer gave detailed and graphic description of her being soaked in blood and bleeding profusely from neck, paramedics told detective at crime scene that they believed victim would die as result of blood loss, and medical records showed neck wound transecting muscle and nerve which necessitated emergency exploratory surgery. *Riddick v. United States*, 806 A.2d 631, 2002 D.C. App. LEXIS 529 (2002).

Defendant was not entitled to a new trial for aggravated assault based on newly discovered evidence; the alleged new evidence was an affidavit which stated that defendant did not serve a jail sentence for his previous assault conviction, the evidence had been readily available to defendant prior to or during trial, and defendant was aware that the State planned to use defendant's assault conviction as a "link" to his murder conviction for impeachment pur-

poses. *Haley v. United States*, 799 A.2d 1201, 2002 D.C. App. LEXIS 312 (2002).

Evidence that defendant maliciously beat and burned the victim, leaving a permanent scar on her leg from a clothes iron, because in working for him as a prostitute she had failed to turn over an indeterminate sum of money, supported conviction for aggravated assault while armed. *Hudson v. United States*, 790 A.2d 531, 2002 D.C. App. LEXIS 8 (2002).

Evidence that defendant cut victim's left eyeball with a knife or razor blade, cutting through full thickness of wall of victim's eye, threatening victims' vision in that eye and requiring months of monitoring for development of complications, together with evidence that victim was legally blind in his right eye before the attack, was sufficient to support finding that defendant inflicted "serious bodily injury," as required to support conviction of aggravated assault. *Wilson v. United States*, 785 A.2d 321, 2001 D.C. App. LEXIS 240 (2001).

Evidence was sufficient to establish identity, and thus, was sufficient to support convictions for aggravated assault while armed and assault with a dangerous weapon, where eyewitness who identified defendant observed the entire altercation, the gymnasium where the fight occurred was adequately lit, and eyewitness was no more than 30 feet from the incident, which was close enough to see a small, sharp object in defendant's hand and to observe defendant's face. *Martin v. United States*, 756 A.2d 901, 2000 D.C. App. LEXIS 172 (2000).

Victim's identification of the defendant, a friend for at least twenty years, supported aggravated assault conviction, even though the victim was uncertain of, or recanted, his prior identification at trial. *Sparks v. United States*, 755 A.2d 394, 2000 D.C. App. LEXIS 109 (2000).

Testimony by the defendant's girlfriend that she found a pellet gun under the defendant's bed was relevant in an aggravated assault prosecution. *Sparks v. United States*, 755 A.2d 394, 2000 D.C. App. LEXIS 109 (2000).

Evidence was sufficient to show that the injury to victim, after being struck with a beer bottle by defendant, involved a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, as required to establish "serious bodily injury" element of aggravated assault while armed, where victim testified that he was "semi-unconscious," "in total shock," and "not totally coherent" after the assault, photographs revealed deep cuts around victim's nose and left eye, and medical records established that victim's "repair level" was "intermediate," and that the 48 stitches he received were "layered." D.C. Code 1981, §§ 22-504.1, 22-3202. *Gathy v. United*

States, 754 A.2d 912, 2000 D.C. App. LEXIS 128 (2000).

Evidence did not establish that two shooting victims suffered serious bodily injury, as was required for convictions for aggravated assault while armed (AAWA); although witness stated that he saw two holes on first victim's body, including hole behind victim's ear with blood coming out, and that second victim grabbed his shoulder and there was blood on back of his

shirt "like he got hit in the back of his neck or his shoulder," there was no testimony from victims, health professionals who treated them, or medical records detailing nature and extent of their injuries. D.C. Code 1981, §§ 22-504.1, 22-3202, 22-4101(7). *Nixon v. United States*, 730 A.2d 145, 1999 D.C. App. LEXIS 88 (1999), writ of certiorari denied by 528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

§ 22-405. Assault on member of police force, campus or university special police, or fire department.

(a) For the purposes of this section, the term "law enforcement officer" means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision.

(b) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 180 days or fined not more than \$1,000, or both.

(c) A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than \$10,000, or both.

(d) It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.

(R.S., D.C., § 432; June 29, 1953, 67 Stat. 95, ch. 159, § 205; Oct. 20, 1965, 79 Stat. 1011, Pub. L. 89-277, § 1; July 29, 1970, 84 Stat. 601, Pub. L. 91-358, title II, § 206; Aug. 11, 1971, 85 Stat. 316, Pub. L. 92-92; May 21, 1994, D.C. Law 10-119, § 3, 41 DCR 1639; Oct. 18, 1995, D.C. Law 11-63, § 3, 42 DCR 4109; June 3, 1997, D.C. Law 11-275, § 4, 44 DCR 1408; June 12, 1999, D.C. Law

12-284, § 2, 46 DCR 1328; June 18, 1999, D.C. Law 12-288, § 2, 45 DCR 4471; Apr. 24, 2007, D.C. Law 16-306, § 208, 53 DCR 8610.)

Cross references. — Minimum sentence for violation of section, see § 24-403.

Offenses committed against any private correctional officer or other employee of the private operator, inmates confined to CTF, see § 24-261.03.

Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000, see § 24-403.01.

Section references. — This section is referred to in §§ 23-524 and 24-403.

Prior Codifications. — 1981 Ed., § 22-505. 1973 Ed., § 22-505.

Effect of amendments. — D.C. Law 16-306 rewrote the section.

Temporary Amendment of Section. — Section 2 of D.C. Law 12-282 inserted “any designated civilian employee of the Metropolitan Police Department” near the beginning of (a).

Section 13(b) of D.C. Law 12-282 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 2 of the Metropolitan Police Department Civilianization and Street Solicitation for Prostitution Emergency Amendment Act of 1998 (D.C. Act 12-428, August 6, 1998, 45 DCR 5884), § 2 of the Metropolitan Police Department Civilianization Legislative Review Emergency Amendment Act of 1998 (D.C. Act 12-506, November 10, 1998, 45 DCR 45 8139), and § 2 of the Metropolitan Police Department Civilianization Congressional Review Emergency Amendment Act of 1999 (D.C. Act 13-13, February 8, 1999, 46 DCR 2333).

For temporary (90 day) amendment of section, see § 208 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 208 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 208 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 208 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of

1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 11-63. — Law 11-63, the “College and University Campus Security Amendment Act of 1995,” was introduced in Council and assigned Bill No. 11-152, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 20, 1995, and July 11, 1995, respectively. Signed by the Mayor on July 25, 1995, it was assigned Act No. 11-120 and transmitted to both Houses of Congress for its review. D.C. Law 11-63 became effective on October 18, 1995.

Legislative history of Law 11-275. — For legislative history of D.C. Law 11-275, see Historical and Statutory Notes following § 22-404.

Legislative history of Law 12-282. — Law 12-282, the “Metropolitan Police Department Civilianization Temporary Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-709. The Bill was adopted on first and second readings on July 7, 1998, and September 22, 1998, respectively. Signed by the Mayor, it was assigned Act No. 12-492 and transmitted to both Houses of Congress for its review. D.C. Law 12-282 became effective on May 28, 1999.

Legislative history of Law 12-284. — Law 12-284, the “Metropolitan Police Department Civilianization Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-710, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor, it was assigned Act No. 12-613 and transmitted to both Houses of Congress for its review. D.C. Law 12-284 became effective on June 12, 1999.

Legislative history of Law 12-288. — Law 12-288, the “Assault on an Inspector or Investigator and Revitalization Corporation Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-21, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on May 5, 1998, and May 19, 1998, respectively. Signed by the Mayor, it was assigned Act No. 12-380 and transmitted to both Houses of Congress for its review. D.C. Law 12-288 became effective on June 18, 1999.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

ANALYSIS

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Active confrontation.

Police officers are required to take police action when crimes are committed in their presence, and the same holds true for a member of police department engaged in police-related outside employment when the member's police powers are in effect for purposes of statute making it unlawful for person to assault or resist law enforcement officer while officer is engaged in the performance of his official duties. *Mattis v. United States*, 995 A.2d 223, 2010 D.C. App. LEXIS 268 (2010).

Defendant's flight from the scene was improperly considered as a basis for his conviction for assaulting a police officer; defendant's flight was not active conduct directed against the officers, and while defendant frustrated the officer's purpose, the manner in which he did so did not contravene the statute, prohibiting one from assaulting a police officer, because he did not resist, oppose or impede the officer from questioning him or attempting to arrest him,

and instead, he chose not to comply. *Coghill v. United States*, 982 A.2d 802, 2009 D.C. App. LEXIS 544 (2009).

To violate the assaulting a police officer statute, a person's conduct must cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty by actively interposing some obstacle that precluded the officer from questioning him or attempting to arrest him. *Coghill v. United States*, 982 A.2d 802, 2009 D.C. App. LEXIS 544 (2009).

Defendant did not actively or physically oppose or interfere with the officers simply by failing to remove her hands from her pockets, and this aspect of defendant's conduct did not cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty, as required to convict defendant of assaulting, resisting, or interfering with a police officer. *Howard v. United States*, 966 A.2d 854, 2009 D.C. App. LEXIS 42 (2009).

Adequacy of representation.

Defense counsel's performance in prosecution for assault on police officer with dangerous weapon, assault with dangerous weapon and carrying pistol without license, including incidents at suppression hearing, opening and closing statements at trial, examination of witnesses and arguments at sentencing hearing, constituted gross incompetence for purposes of determining whether defendant was denied effective assistance of counsel. D.C. Code §§ 22-502, 22-505(a, b), 22-3204; U.S. Const. Amend. 6. *Oesby v. United States*, 398 A.2d 1, 1979 D.C. App. LEXIS 332 (1979).

Accused, who was convicted of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon and who asserted that there had been inadequate preparation by his trial counsel, was not denied his right to effective assistance of counsel, absent any indication of any substantial defense which accused might have advanced and which was excluded as result of such alleged lack of preparation. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a); U.S. Const. Amend. 6. *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Failure to preserve, for appeal, the issue whether trial court erred in allowing in-court identifications of accused, who were convicted of armed robbery, assault with a dangerous weapon, assault on police officer and possession

of prohibited weapon, did not deny effective assistance of counsel where sole ground advanced for suppression of in-court identifications was the failure of government to conduct pretrial lineups and there was no indication that on-scene confrontations between accused and government witnesses were tainted by any impermissible police procedure. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a); U.S. Const. Amends. 5, 6; D.C. Code SCR, Criminal Rule 12(b)(3). *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Admissibility of evidence.

In prosecution for assault with a deadly weapon upon a member of the police department, under the circumstances, failure of defendant's counsel in the trial court to pursue his attempt to impeach a government witness did not constitute ineffective assistance of counsel, nor, under the circumstances, did trial court err in permitting introduction of evidence on the doctrine of flight or in giving an erroneous instruction thereon. D.C. Code 1951, § 22-505(b). *Tolliver v. U.S.*, 273 F.2d 523, 1959 U.S. App. LEXIS 2872 (C.A.D.C. 1959).

Although defendant's flight was not a basis for assaulting a police officer violation, the fact that defendant fled from the traffic stop had relevance as to whether the officer had reasonable suspicion to pursue defendant into the woods, and under these circumstances, defendant's headlong flight was sufficient to give officer reasonable articulable suspicion to justify an investigative Terry stop and to pursue defendant into the woods, and because officer was alone, could not tell if defendant was armed, and defendant refused to show his hands when repeatedly ordered to do so, it was reasonable for officer to handcuff defendant to perform the investigatory stop. *Coghill v. United States*, 982 A.2d 802, 2009 D.C. App. LEXIS 544 (2009).

Order excluding evidence regarding alleged injuries sustained by defendant during arrest for assault deprived him of meaningful opportunity to present defense, in trial for assault; evidence was relevant to defendant's theory of case that officers involved in arrest were biased, namely by showing that officer lied about assault by arresting officer in order to cover up fact that arresting officer allegedly apprehended defendant for no reason and injured him in process, and issue whether defendant suffered injuries during assault was factually disputed. *McDonald v. United States*, 904 A.2d 377, 2006 D.C. App. LEXIS 444 (2006).

Where prosecution presented evidence which placed revolver and air pistol in hands of defendant and codefendant, such guns had connection with crime and thus it was not error to admit guns into evidence and show them to jury

in prosecution for assault on police officer with dangerous weapon, assault with dangerous weapon, and carrying pistol without license. D.C. Code §§ 22-502, 22-505(a, b), 22-3204. *Oesby v. United States*, 398 A.2d 1, 1979 D.C. App. LEXIS 332 (1979).

Evidence, including testimony of police officer, was sufficient to support trial judge's finding that defendant charged with assault and possession of prohibited weapon knowingly and intelligently waived his constitutional rights, despite fact that police officer failed to secure defendant's signature on standard police form which acknowledged that arrestee understood his rights and chose to waive them. D.C. Code §§ 22-505, 22-3214(b). *Walden v. United States*, 351 A.2d 515, 1976 D.C. App. LEXIS 470 (1976).

Defendant's statement to epidemiologist, after epidemiologist had assisted in subduing defendant following attack on correctional officer and in response to epidemiologist's inquiry as to why defendant had attacked officer, that defendant had nothing to lose as he was a lifetimer was admissible in prosecution for assault on correctional officer and of assaulting and interfering with officer. D.C. Code § 22-505(a, b). *Smith v. United States*, 318 A.2d 891, 1974 D.C. App. LEXIS 417 (1974).

Arguments and conduct of counsel.

Trial court did not err in refusing to give curative instruction after prosecutor suggested, in closing argument, that defendant may have carried his pistol prior to the incident in question with intent of using it to commit a crime since that statement was a proper rebuttal to defense counsel's argument that defendant had been carrying the gun to defend himself and that the government had failed to show any motive for the shooting and, in addition, court subsequently instructed jury that arguments of counsel are not evidence. D.C. Code §§ 22-501, 22-505, 22-3202, 22-3204. *Fletcher v. United States*, 335 A.2d 248, 1975 D.C. App. LEXIS 357 (1975).

Refusal to declare a mistrial after prosecuting attorney stated in his summation that assaulting a correctional officer was basically no different from regular assault did not constitute error. D.C. Code §§ 22-504, 22-505. *Johnson v. United States*, 298 A.2d 516, 1972 D.C. App. LEXIS 312 (1972).

Arrest.

Defendant's actions during Terry stop of pushing officer and reaching for his own waistband provided officer with probable cause to arrest defendant for assaulting a police officer and to search for gun. *United States v. Jones*, 584 F.3d 1083, 2009 U.S. App. LEXIS 23359 (C.A.D.C. 2009), writ of certiorari denied by 130

S. Ct. 2081, 176 L. Ed. 2d 428, 2010 U.S. LEXIS 2894, 78 U.S.L.W. 3565 (U.S. 2010).

Officer had a reasonable suspicion supported by articulable facts to make a Terry stop in order to investigate whether or not defendant was drinking alcoholic beverages in a public place in violation of District of Columbia law; about 20 people were outside in residential neighborhood, there appeared to be a party atmosphere, defendant was carrying large white styrofoam cup in his hand and brown paper bag under his arm, when five or six officers exited two cars the group began to disperse in other direction from officers, and defendant voluntarily stated to officer "I ain't doing nothing. I'm just drinking." *United States v. Jones*, 584 F.3d 1083, 2009 U.S. App. LEXIS 23359 (C.A.D.C. 2009), writ of certiorari denied by 130 S. Ct. 2081, 176 L. Ed. 2d 428, 2010 U.S. LEXIS 2894, 78 U.S.L.W. 3565 (U.S. 2010).

Defendant's acquittal of driving with a suspended permit and running a stop sign did not establish that there was no probable cause for arrest for driving automobile without permit and prosecution for assault on police officer at time of arrest did not place defendant twice in jeopardy for the same offense. D.C. Code § 22-505(a). *United States v. Spencer*, 448 F.2d 1093, 1971 U.S. App. LEXIS 8554 (C.A.D.C. 1971).

Even assuming that defendant had made request for specific findings in bench trial on claim that assault was justified in light of excessive force by police, as defense to assault on police officer, trial court did consider his claim, but rejected it in view of police officer's testimony that defendant had resisted arrest, and trial court made finding that defendant had no right to resist arrest. *Tyson v. United States*, 30 A.3d 804, 2011 D.C. App. LEXIS 620 (2011).

Ultimate guilt of defendant of offense of assault of a police officer would be irrelevant to question of a valid arrest, where existence of probable cause to arrest for assault on the police officer was clear. D.C. Code § 22-505. *Terrell v. United States*, 294 A.2d 860, 1972 D.C. App. LEXIS 255 (1972), writ of certiorari denied by 410 U.S. 938, 93 S. Ct. 1398, 35 L. Ed. 2d 603, 1973 U.S. LEXIS 3458 (1973).

Officers, who, during course of immediate investigation of alleged robbery, were informed by victim that defendant passerby was perpetrator of the crime, had probable cause to arrest defendant, and thus defendant, who, as result of efforts to resist arrest, was convicted of simple assault, was not entitled to relief on theory that he had right to use force to resist illegal arrest. D.C. Code § 22-505; Act of July 29, 1970, § 206, 84 Stat. 601. *Brown v. United States*, 274 A.2d 683, 1971 D.C. App. LEXIS 285 (1971).

Construction and application.

District of Columbia statute under which assault on correctional officer is criminal act

not only expressly includes assault in District of Columbia facilities located outside District but would apply by implication also to assaults on District policemen engaged in official duties elsewhere. D.C. Code § 22-505(a). *Thompson v. United States*, 548 F.2d 1031, 1976 U.S. App. LEXIS 6102 (C.A.D.C. 1976).

Police force from another jurisdiction can lawfully "operate" in the District of Columbia so long as the police are in fresh pursuit of person believed to have committed a felony in their own jurisdiction for purposes of statute providing that person who assaults any officer or member of any police force operating in the District of Columbia can be convicted of assault on a police officer. D.C. Code 1981, § 22-505(a). *Watkins v. United States*, 724 A.2d 1200, 1999 D.C. App. LEXIS 22 (1999).

If a police officer from another jurisdiction enters the District of Columbia in fresh pursuit of defendant, who is believed to have committed a felony in that jurisdiction, the defendant may be convicted of assault on a police officer for acts against that police officer occurring within the District of Columbia. D.C. Code 1981, §§ 22-505, 23-901. *Watkins v. United States*, 724 A.2d 1200, 1999 D.C. App. LEXIS 22 (1999).

Virginia police became a "police force operating in the District of Columbia" when they entered the District of Columbia in fresh pursuit of defendant, who was suspected of having committed the felony offense of burglary, and therefore, defendant could be convicted of assaulting a Virginia police officer who was in the District of Columbia. D.C. Code 1981, §§ 22-505, 23-901. *Watkins v. United States*, 724 A.2d 1200, 1999 D.C. App. LEXIS 22 (1999).

Metro transit police fell within scope of statute prohibiting assault on police officer, D.C. Code 1981, § 22-505(a), as they were duly authorized police force with authority to operate in District of Columbia, and as the statute placed no limitation on type of "law enforcement officer" who was intended to be covered. D.C. Code 1981, § 1-2431, Tit. III, §§ 3, 76. *McDonald v. United States*, 496 A.2d 274, 1985 D.C. App. LEXIS 453 (1985).

Deadly or dangerous weapon.

Juvenile's teeth could be found to be a "deadly or dangerous weapon" supporting delinquency adjudication for assaulting a police officer with a deadly or dangerous weapon; the question for the jury would be whether the teeth were likely to cause death or great bodily injury in the manner in which juvenile used them, threatened to use them or intended to use them. *In re D.T.*, 977 A.2d 346, 2009 D.C. App. LEXIS 334 (2009).

Defenses.

Statute governing offense of assaulting, resisting, opposing, impeding, intimidating, or

interfering with a police officer (APO) prohibits forceful resistance even if the officer's conduct is unlawful; an individual wronged by an unlawful search or arrest has recourse through legal means, such as the exclusionary rule or civil claims for constitutional rights violations, and need not resort to physical violence in order to protect his or her rights. *Dolson v. United States*, 948 A.2d 1193, 2008 D.C. App. LEXIS 251 (2008).

A defendant cannot claim self-defense to justify an assault on a police officer unless there is some evidence that the officer used excessive force to effect an arrest. *Blocker v. United States*, 940 A.2d 1042, 2008 D.C. App. LEXIS 11 (2008).

Generally, one cannot invoke right of self-defense to justify assaultive behavior toward police officer. D.C. Code 1981, §§ 22-504, 22-505. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

One can claim self-defense against police officer who was using excessive force in carrying out official duties, under exception to general rule precluding invocation of right of self-defense to justify assaultive behavior toward police officer, whether charge is simple assault or assault on police officer; if officer used excessive force and defendant responded with force that was "reasonably necessary under the circumstances" for self-protection, defendant will have acted with "justifiable and excusable cause" and government will have failed to prove its case. D.C. Code 1981, §§ 22-504, 22-505. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Exception to general rule precluding invocation of right of self-defense to justify assaultive behavior toward police officer, when defendant did not know or have reason to know that complainant was police officer, was available only when defendant was charged with simple assault; it was not available to defendant charged with assault on police officer. D.C. Code 1981, §§ 22-504, 22-505. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Use of force against police officer who is attempting to detain citizen for any legitimate purpose associated with official police duties is limited only to defense against excessive force. D.C. Code 1981, § 22-505. *Speed v. United States*, 562 A.2d 124, 1989 D.C. App. LEXIS 135 (1989).

Arrestee's conviction for criminal assault on police officer who shot him during the arrest did not collaterally estop him from claiming that police officer used excessive force. D.C. Code 1981, § 22-505. *District of Columbia v. Peters*, 527 A.2d 1269, 1987 D.C. App. LEXIS 374 (1987).

Illegality of an arrest is not a defense and thus is irrelevant to charge of assaulting a

police officer. D.C. Code 1973, § 22-505(a). *Lassiter v. District of Columbia*, 447 A.2d 456, 1982 D.C. App. LEXIS 378 (1982).

Where prosecutor reindicted 17 defendants under a 26-count indictment, after defendants, eight of whom were charged under a 15-count indictment, and nine of whom were charged under an 11-count indictment, made motion to join all 17 defendants to be tried together, such action resulted in the appearance of vindictiveness on the part of the government, and the burden was on the government to dispel that appearance. (Per Pratt, J., with one Judge concurring.) D.C. Code §§ 22-105, 22-505(a, b), 22-1122(b). *United States v. Schiller*, 424 A.2d 51, 1980 D.C. App. LEXIS 395 (1980), writ of certiorari denied by 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341, 1981 U.S. LEXIS 1897, 49 U.S.L.W. 3807 (1981).

Discovery.

In proceeding in which accused were charged with assault on three police officers, constitutional dictates of United States Supreme Court decision pertaining to suppression of material evidence by prosecution did not require that Government disclose documents sought under accused's motion for discovery and inspection of complaints alleging misconduct against such officers, forms filed with respect to the officers and "supporting documents. . . reports, results of any investigations" in connection with any complaint against the officers. D.C. Code §§ 4-134, 22-505(a). *United States v. Akers*, 374 A.2d 874, 1977 D.C. App. LEXIS 333 (1977).

In proceeding in which accused were charged with assault on three police officers and in which defense was to be based on theory of self-defense against excessive force in effecting arrest, documents, which were within officers' personnel files, which pertained to prior conduct of officers and which were essentially unusable to the defense as they were, were not material to defense, within meaning of rule providing for disclosure of material documents, on theory that they could have been material to counseling accused whether to plead guilty or would influence decision by counsel to investigate facts truly at issue before trial. D.C. Code §§ 14-305, 22-505(a); D.C. Code SCR, Criminal Rules 16, 16(a)(1)(C), (b). *United States v. Akers*, 374 A.2d 874, 1977 D.C. App. LEXIS 333 (1977).

In proceeding in which accused were charged with assault on three police officers, granting of accused's discovery requests, under rule providing for disclosure of documents material to preparation of the defense, for disclosure of certain documents, within officers' personnel records, on theory that accused, who did not assert that reputation of any officer for violence was known to accused at time of alleged assault, would be permitted at trial to introduce

the documents as evidence of violence by officers to prove that they were of violent character and likely to have been the first aggressors was error. D.C. Code § 22-505(a); D.C. Code SCR, Criminal Rules 16, 16(a)(1)(C), (b). *United States v. Akers*, 374 A.2d 874, 1977 D.C. App. LEXIS 333 (1977).

In proceeding in which accused were charged with assault on three police officers, even if documents, which were within officers' personnel records and which accused sought to discover, reflected prior unlawful assaultive acts on part of such officers, the documents were not discoverable, under rule providing for disclosure of documents material to preparation of the defense, on ground that such documents could be used to impeach officers' credibility, in view of fact that unlawful assaultive conduct does not involve dishonesty or false statement. D.C. Code §§ 14-305, 22-505(a); D.C. Code SCR, Criminal Rules 16, 16(a)(1)(C), (b). *United States v. Akers*, 374 A.2d 874, 1977 D.C. App. LEXIS 333 (1977).

Where action of government in regard to missing disciplinary report describing alleged assault on correctional officer for which defendant was being prosecuted did not amount to bad faith and did not rise to level of gross negligence but simply amounted to negligence, failure to apply sanction under Jencks Act in striking testimony of correctional officer, who made report, and ordering new trial was not abuse of discretion. D.C. Code § 22-505(a); 18 U.S.C. § 3500. *Johnson v. United States*, 336 A.2d 545, 1975 D.C. App. LEXIS 363 (1975), writ of certiorari denied by 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648, 1976 U.S. LEXIS 1056 (1976).

Discretion of court.

Trial court acted within its discretion when, during jury deliberations and after realizing that it had erroneously instructed jury on assault on a police officer (APO) while armed rather than on charged offense of APO with a dangerous weapon, it instructed jury on APO as lesser-included offense of APO with a dangerous weapon and withdrew from jury's consideration charge of APO with a dangerous weapon and related charge of possession of a firearm during a crime of violence (PFCV); facts of case supported instruction on APO, erroneous instruction could not be allowed to stand uncorrected, and defendant was not prejudiced as a result of reinstructions. *Blocker v. United States*, 940 A.2d 1042, 2008 D.C. App. LEXIS 11 (2008).

Double jeopardy.

Defendant was not put in double jeopardy when, after having been convicted of disorderly conduct, he was prosecuted for assaulting a police officer, notwithstanding fact that both

incidents occurred in relatively short span of time and at same place. D.C. Code §§ 22-505(a), 22-1107. *Harris v. United States*, 402 F.2d 205, 1968 U.S. App. LEXIS 5575 (C.A.D.C. 1968).

Defendant's conviction of assault and of possession of prohibited weapon, both offenses arising out of same incident, did not result in double jeopardy, since each offense demanded proof of essential element not needed in other. D.C. Code §§ 22-505, 22-3214(b). *Walden v. United States*, 351 A.2d 515, 1976 D.C. App. LEXIS 470 (1976).

Examination of witnesses.

Prior conviction of attempted housebreaking was properly used for impeachment of defendant charged with unauthorized use of vehicle and assault on police officer. D.C. Code §§ 22-505(a), 22-2204. *United States v. White*, 427 F.2d 634, 1970 U.S. App. LEXIS 9103 (C.A.D.C. 1970).

Trial court's refusal to allow defendant to cross-examine police officer, who was shot while trying to arrest defendant, about police regulations that required reports to be filed "immediately" when officers drew and pointed their firearms and to be sequestered during the resulting investigation, did not violate the Confrontation Clause, in prosecution for resisting a police officer and other offenses, as such cross-examination would have resulted in a distracting "mini-trial" on collateral issues; report regulation did not establish time limit for filing reports or provide for any sanctions if report was submitted late, officer had been shot such that some delay in submission of his report was to be expected, and responsibility to sequester officers during a use-of-force investigation was placed on investigating officer. *Coles v. United States*, 36 A.3d 352, 2012 D.C. App. LEXIS 19 (2012).

Expungement of records.

Trial court was not plainly wrong in concluding from conflicting testimony that defendant failed to establish by clear and convincing evidence that he did not assault a police officer; accordingly, defendant was not entitled to have his arrest record sealed even though assault charges against him had been dismissed, and even though he was successful in his civil action against the District of Columbia for malicious prosecution, false imprisonment, unreasonable seizure of his pistol, and trespass. D.C. Code 1981, § 22-505. *Earle v. District of Columbia*, 479 A.2d 877, 1984 D.C. App. LEXIS 462 (1984).

Identification of accused.

Even if accused, who elected not to testify at trial on charge of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon, had "testimo-

nial privilege" at trial to don jacket he was alleged to have worn at time of the offenses, denial of request that he be permitted to put on such jacket "to make double sure" that jacket had never been seen by his wife, who had testified that she had never seen the jacket, was not error. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a). *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Indictment and information.

Indictment's allegedly erroneous reference to statutes relating to use of a weapon did not warrant reversal of defendant's conviction for assaulting police officers, absent prejudice to defendant, but case would be remanded for resentencing. D.C. Code 1981, §§ 22-505(a, b), 22-3202(a)(1). *United States v. Bowie*, 198 F.3d 905, 1999 U.S. App. LEXIS 33134 (C.A.D.C. 1999).

Where offenses of robbery, assault with dangerous weapon, assault on member of police force, unauthorized use of vehicle, and carrying dangerous weapon were based on two or more connected acts constituting part of common scheme and plan, defendants were alleged to have participated in same series of acts constituting offenses and each of defendants aided and abetted offenses charged against other defendants, it was proper for grand jury to join defendants and offenses in the indictment. D.C. Code §§ 22-502, 22-505(a), 22-2204, 22-2901, 22-3204; Fed.Rules Crim.Proc. rule 8(a, b), 18 U.S.C. *United States v. Wilson*, 434 F.2d 494, 1970 U.S. App. LEXIS 8760 (C.A.D.C. 1970).

Constructive amendment of indictment did not result from fact that acts listed in armed assault on police officer (AAPO) charge were stated in conjunctive but verdict form and instructions were in disjunctive. D.C. Code 1981, § 22-505. *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

Ruling by trial court that action of prosecutor in reindicting 17 defendants under a single 26-count indictment, after defendants, who were charged under one of two indictments with 11 and 15 counts, respectively, made a motion to be tried together, was motivated by vindictiveness in seeking the new indictment was without support in the record. (Per Pratt, J., with one Judge concurring.) D.C. Code §§ 22-105, 22-505(a, b), 22-1122(b). *United States v. Schiller*, 424 A.2d 51, 1980 D.C. App. LEXIS 395 (1980), writ of certiorari denied by 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341, 1981 U.S. LEXIS 1897, 49 U.S.L.W. 3807 (1981).

Where complaint was filed charging defendant with felony, but grand jury returned ignoramus bill and felony complaint was dismissed, federal rule providing that prosecution shall terminate upon filing of dismissal by prosecutor

did not preclude trial on information charging misdemeanor. Fed.Rules Crim.Proc. rule 48(a), 18 U.S.C.; D.C. Code 1961, §§ 22-504, 22-505. *United States v. Kennedy*, 220 A.2d 322, 1966 D.C. App. LEXIS 188 (App. 1966).

Instructions.

Instruction that erroneously conflated and broadly defined "use" and "carry" as used in offense for use or carrying of firearm during and in relation to crime of violence was harmless, given overwhelming evidence of guilt, including defendant's assault convictions for pointing and firing gun at police officers, which showed that jury found defendant had carried gun while robbing restaurant immediately prior to encounter with officers, as well as restaurant employees' testimony that defendant jumped over counter brandishing gun. 18 U.S.C. § 924(c); D.C. Code 1981, § 22-505(a, b). *United States v. Kennedy*, 133 F.3d 53, 1998 U.S. App. LEXIS 568 (C.A.D.C. 1998), writ of certiorari denied by 525 U.S. 911, 119 S. Ct. 255, 142 L. Ed. 2d 210, 1998 U.S. LEXIS 6229, 67 U.S.L.W. 3238 (1998).

In prosecution for assaulting police officer, requested instruction as to defendant's right to resist unlawful arrest and use such force as was at his command and necessary to prevent such arrest was properly refused as being too broad and inapplicable to issues of case. D.C. Code 1951, § 22-505. *Abrams v. U.S.*, 237 F.2d 42, 1956 U.S. App. LEXIS 2857 (C.A.D.C. 1956).

Even if defendant, charged with assaulting, resisting, opposing, impeding, intimidating, or interfering with a police officer (APO), was entitled to jury instruction that he could not be convicted based solely on his conduct in verbally asserting his Fourth Amendment right to be free of police intrusion onto his property without a warrant, trial court's failure to give such instruction was not plain error; omission of instruction could not have had a prejudicial impact on jury's deliberations, as three defense witnesses agreed that defendant did not use words only, but used force to hold shut a gate in order to prevent officer from getting through. *Dolson v. United States*, 948 A.2d 1193, 2008 D.C. App. LEXIS 251 (2008).

Defendant, charged with assaulting, resisting, opposing, impeding, intimidating, or interfering with a police officer (APO), was not entitled to requested jury instruction that he could not be convicted based solely on his conduct in verbally asserting his Fourth Amendment right to be free of police intrusion onto his property without a warrant; even if evidence supported such a "words only" instruction, defendant failed to sufficiently distinguish such argument from his request for an instruction that defendant could not be convicted based on his conduct in preventing officer from entering his property by holding a gate shut while as-

serting his Fourth Amendment right. *Dolson v. United States*, 948 A.2d 1193, 2008 D.C. App. LEXIS 251 (2008).

Defendant was not entitled at trial for assault on a police officer (APO) to a jury instruction on justifiable or excusable cause, even though officers who encountered defendant testified that they sprayed defendant with pepper spray; no evidence suggested that officers used excessive force to effect arrest, as officers testified that they sprayed defendant because he failed to follow their commands and strongly resisted being handcuffed, both of two eyewitnesses testified that they called 911 because they feared for safety of officers, and one eyewitness saw no physical force on officers' part "other than just wrestling with [defendant]" in an effort to subdue him. *Blocker v. United States*, 940 A.2d 1042, 2008 D.C. App. LEXIS 11 (2008).

Any error in trial court's omission of instructions for jury to not treat instruction on assault on a police officer (APO) any differently than other instructions, in context of trial court's realization that it had erroneously instructed jury on APO while armed rather than on charged offense of APO with a dangerous weapon and its subsequent instruction on APO as lesser-included offense of APO with a dangerous weapon and withdrawal from jury's consideration charge of APO with a dangerous weapon and related charge of possession of a firearm during a crime of violence (PFCV), was not plain error; reinstructions, considered as a whole, fairly and accurately stated applicable law. *Blocker v. United States*, 940 A.2d 1042, 2008 D.C. App. LEXIS 11 (2008).

Trial court had an affirmative obligation to correct its error in instructing jury on assault on a police officer (APO) while armed, rather than on offense that was charged in indictment, which was offense of APO with a dangerous weapon, even though jury, which was deliberating, had not yet expressed any confusion regarding offense charged in indictment; trial court recognized that jury, because it had received an erroneous instruction, could not have had a correct understanding of law applicable to offense charged in indictment. *Blocker v. United States*, 940 A.2d 1042, 2008 D.C. App. LEXIS 11 (2008).

Jury reinstructions, stating that general right of self-defense was applicable to both offenses of assault on a police officer (APO) and simple assault and that government had to prove beyond a reasonable doubt that defendant had not acted in self-defense, were not plain error where defendant was afforded greater right of self-defense than that to which he was entitled by law. D.C. Code 1981, §§ 22-504, 22-505. *Robinson v. United States*, 649 A.2d 584, 1994 D.C. App. LEXIS 204 (1994).

Trial court was not required to instruct jury as to definition of terms outlined in statute governing charged offense of armed assault on police officer (AAPO), where defendant never requested it to do so. D.C. Code 1981, § 22-505. *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

Defendant charged with assaulting police officer while armed was not entitled to self-defense instructions, where no lesser-included charge of simple assault was before jury and defendant did not claim that police officers used excessive force. D.C. Code 1981, §§ 22-504, 22-505, 22-3202. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Jury instructions in prosecution for assault on police officer while armed, in which jury was advised three times that government had to prove beyond reasonable doubt that defendant knew or had reason to know that men at whom he fired shots were police officers, adequately explained law to jury and adequately encompassed defense theory that defendant thought his pursuers were drug dealers; it was not necessary that instructions be modified to focus jury's attention on defendant's claim that he had not heard police officers identify themselves, that under circumstances he had no reason to believe his plain clothes pursuers were police officers, and that he therefore reasonably believed they were drug dealers. D.C. Code 1981, §§ 22-505, 22-3202. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

That Government chose to prosecute defendant for simple assault, rather than assault on police officer, for altercation involving police officer did not require that jury be instructed on general law of self-defense, rather than specific self-defense rights applicable when person using force is police officer engaged in official police duties. D.C. Code 1981, §§ 22-504, 22-505. *Speed v. United States*, 562 A.2d 124, 1989 D.C. App. LEXIS 135 (1989).

In prosecution for simple assault in which complainant was police officer, instructions to jury on when use of force against police officer is justified were incomplete, requiring reversal; instructions did not outline defendant's right to defend himself when no arrest was being made, and instructions did not state that Government was required to prove that predicate facts limiting defendant's right to defend himself were present or that Government bore burden of proof on issue of self-defense or justification. D.C. Code 1981, § 22-505. *Speed v. United States*, 562 A.2d 124, 1989 D.C. App. LEXIS 135 (1989).

In prosecution for simple assault, general instructions that Government had burden of proving defendant's guilt beyond reasonable doubt were insufficient to inform jury that Government also had burden of proof on issue

of self-defense. D.C. Code 1981, § 22-505. *Speed v. United States*, 562 A.2d 124, 1989 D.C. App. LEXIS 135 (1989).

Defendant accused of assaulting and interfering with police officer was entitled to instruction as to right to come to defense of third person, in light of defendant's testimony that situation in which officers were attempting to arrest suspected drug buyer appeared to him to be two men assaulting and apparently robbing a third, the apparent victim gasping for breath, unable to talk, and slobbering. D.C. Code 1981, § 22-505(a). *Jones v. United States*, 555 A.2d 1024, 1989 D.C. App. LEXIS 44 (1989).

Trial court's failure to give instruction on defense of third person was not harmless error, since it was reasonably possible that jury appraised of defendant's right to defend third person would not have convicted defendant of assaulting and interfering with a police officer. D.C. Code 1981, § 22-505(a). *Jones v. United States*, 555 A.2d 1024, 1989 D.C. App. LEXIS 44 (1989).

In prosecution of defendant on charge of assault on a police officer, evidence, which indicated that officer was wearing jeans and which was contradictory as to whether officer identified himself, was sufficient to support charge on lesser included offense of simple assault as requested by defendant. D.C. Code §§ 22-504, 22-505. *Petway v. United States*, 420 A.2d 1211, 1980 D.C. App. LEXIS 376 (1980).

Where police officers testified that they arrived at apartment in response to disorderly conduct complaint, that they were confronted by defendant who was kicking at the door and yelling profanities, that they placed her under arrest, which she resisted violently, that she broke away and obtained a knife, and that she advanced on the officers, requiring them to draw their guns and seek reinforcements to subdue her, and where defendant testified that she had not threatened any officer with a knife but had herself been attacked by the officers, defendant was not entitled to an instruction on self-defense. D.C. Code §§ 22-502, 22-505(a). *Holt v. United States*, 340 A.2d 827, 1975 D.C. App. LEXIS 413 (1975).

Jurisdiction.

Superior court properly exercised jurisdiction over prosecution for assault on District of Columbia correctional officer by defendant who allegedly attacked two members of correctional force with steel bar. D.C. Code 1973, §§ 11-923(b)(1), 22-505(a). *Jackson v. United States*, 441 A.2d 1000, 1982 D.C. App. LEXIS 286 (1982).

Statute providing that superior court has jurisdiction of any criminal case under any law applicable exclusively to District of Columbia vests jurisdiction in superior court to try assaults on correctional officers charged under

statute prohibiting such assaults when assault was committed within geographical boundaries of city. D.C. Code 1973, §§ 11-923(b)(1), 22-505(a). *Jackson v. United States*, 441 A.2d 1000, 1982 D.C. App. LEXIS 286 (1982).

If superior court were constitutionally barred from exercising jurisdiction over assaults on correctional officers outside District of Columbia, such bar would have no effect on its jurisdiction over such assaults inside District. D.C. Code 1973, § 22-505(a); U.S. Const. Art. 1, § 8, cl. 17. *Jackson v. United States*, 441 A.2d 1000, 1982 D.C. App. LEXIS 286 (1982).

Superior court had jurisdiction to try accused for offense of assaulting police officer. D.C. Code § 22-505(a). *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Statute proscribing interfering with member of police force operating in District of Columbia, proscribing assaulting district employee charged with supervision of juveniles confined in district facility located within District or elsewhere and proscribing assaulting member of fire department operating in District contains three different "laws," within statute providing that superior court has jurisdiction of any criminal case under any law applicable exclusively to District; thus superior court had jurisdiction of prosecution for assault on police officer in District, even if that court would have no jurisdiction over prosecution for assault on supervisor of confined juvenile on ground that it was an extraterritorial offense. D.C. Code § 22-505(a). *United States v. Thompson*, 347 A.2d 581, 1975 D.C. App. LEXIS 276 (1975).

Within statute providing that superior court has jurisdiction of any criminal case under any law applicable exclusively to District of Columbia, "any law" does not mean "any statute" but means any distinct, self-contained directive or prohibition; thus it is not required that a statutory section in its entirety apply exclusively to district in order for superior court to have jurisdiction of any prohibition in unseverable statute. D.C. Code §§ 11-923(b)(1), 22-505(a). *United States v. Thompson*, 347 A.2d 581, 1975 D.C. App. LEXIS 276 (1975).

Juvenile adjudications.

Conviction of juvenile of first-degree felony-murder, armed robbery, assault with dangerous weapon, assault upon police officer with dangerous weapon and carrying dangerous weapon would be remanded to district court to consider possibility of sentencing under Youth Corrections Act. D.C. Code §§ 22-502, 22-505(b), 22-2401, 22-3202, 22-3204; 18 U.S.C. § 5005 et seq. *United States v. Howard*, 449 F.2d 1086, 1971 U.S. App. LEXIS 9212 (C.A.D.C. 1971).

Evidence supported conclusion that defendants assaulted officers, given police officers' testimony that defendants hit them. *Gatlin v.*

United States, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

Juvenile's intent to cause injury to another juvenile could be transferred from intended victim to actual unintended victims, three juvenile supervisors, as required to support adjudication of delinquency for assault on employees charged with supervising confined juveniles. D.C. Code 1986 Supp. § 22-505(a). In re E.D.P., 573 A.2d 1307, 1990 D.C. App. LEXIS 106 (1990).

Evidence that juvenile interfered with three juvenile supervisors as they were attempting to control fray involving three juveniles would be sufficient to support conviction for violating statute proscribing interference with employee charged with supervising confined juveniles. D.C. Code 1986 Supp. § 22-505(a). In re E.D.P., 573 A.2d 1307, 1990 D.C. App. LEXIS 106 (1990).

Trial court had jurisdiction over delinquency proceeding arising out of assault on juvenile supervisors at facility where juvenile was serving two-year commitment. D.C. Code 1986 Supp. § 22-505(a). In re E.D.P., 573 A.2d 1307, 1990 D.C. App. LEXIS 106 (1990).

Trial judge did not abuse its discretion in denying juvenile's motion to dismiss delinquency petition for social reasons, in light of factual circumstances of assault giving rise to the petition. D.C. Code 1986 Supp. § 22-505(a). In re E.D.P., 573 A.2d 1307, 1990 D.C. App. LEXIS 106 (1990).

In proceeding to have juvenile adjudged a delinquent, evidence was sufficient to justify finding that juvenile assaulted police officer. D.C. Code § 22-505(a). In re G., 427 A.2d 440, 1981 D.C. App. LEXIS 230 (1981).

In proceeding to have juvenile adjudged delinquent as result of alleged assault of police officer, there was no abuse in trial court's refusing to exercise its discretion to examine in camera disciplinary records and records of citizen complaints filed against police officer pertaining to use of force, in view of fact that trial court's ruling granting government's motion to quash juvenile's subpoena duces tecum was based on premise that, even if it existed, material sought would not be admissible. D.C. Code § 22-505(a); D.C. Code SCR, Juvenile Rule 17(c). In re G., 427 A.2d 440, 1981 D.C. App. LEXIS 230 (1981).

Juvenile charged with assaulting police officer was not entitled to examine arresting police officer's records in order to prepare self-defense defense to the charge where juvenile did not have prior knowledge of police officer's allegedly violent personality. D.C. Code § 22-505(a); D.C. Code SCR, Juvenile Rule 17(c). In re G., 427 A.2d 440, 1981 D.C. App. LEXIS 230 (1981).

Statutory provision proscribing assaults on officers or employees of juvenile facility "located

within the District of Columbia or elsewhere" was intended to reach attacks on personnel of juvenile facility taking place outside, as well as inside, the District, and thus family division had jurisdiction of proceedings brought against two juveniles based upon their assaults on counselors at District juvenile facility located in Maryland. D.C. Code §§ 16-2301(7), 22-505(a). In re W., 391 A.2d 1385, 1978 D.C. App. LEXIS 315 (1978).

Reasonable trier of fact could have found that two juveniles, who were involved in assault on counselors at District of Columbia juvenile detention facility located in Maryland, beyond a reasonable doubt were principals or aiders and abettors and their adjudications of delinquency were therefore affirmed. D.C. Code § 22-505(a). In re W., 391 A.2d 1385, 1978 D.C. App. LEXIS 315 (1978).

In juvenile court prosecution for interfering with police officer in performance of his duties, standard to be applied in determining involvement is not proof beyond reasonable doubt but proof by preponderance of evidence. D.C. Code § 22-505(a). In re Johnson, 253 A.2d 462, 1969 D.C. App. LEXIS 269 (App. 1969), reversed by 429 F.2d 214, 139 U.S. App. D.C. 30, 1970 U.S. App. LEXIS 8461 (1970).

Legislative power of Congress.

Congress exercises exclusive control over District of Columbia pursuant to Constitution and may distribute judicial authority among courts and magistrates and regulate judicial proceedings in District in any way it sees fit as long as it does not contravene Constitution. D.C. Code 1973, § 22-505(a); U.S. Const. Art. 1, § 8, cl. 17. Jackson v. United States, 441 A.2d 1000, 1982 D.C. App. LEXIS 286 (1982).

Lesser included offenses.

Simple assault is lesser included offense of assault on police officer. Gatlin v. United States, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

Simple assault is lesser included offense of assault on police officer. D.C. Code 1981, §§ 22-504, 22-505(a). McDonald v. United States, 496 A.2d 274, 1985 D.C. App. LEXIS 453 (1985).

Assault on a correctional officer was a lesser included offense of assault on a correctional officer while armed and conviction for the former could not stand in face of conviction of the latter. D.C. Code § 22-505(a, b). Smith v. United States, 318 A.2d 891, 1974 D.C. App. LEXIS 417 (1974).

When resisting arrest involves force used on a police officer, that offense too could be a lesser included offense of assault on a police officer and chargeable as a simple assault. United States v. Daramola, 119 WLR 1009 (Super. Ct. 1991).

Merger of offenses.

Defendant's convictions for assault with dan-

gerous weapon and assaulting, resisting, or interfering with police officer with dangerous weapon, stemming from defendant's actions against police officers, did not merge; action that gave rise to assault with dangerous weapon charge occurred when defendant stopped in front of unmarked police vehicle and pointed his pistol directly at windshield, causing officers to crouch down to seek cover, and at time of this assault, defendant would not yet have known he was assaulting police officers, and moments later, after officers exited vehicle and identified themselves, they commanded that defendant stop and, as they gave chase, the next assault by defendant occurred, and there was clear separation between the first and second assaults. *Scott v. United States*, 975 A.2d 831, 2009 D.C. App. LEXIS 249 (2009).

Defendant's convictions for possession of a firearm during a crime of violence (PFCV) and felony assaulting a police officer (APO) did not merge, though both offenses arose as a result of the single action of holding a gun, as each crime required proof of an element that the other did not, and, thus, were considered separate offenses. *Ball v. United States*, 26 A.3d 764, 2011 D.C. App. LEXIS 510 (2011).

Nature and elements of offense.

— In general.

Simple assault is lesser included offense of assault on police officer. *Gatlin v. United States*, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

Defendant's convictions for assaulting a police officer and for escape from an officer did not merge, as each required proof of an element which the other did not. *Mack v. United States*, 772 A.2d 813, 2001 D.C. App. LEXIS 111 (2001).

Juvenile's conduct, on a school day after class started in high school a block away, in refusing to identify himself to police officer, using profanity, and not complying with officer's request to remain did not constitute the statutory offense of assault on a police officer. D.C. Code 1981, § 22-505. In re C.L.D., 739 A.2d 353, 1999 D.C. App. LEXIS 251 (1999).

To commit the statutory offense of assault on a police officer, a person's conduct must go beyond speech and mere passive resistance or avoidance, and cross the line into active confrontation, obstruction or other action directed against an officer's performance in the line of duty. D.C. Code 1981, § 22-505. In re C.L.D., 739 A.2d 353, 1999 D.C. App. LEXIS 251 (1999).

The key in determining whether the statutory offense of assault on a police officer occurred is the active and oppositional nature of the conduct for the purpose of thwarting a police officer in his or her duties. D.C. Code

1981, § 22-505. In re C.L.D., 739 A.2d 353, 1999 D.C. App. LEXIS 251 (1999).

Speech, alone, may not permissibly constitute the statutory offense of assault on a police officer. D.C. Code 1981, § 22-505. In re C.L.D., 739 A.2d 353, 1999 D.C. App. LEXIS 251 (1999).

Fact that defendant knew or should have known that complainants were police officers was an element of offense of assault on a police officer with a dangerous weapon. D.C. Code § 22-505. *Fletcher v. United States*, 335 A.2d 248, 1975 D.C. App. LEXIS 357 (1975).

Statute making it unlawful to assault, without justifiable and excusable cause, any officer of any penal or correctional institution does not contemplate a level of conduct measurably different from simple assault. D.C. Code §§ 22-504, 22-505. *Johnson v. United States*, 298 A.2d 516, 1972 D.C. App. LEXIS 312 (1972).

The legislature has explicitly recognized that an officer or member of a police force operating in the District of Columbia may use force, e.g., engage in an assault, to effect even an unlawful arrest, in circumstances where such conduct by one not an officer or member of such a police force obviously would constitute a criminal assault. *United States v. Holt*, 120 WLR 621 (Super. Ct. 1992).

— Obstruction of justice, nature and elements of offense.

Defendant accused of attempting without justifiable and excusable cause to impede, interfere with, or resist police officer performing official duties should have been charged under statute providing punishment for unjustifiably impeding police officer performing official duties, not statute providing punishment for attempt to commit any crime. D.C. Code 1961, §§ 22-103, 22-505. *United States v. Caviness*, 192 A.2d 288, 1963 D.C. App. LEXIS 251 (App. 1963).

Off-duty officer.

Statute prohibiting person from assaulting, resisting, or interfering with a police officer protected officer, even though he was off duty and working for a private employer at the time of the assault; in spite of his off-duty status, when officer intervened in argument between defendant and another restaurant patron, he was engaged in the performance of official duties. *Mattis v. United States*, 995 A.2d 223, 2010 D.C. App. LEXIS 268 (2010).

Pleas.

Active role of court in trying to convince defendant that he should follow counsel's advice to enter plea of guilty to pistol charge is improper. (Per Mack, A. J., with three Judges concurring and three Judges concurring in part). D.C. Code §§ 22-505(a), 22-3204; D.C. Code SCR, Criminal Rule 11; U.S. Const.

Amend. 6. *Butler v. United States*, 414 A.2d 844, 1980 D.C. App. LEXIS 288 (1980).

Presumptions and burden of proof.

Defendant was entitled to benefit of pretrial rebuttable presumption of vindictiveness when government added charge of assault on a police officer (APO) to preexisting charge of possession of marijuana, which shifted burden to government to explain its decision to add APO charge; government knew from date of defendant's arrest that there were facts potentially supporting charge of assault and resisting arrest, government added APO charge after defendant sought to enforce his subpoena and trial was continued, and government, by announcing that it was ready to go to trial, communicated that fluid pretrial litigation period was over. *Simms v. United States*, 41 A.3d 482, 2012 D.C. App. LEXIS 144 (2012).

Government had to prove that defendant knew or had reason to know that victim was police officer to convict defendant of assault on police officer while armed. D.C. Code 1981, §§ 22-505, 22-3202. *Nelson v. United States*, 580 A.2d 114, 1990 D.C. App. LEXIS 244 (1990).

Purpose.

Purpose of statute governing offense of assaulting, resisting, opposing, impeding, intimidating, or interfering with a police officer (APO) is to de-escalate the potential for violence which exists whenever a police officer encounters an individual in the line of duty; this concern is not limited to the officer's safety but extends to all parties involved, including the prospective arrestee. *Dolson v. United States*, 948 A.2d 1193, 2008 D.C. App. LEXIS 251 (2008).

Review.

Where petitioners were charged in unrelated proceedings in superior court with assaulting District of Columbia police officer and were not charged with federal misdemeanor, their cases were not within jurisdiction of federal Court of Appeals, and their petitions for leave to appeal from determination by District of Columbia Court of Appeals that superior court had power to act in their cases were accordingly dismissed. D.C. Code §§ 11-301(1, 2), 22-505(a). *Thompson v. United States*, 548 F.2d 1031, 1976 U.S. App. LEXIS 6102 (C.A.D.C. 1976).

That defendant had served his sentence did not render case moot in view of effect of felony conviction on civil rights and punishment upon subsequent conviction. D.C. Code 1961, §§ 1-1102(2)(c), 22-104, 22-505(a). *Dancy v. United States*, 361 F.2d 75, 1965 U.S. App. LEXIS 4299 (C.A.D.C. 1965).

Defendant, who had served sentence, was entitled to have conviction for assault reversed and case remanded, where alleged assault was committed on witness who testified against defendant at preliminary hearing at which de-

fendant had not been accorded right to counsel, and no preliminary hearing was granted on assault charge. D.C. Code 1961, § 22-505(a). *Dancy v. United States*, 361 F.2d 75, 1965 U.S. App. LEXIS 4299 (C.A.D.C. 1965).

In view of defendant's age and lack of prior criminal record, and especially apparent feeling of jury that punishment should be tempered with mercy, district court might wish to reconsider sentence imposed for assault upon police officer. D.C. Code 1961, § 22-505(a); Fed. Rules Crim. Proc. rule 35, 18 U.S.C. *Lee v. United States*, 344 F.2d 566, 1965 U.S. App. LEXIS 6268 (C.A.D.C. 1965).

Although the government argued alternatively that, leaving aside defendant's flight from the scene, the evidence of defendant's conduct in the woods sufficiently supported his conviction for assaulting a police officer, defendant's conviction could not stand because, based on the record before it, appellate court could not determine whether the jury improperly relied on the evidence of defendant's flight in convicting him of assaulting a police officer; whenever various alternative theories of liability were submitted to a jury, any one of which was later determined to be improper, the conviction could not be sustained. *Coghill v. United States*, 982 A.2d 802, 2009 D.C. App. LEXIS 544 (2009).

The assault on a police officer statute, which prohibited an individual from intimidating a police officer in the performance of his or her duties, was not unconstitutionally overbroad as applied to defendant who ordered his dog to attack officer; the statute did not reach constitutionally protected speech. *Dickens v. United States*, 19 A.3d 321, 2011 D.C. App. LEXIS 220 (2011).

The assault on a police officer statute, which prohibited an individual from intimidating a police officer in the performance of his or her duties, was not unconstitutionally vague as applied to defendant; an ordinary person would understand that defendant's conduct in telling his dog to "get" the arresting officer was prohibited by statute. *Dickens v. United States*, 19 A.3d 321, 2011 D.C. App. LEXIS 220 (2011).

Defendant's failure to request specific findings by trial court, in prosecution for assault on a police officer tried to the court in which the government advanced several theories of guilt, pursuant to rule requiring trial court, in a case tried without a jury, to make a general finding and, on request made before the general finding, find the facts specially, did not preclude remand of case for a determination on the existing record of the theory on which the trial court relied in finding defendant guilty, as the government also could have requested specific findings under the rule but did not do so, and factual findings by the trial court, even though not required, would be helpful to proper appel-

late review of conviction. *Jones v. United States*, 16 A.3d 966, 2011 D.C. App. LEXIS 155 (2011).

Validity.

Statute, construed to prohibit individuals from opposing District juvenile supervisors, did not infringe on rights of free speech and assembly and was not overbroad. D.C. Code 1986 Supp. § 22-505(a); U.S.C. Const.Amend. 1. In re E.D.P., 573 A.2d 1307, 1990 D.C. App. LEXIS 106 (1990).

Verdict.

That defendant was convicted for assault upon only one of three officers involved in fracas, with acquittal of assault upon the other two, presented no basis for reversing the conviction on theory of inconsistent verdict. D.C. Code § 22-505(a). *United States v. Spencer*, 448 F.2d 1093, 1971 U.S. App. LEXIS 8554 (C.A.D.C. 1971).

Where defendant was convicted of armed assault on police officer (AAPO) but acquitted of assault with dangerous weapon (ADW), his conviction of possession of firearm during crime of violence (PFCV) was not improper on grounds that jury might have convicted defendant of PFCV based on belief that AAPO was proper predicate offense to PFCV, rather than ADW as alleged in indictment; the indictment was read to jury at beginning of trial, prosecutor explained in closing argument that ADW was predicate offense, and trial court instructed jury that possession of weapon must have occurred at time when defendant was engaged in commission of crime of violence. D.C. Code 1981, §§ 22-503, 22-505(b), 22-3204(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

No conclusions as to jury's confusion in convicting defendant of possession of firearm during crime of violence (PFCV) but acquitting him of assault with dangerous weapon (ADW) could be drawn from markings on verdict form, since it was unknown who made notations or if notations had support of each juror, and determining why juror or jurors made notations would require sheer speculation. D.C. Code 1981, §§ 22-503, 22-505(b), 22-3204(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

Weight and sufficiency of evidence.

Evidence sustained conviction for assault on police officer while armed with dangerous weapon. D.C. Code § 22-505(b). *United States v. Lee*, 509 F.2d 400, 1974 U.S. App. LEXIS 5476 (C.A.D.C. 1974), writ of certiorari denied by 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765, 1975 U.S. LEXIS 1180 (1975).

Evidence established that assault on police officer at time of allegedly unlawful arrest was part of such excessive resistance to the arrest

as would warrant conviction of assaulting a police officer. D.C. Code § 22-505(a). *United States v. Spencer*, 448 F.2d 1093, 1971 U.S. App. LEXIS 8554 (C.A.D.C. 1971).

Evidence sustained conviction for assault upon police officer. D.C. Code 1961, § 22-505(a). *Lee v. United States*, 344 F.2d 566, 1965 U.S. App. LEXIS 6268 (C.A.D.C. 1965).

Evidence sustained conviction for assaulting and interfering with an officer of the metropolitan police department engaged in performance of his official duties. D.C. Code 1961, § 22-505(a). *Lawson v. U.S.*, 301 F.2d 520, 1962 U.S. App. LEXIS 6110 (C.A.D.C. 1962).

The evidence was not so one-sided that reasonable jurors would have had to conclude that police officer had probable cause to make arrest for resisting arrest, so that reasonable jurors could not have reached a verdict in arrestee's favor on his claims against police officer and District of Columbia under District of Columbia law for false arrest and malicious prosecution, as required for officer and District of Columbia to be entitled to judgment as a matter of law; arrestee presented evidence from which jury might have concluded that he did not commit crime of resisting arrest under District of Columbia law because he had justifiable or excusable cause to interfere with officers' arrest of another man, and he did not use force against the officers. *Hudson v. District of Columbia*, 517 F.Supp.2d 40, 2007 U.S. Dist. LEXIS 24178 (2007), affirmed in part and vacated in part by, remanded by 558 F.3d 526, 385 U.S. App. D.C. 10, 2009 U.S. App. LEXIS 4238 (2009).

Evidence was sufficient to support convictions for two counts of assault on a police officer (APO); first officer testified that defendant delivered elbow strike and attempted to hit officer while in a "fighting stance," that defendant did so without officer having used any force against him, that second officer jumped on defendant's back and struck his knees only after defendant had attempted to hit first officer, and that defendant resisted efforts of officers to handcuff him. *Crossland v. United States*, 32 A.3d 1005, 2011 D.C. App. LEXIS 686 (2011).

Sufficient evidence supported conviction for felony assaulting a police officer (APO); defendant, while fleeing on foot from police officer who pursued him, pointed a loaded gun at officer, created a grave risk of causing significant bodily injury to officer, and even assuming that defendant's gun was jammed at the time he aimed it at officer, any sudden jostling during defendant's "dead pursuit" away from officer could have dislodged the temporary jam of his gun or even used his finger to pull the trigger. *Ball v. United States*, 26 A.3d 764, 2011 D.C. App. LEXIS 510 (2011).

Evidence was sufficient to support adjudication of delinquency based on juvenile committing acts that constituted assault on a police

officer; juvenile resisted the officers when he pulled his arms away and rolled around on his stomach while two officers were attempting to place handcuffs on juvenile's wrists. In re J.S., 19 A.3d 328, 2011 D.C. App. LEXIS 221 (2011).

Defendant's statement to his dog to "get them" or "get him," without corresponding physical action, was sufficient to support conviction for assault on a police officer based on intimidation; defendant's language was not merely an obnoxious response to the officer, as defendant used his language to get his dog to attack officer. In re J.S., 19 A.3d 328, 2011 D.C. App. LEXIS 221 (2011).

Evidence that defendant shoved officer, if credited by finder of fact, would be sufficient to constitute an assault under the statute setting forth offense of assault on a police officer, but because testimony from officers and defendant was conflicting and the trial court, in a bench trial, did not make any credibility determinations or specific factual findings to resolve the conflicts, case would be remanded so that the trial court could clarify the basis of its guilty verdict. *Jones v. United States*, 16 A.3d 966, 2011 D.C. App. LEXIS 155 (2011).

Evidence was sufficient to support defendant's conviction for assaulting a police officer; while he was stopped for driving car with unlawfully tinted windows, defendant abruptly sat back in driver's seat while officer was attempting to conduct pat-down search, shifted the parked vehicle into gear, and braced his arms against steering wheel to prevent being removed from the vehicle by several officers, and defendant's active resistance of the pat-down and attempts to remove him from vehicle were precisely the type of escalating conduct that increased likelihood of violence during police encounters and that statute, prohibiting assaulting a police officer, was designed to prevent. *Coghill v. United States*, 982 A.2d 802, 2009 D.C. App. LEXIS 544 (2009).

Evidence supported finding that juvenile used his teeth in a manner likely to cause great bodily injury, thus supporting delinquency adjudication for assaulting a police officer with a deadly or dangerous weapon; while struggling with officer on the ground, juvenile lunged at officer's upper thigh and groin with his teeth, biting though officer's pants and skin, leaving

teeth marks and a bleeding wound. In re D.T., 977 A.2d 346, 2009 D.C. App. LEXIS 334 (2009).

Evidence was sufficient to support defendant's conviction for assaulting, resisting, or interfering with a police officer with a dangerous weapon; although officers were in the area in street clothes, in an unmarked car, conducting undercover operations, officers testified that they each issued multiple verbal commands, in voice loud enough for defendant to hear, in which they stated that they were police officers, and defendant was approximately thirty to forty feet from officer when defendant pointed his .45 caliber pistol at officer, and jury could, and inferably did, conclude that distance between defendant and officers and the other attendant circumstances did not prevent defendant from hearing officers' commands and their statements that they were police officers. *Scott v. United States*, 975 A.2d 831, 2009 D.C. App. LEXIS 249 (2009).

Even if officer's warrantless entry onto defendant's property was unlawful, evidence that defendant closed gate on his property, locked it, then held it shut in order to prevent officer from entering property to effect defendant's arrest supported conviction for assaulting, resisting, opposing, impeding, intimidating, or interfering with a police officer (APO). *Dolson v. United States*, 948 A.2d 1193, 2008 D.C. App. LEXIS 251 (2008).

Evidence that defendant resisted arrest while armed with pistol was sufficient to sustain conviction of armed assault on police officer (AAPO). D.C. Code 1981, § 22-505(b). *Ransom v. United States*, 630 A.2d 170, 1993 D.C. App. LEXIS 221 (1993).

In prosecution for assault with a dangerous weapon, assault on a police officer with a dangerous weapon and assault on a police officer, jury could have found that both defendants were participants in altercation provoked by one defendant's obstruction of public street in violation of traffic regulations, that fisticuffs followed, and that other defendant drove automobile into officer with guilty knowledge, intending to aid the other defendant. D.C. Code §§ 22-502, 22-505(a, b). *Johnson v. United States*, 386 A.2d 710, 1978 D.C. App. LEXIS 382 (1978).

§ 22-406. Mayhem or maliciously disfiguring.

Every person convicted of mayhem or of maliciously disfiguring another shall be imprisoned for not more than 10 years.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 807.)

Cross references. — Additional penalty for possession of firearm, see § 22-4502.

Prior Codifications. — 1981 Ed., § 22-506. 1973 Ed., § 22-506.

CASE NOTES

ANALYSIS

Adequacy of representation.
 Admissibility of evidence.
 Indictment and information.
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Adequacy of representation.

Conceding that stab injuries resulted in permanently disabling injury, as needed to support mayhem conviction, was not ineffective assistance of counsel given that extent of victim's injury was irrelevant to asserted alibi defense and concession had effect of precluding gory testimony concerning victim's injuries which necessitated removal of 16 inches of her small intestine. *McKinnon v. United States*, 644 A.2d 438, 1994 D.C. App. LEXIS 100 (1994), writ of certiorari denied by 513 U.S. 1005, 115 S. Ct. 523, 130 L. Ed. 2d 428, 1994 U.S. LEXIS 8113, 63 U.S.L.W. 3386 (1994).

Admissibility of evidence.

Limited evidence that defendant was victim's pimp, who had recruited her, together with another woman, to work for him as prostitutes was admissible, in prosecution for malicious disfigurement while armed, to explain defendant's motive in inflicting injuries of such severity on the victim. *Hudson v. United States*, 790 A.2d 531, 2002 D.C. App. LEXIS 8 (2002).

Golf club used in beatings was properly admitted into evidence in prosecution for, inter alia, malicious disfigurement, where complainant, who shared apartment with defendant, consented to warrantless search of the apartment. D.C. Code § 22-506. *Villines v. United States*, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

Admitting colored photographs of complainant showing scars on upper portion of her body was not an abuse of discretion, in prosecution for, inter alia, assault with a dangerous weapon and malicious disfigurement, where photographs were not inflammatory and were clearly probative of the condition of complainant's body and, thus, were material on issue of malicious disfigurement. D.C. Code §§ 22-502, 22-506. *Villines v. United States*, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

Indictment and information.

Indictment and proof were not insufficient in

prosecution for mayhem because a specific intent to maim and disfigure the complainant was neither alleged nor proved, since specific intent was not necessary to constitute mayhem. *Brown v. U.S.*, 171 F.2d 832, 1948 U.S. App. LEXIS 2925 (C.A.D.C. 1948).

Although there was no such crime as assault with "intent to maim and maliciously disfigure," indictment charging defendant with assault with intent to maim and maliciously disfigure victim was not fatally deficient since the charge, with the parenthetical reference to the specific statute on which the prosecution was based, apprised defendant of nature of the accusation against him in a manner which would preclude a future prosecution against him based on the same averments. D.C. Code 1981, § 22-506; Criminal Rule 7(c). *Smith v. United States*, 466 A.2d 429, 1983 D.C. App. LEXIS 482 (1983).

Insanity defense.

Where defendant, indicted for sodomy, assault with dangerous weapon and mayhem, neither raised defense of insanity prior to return of jury verdict of guilty nor brought to court's attention prior imprisonment for sex-related crime or attempted suicide while in prison and confinement there for psychiatric treatment, defendant had not been improperly deprived of defense of insanity during trial. D.C. Code §§ 22-502, 22-506, 24-301, 24-301(j). *Hughes v. United States*, 308 A.2d 238, 1973 D.C. App. LEXIS 331 (1973).

Instructions.

In prosecution for malicious disfigurement and aggravated assault, trial court should have linked self-defense instruction to specific charge of aggravated assault, upon co-defendant's request. *Jones v. United States*, 893 A.2d 564, 2006 D.C. App. LEXIS 92 (2006).

In prosecution of defendant for malicious disfigurement, there was no error in trial judge instructing jury in accordance with Criminal Jury Instructions' definition of malicious disfigurement, substituting for undifferentiated "malice" certain elements which the government had to prove, such as defendant inflicted the injury and he specifically intended to disfigure the complainant and the defendant did not act in self-defense; in case of malicious disfigurement, all of the concepts traditionally embraced by the term "malice" were encompassed within requirements that government prove specific intent to permanently disfigure victim, as well as absence of self-defense (where raised) and any mitigating circumstances. *Burton v. United States*, 818 A.2d 198, 2003 D.C. App. LEXIS 135 (2003).

Trial court did not commit plain error in failing to instruct jury that, in order to convict defendant of mayhem, government had to prove that defendant had specific intent to maim. D.C. Code 1981, § 22-506. *Clark v. United States*, 639 A.2d 76, 1993 D.C. App. LEXIS 277 (1993).

Defendant charged with armed assault with intent to kill and armed mayhem was entitled to charge that jury could consider assault with dangerous weapon as lesser included offense for both of charged offenses; evidence indicated that, after victim had argued with defendant in convenience store and defendant threatened to kill him, defendant left store, and that when victim left store, defendant produced handgun and fired gun, striking victim in right hip. *Hayward v. United States*, 612 A.2d 224, 1992 D.C. App. LEXIS 221 (1992).

Defendant did not waive his right to instruction on assault as lesser included offense of mayhem, even though request was not made with consummate clarity; request was reasonably clear in view of confusion resulting from court's incorrect assumptions about law. D.C. Code 1981, § 22-506. *Moore v. United States*, 599 A.2d 1381, 1991 D.C. App. LEXIS 324 (1991).

Defendant was entitled, upon timely request, to instruction on assault as lesser included offense of mayhem charge given defendant's testimony that he slapped complaining witness but did not kick her and his vigorous challenge to allegation that complainant suffered disabling permanent injury as result of kick which was basis for mayhem charge. D.C. Code 1981, § 22-506. *Moore v. United States*, 599 A.2d 1381, 1991 D.C. App. LEXIS 324 (1991).

Trial court's failure to give instruction on assault as lesser included offense of mayhem constituted reversible error, where court could not say with requisite assurance that error did not prejudice defendant who was convicted of mayhem. D.C. Code 1981, § 22-506. *Moore v. United States*, 599 A.2d 1381, 1991 D.C. App. LEXIS 324 (1991).

Defendant did not waive his right to instruction on assault as lesser included offense of mayhem by failing to again request such instruction after jurors sent note during their deliberation inquiring whether they could convict defendant even if they had some doubt as to whether defendant's kick injured defendant's eye, where judge had already denied counsel's request for such instruction before delivering his charge to jury; it would have been extraordinary for judge to instruct jury about lesser included offense for first time in response to note sent during deliberations. D.C. Code 1981, § 22-506. *Moore v. United States*, 599 A.2d 1381, 1991 D.C. App. LEXIS 324 (1991).

Instruction that in order to establish malicious disfigurement, the Government had to prove beyond a reasonable doubt that as a result of the injury, complaining witness was permanently disfigured, that is, that complaining witness was appreciably less attractive or that a part of the body of complaining witness was to some appreciable degree less useful or functional than it was before injury, was not erroneous as failing to suggest that disfigurement was not permanent if it could be removed through medical procedures. D.C. Code 1973, § 22-506. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

Instruction of malicious disfigurement required proof that defendant inflicted injury on complaining witness, that as a result of injury complaining witness was permanently disfigured, that defendant inflicted injury on complaining witness with malice, and that defendant inflicted injury while armed with or having readily available a dangerous or deadly weapon was reversibly erroneous in failing to charge essential element of specific intent. D.C. Code 1973, § 22-506. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

Jurisdiction.

In view of defendant's concession that he approached complainant in his car within district, rode with complainant into Maryland and returned with him to district, and in view of fact that defendant was overheard by officer threatening complainant with injury if he did not remain silent while they were all at intersection concededly within district line, trial court did not lack jurisdiction of offenses of armed robbery, assault with dangerous weapon and mayhem and malicious disfigurement. D.C. Code §§ 11-923(b)(1), 22-502, 22-506, 22-2901, 22-3202; D.C. Code SCR, Criminal Rule 12(b)(2). *Adair v. United States*, 391 A.2d 288, 1978 D.C. App. LEXIS 567 (1978).

Lesser included offenses.

Assault is lesser included offense of mayhem. D.C. Code 1981, § 22-506. *Moore v. United States*, 599 A.2d 1381, 1991 D.C. App. LEXIS 324 (1991).

Assault with dangerous weapon was lesser included offense of mayhem while armed, arising out of incident in which defendant, while fighting with victim and with general intent to injure, struck victim with pencil, lodging pencil in victim's right eye; there was evidence that defendant acted in self-defense and did not realize pencil was in his hand when he struck victim. D.C. Code 1981, §§ 22-502, 22-506, 22-3202, 22-3202(a). *Wynn v. United States*, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

Merger of offenses.

Defendant's convictions for aggravated assault and simple assault should have merged

with defendant's malicious disfigurement conviction, and thus, on remand, defendant's convictions for aggravated assault and simple assault should be vacated. *Burton v. United States*, 818 A.2d 198, 2003 D.C. App. LEXIS 135 (2003).

Conviction for aggravated assault while armed merged with conviction for malicious disfigurement while armed. *Hudson v. United States*, 790 A.2d 531, 2002 D.C. App. LEXIS 8 (2002).

Defendant's convictions for armed mayhem and assault with intent to kill while armed (AWIKWA) did not merge, even though they arose from single shooting. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Green v. United States*, 718 A.2d 1042, 1998 D.C. App. LEXIS 161 (1998), writ of certiorari denied by 526 U.S. 1011, 119 S. Ct. 1156, 143 L. Ed. 2d 222, 1999 U.S. LEXIS 1836, 67 U.S.L.W. 3560 (1999).

Convictions on mayhem while armed and assault with dangerous weapon merged into one offense. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Sterling v. United States*, 691 A.2d 126, 1997 D.C. App. LEXIS 38 (1997), amended by 1997 D.C. App. LEXIS 107 (D.C. May 13, 1997).

Conviction for kidnapping did not merge with convictions for assault with intent to rape while armed, mayhem while armed, and assault with a deadly weapon; assault-related convictions required proof that defendant was armed, and kidnapping conviction required proof of asportation or confinement. D.C. Code 1981, §§ 22-501, 22-506, 22-2101, 22-3202. *Whitaker v. United States*, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

Convictions for malicious disfigurement and for mayhem did not merge; Government offered evidence that victim suffered permanent disabilities which did not involve permanent disfigurement as necessary to show mayhem and that she had suffered disfigurement and injuries to her appearance which were not necessarily disabling as necessary to support malicious disfigurement. D.C. Code 1981, §§ 22-506, 22-3202. *Edwards v. United States*, 583 A.2d 661, 1990 D.C. App. LEXIS 298 (1990).

Convictions for assault with a dangerous weapon were not subject to being reversed on ground that they merged with convictions for malicious disfigurement while armed where it was clear that the jury found defendants guilty of assault with a dangerous weapon as a lesser included offense of either the assault with intent to kill while armed count or the assault with intent to commit robbery while armed count and that, by specific request, the lesser included offense charge was limited to either of those counts. D.C. Code 1973, §§ 22-401, 22-501, 22-502, 22-506, 22-3202, 22-3502. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

Doctrine of merger did not apply to charge of assault with intent to kill while armed and charge of mayhem while armed, although offenses arose from single occurrence, since elements of proof of two crimes were different, statutes proscribing crimes protected different societal interests, and infliction of permanent injury, which is required for finding of mayhem, is not integral part of every assault. D.C. Code §§ 22-501, 22-506. *Bridgeford v. United States*, 411 A.2d 633, 1980 D.C. App. LEXIS 230 (1980).

Mayhem was not lesser included offense of, and did not merge into, felony-murder on theory that defendant's act of burning victim was simply the means of killing him. D.C. Code §§ 22-506, 22-2401, 23-112. *McFadden v. United States*, 395 A.2d 14, 1978 D.C. App. LEXIS 349 (1978).

Since evidence showed that offenses arose out of separate acts no need existed to consider whether offense of inducing a female to engage in prostitution was a lesser included offense of compelling female to reside with defendant for purposes of prostitution, or whether assault with a dangerous weapon was a lesser included charge of malicious disfigurement. D.C. Code §§ 22-502, 22-506, 22-2705, 22-2706. *Villines v. United States*, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

Nature and elements.

What originated as narrow common-law offense of mayhem is generally today statutory offense of larger dimensions, and transition has been accompanied, if not induced, by a shift in emphasis from military and combative effects of injury to preservation of human body in normal functioning. D.C. Code § 22-506. *United States v. Cook*, 462 F.2d 301, 1972 U.S. App. LEXIS 10343 (C.A.D.C. 1972).

Statute making it offense to commit mayhem or maliciously disfigure another requires permanence of injury or disfigurement in some appreciable form. D.C. Code § 22-506. *United States v. Cook*, 462 F.2d 301, 1972 U.S. App. LEXIS 10343 (C.A.D.C. 1972).

To "disfigure" is to make less complete, perfect, or beautiful in appearance or character, and disfigurement, in law as in common acceptance, may well be something less than total and irreversible deterioration of bodily organ. D.C. Code § 22-506. *United States v. Cook*, 462 F.2d 301, 1972 U.S. App. LEXIS 10343 (C.A.D.C. 1972).

Cosmetic effects of scarring may be sufficiently severe to bring case within ambit of statute making it an offense to commit mayhem or to maliciously disfigure another. D.C. Code § 22-506. *United States v. Cook*, 462 F.2d 301, 1972 U.S. App. LEXIS 10343 (C.A.D.C. 1972).

So long as an act of mayhem is done maliciously and wilfully, a specific intent is not necessary to constitute the crime, since the

common-law definition, which is applicable, does not include a specific intent. *Brown v. U.S.*, 171 F.2d 832, 1948 U.S. App. LEXIS 2925 (C.A.D.C. 1948).

If an assault be so malicious and wilful as to result in the loss of an eye, leg, or arm, it is immaterial to the gravity of the offense of mayhem that the assailant had no specific intention of depriving his victim of the eye, leg, or arm. *Brown v. U.S.*, 171 F.2d 832, 1948 U.S. App. LEXIS 2925 (C.A.D.C. 1948).

Permanent disabling injury is element of mayhem. *McKinnon v. United States*, 644 A.2d 438, 1994 D.C. App. LEXIS 100 (1994), writ of certiorari denied by 513 U.S. 1005, 115 S. Ct. 523, 130 L. Ed. 2d 428, 1994 U.S. LEXIS 8113, 63 U.S.L.W. 3386 (1994).

Specific intent to maim is not an element of the crime of mayhem. D.C. Code 1981, §§ 22-506, 49-301. *Peoples v. United States*, 640 A.2d 1047, 1994 D.C. App. LEXIS 64 (1994).

The essential elements of the crime of mayhem are: that defendant caused permanent disabling injury to another; that he had the general intent to do the injurious act; and that he did so willfully and maliciously. D.C. Code 1981, § 22-506. *Peoples v. United States*, 640 A.2d 1047, 1994 D.C. App. LEXIS 64 (1994).

Elements of malicious disfigurement are: that defendant inflicted injury on another; that victim was permanently disfigured; that defendant specifically intended to disfigure victim; and that defendant was acting with malice. D.C. Code 1981, § 22-506. *Peoples v. United States*, 640 A.2d 1047, 1994 D.C. App. LEXIS 64 (1994).

Stationary bathroom fixtures were not "dangerous weapons" with which defendant could be armed within meaning of mayhem while armed and malicious disfigurement while armed statutes; attached sink, toilet, and bathtub against which defendant alleged hurled his wife were preexisting part of surroundings in which defendant found himself while perpetrating assault and not something which defendant could possess or with which he could arm himself. D.C. Code 1981, §§ 22-502, 22-506, 22-3202. *Edwards v. United States*, 583 A.2d 661, 1990 D.C. App. LEXIS 298 (1990).

Pencil is capable of causing bodily harm and thus may in some circumstances be "dangerous weapon." D.C. Code 1981, §§ 22-502, 22-506, 22-3202, 22-3202(a). *Wynn v. United States*, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

In determining whether weapon is dangerous weapon, best evidence of dangerous character is injury actually inflicted by weapon. D.C. Code 1981, §§ 22-502, 22-506, 22-3202, 22-3202(a). *Wynn v. United States*, 538 A.2d 1139, 1988 D.C. App. LEXIS 51 (1988).

Offenses of assault with intent to kill and malicious disfigurement are governed by separate statutes and each statutory provision re-

quires proof of element which other does not. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Wilson v. United States*, 528 A.2d 876, 1987 D.C. App. LEXIS 392 (1987).

While common-law mayhem was traditionally viewed as a crime against the King and was therefore limited to injuries which deprived a fighting man of use of one of his limbs or some part of his body which affected his ability or willingness to engage in combat, modern view of mayhem relates more to preservation of the normal functioning of the human body and proscription against malicious disfigurement focuses upon willful permanent disfigurement rather than disablement. D.C. Code 1981, § 22-506. *Smith v. United States*, 466 A.2d 429, 1983 D.C. App. LEXIS 482 (1983).

The crime of malicious disfigurement requires proof of specific intent to maim or disfigure. D.C. Code 1973, § 22-506. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

The essential elements of the offense of malicious disfigurement, each of which the Government must prove beyond a reasonable doubt, are that defendant inflicted injury on the complaining witness, that as a result of injury, complaining witness was permanently disfigured, that at the time defendant inflicted injury, he specifically intended to disfigure complaining witness, and that when he inflicted the injury, defendant was acting with malice. D.C. Code 1973, § 22-506. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

To be permanently disfigured in the context of the crime of "malicious disfigurement" means that the person is appreciably less attractive or that a part of its body is to some appreciable degree less useful or functional than it was before the injury. D.C. Code 1973, § 22-506. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

In the context of the crime of malicious disfigurement, "malice" is a state of mind or heart regardless of the life and safety of others; it may also be defined as the condition of mind which prompts a person to do willfully, that is on purpose without adequate provocation, justification or excuse, a wrongful act before seeable consequence of which is a serious permanent disfiguring bodily injury to another. D.C. Code 1973, § 22-506. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

Presumptions and burden of proof.

In prosecution for malicious disfigurement, specific intent to disfigure can be inferred from the circumstances surrounding the disfiguring act. D.C. Code 1981, § 22-506. *Peoples v. United States*, 640 A.2d 1047, 1994 D.C. App. LEXIS 64 (1994).

Assault with a dangerous weapon requires proof that the weapon actually was used in assault while malicious disfigurement, with the punishment enhancement element of being armed, requires only proof that the accused was armed or had a dangerous weapon readily available; malicious disfigurement while armed requires proof of specific intent and permanent disfigurement while assault with a dangerous weapon does not require proof of either fact. D.C. Code 1973, §§ 22-401, 22-501, 22-502, 22-506, 22-3202, 22-3502. *Perkins v. United States*, 446 A.2d 19, 1982 D.C. App. LEXIS 363 (1982).

Questions of law and fact.

Evidence on question whether victim was permanently disfigured was for jury in prosecution for malicious disfigurement while armed, even though Government offered no evidence of victim's appearance or physical condition prior to his injury. D.C. Code 1981, §§ 22-506, 22-3202. *Foreman v. United States*, 506 A.2d 1124, 1986 D.C. App. LEXIS 303 (1986).

Review.

Where respective penalties for mayhem and assault with a dangerous weapon were identical, contention that defendant who poured acid on girl should have been indicted for mayhem rather than assault with dangerous weapon was frivolous. D.C. Code 1961, §§ 22-502, 22-506. *Bishop v. United States*, 349 F.2d 220, 1965 U.S. App. LEXIS 5028 (C.A.D.C. 1965), US Supreme Court certiorari denied by 393 U.S. 870, 89 S. Ct. 158, 21 L. Ed. 2d 139, 1968 U.S. LEXIS 868 (1968).

Trial concession by defense that injuries which prompted removal of 16 inches of assault victim's small intestine were permanent as needed to support mayhem conviction, precluded challenge to injury requirement on appeal. *McKinnon v. United States*, 644 A.2d 438, 1994 D.C. App. LEXIS 100 (1994), writ of certiorari denied by 513 U.S. 1005, 115 S. Ct. 523, 130 L. Ed. 2d 428, 1994 U.S. LEXIS 8113, 63 U.S.L.W. 3386 (1994).

On remand after reversal of conviction for mayhem on basis of trial court's failure to give lesser included offense instruction, government had right to prosecute defendant for mayhem a second time; however, if government did not seek retrial, then mayhem conviction had to be reduced to conviction for assault. D.C. Code 1981, § 22-506. *Moore v. United States*, 599 A.2d 1381, 1991 D.C. App. LEXIS 324 (1991).

In view of testimony of medical experts that injuries suffered by child were inconsistent with defendant's testimony, in view of testimony by defendant's two sisters-in-law concerning defendant's relationship with the child, and in view of evidence that bruises had been

noticed on the child's body on several occasions, error of prosecutor in stating, in defendant's trial for mayhem, that the child was paralyzed for life, an assertion which was not justified by the testimony, was harmless. D.C. Code § 22-506. *Cohoon v. United States*, 387 A.2d 1098, 1978 D.C. App. LEXIS 521 (1978).

Verdict.

Jury could infer from evidence in prosecution for malicious disfigurement that defendant had required deliberate intent to disfigure victim by throwing caustic liquid at him, even though no evidence was presented to show that defendant knew liquid would cause harmful burns. D.C. Code 1981, § 22-506. *Curtis v. United States*, 568 A.2d 1074, 1990 D.C. App. LEXIS 4 (1990).

In light of ferocity of the attack, the injuries sustained, and defendant's own comments while assaulting victim, there was ample circumstances from which jury could infer evidence of defendant's specific intent to commit mayhem. D.C. Code 1981, § 22-506. *Smith v. United States*, 466 A.2d 429, 1983 D.C. App. LEXIS 482 (1983).

Weight and sufficiency of evidence.

Evidence in prosecution on charge of maliciously disfiguring another was sufficient to sustain conviction of defendant who threw lye at victim who sustained partial loss of vision and scars. D.C. Code § 22-506. *United States v. Cook*, 462 F.2d 301, 1972 U.S. App. LEXIS 10343 (C.A.D.C. 1972).

Evidence was sufficient to support finding that defendant had requisite specific intent to permanently disfigure victim, as required to support conviction for malicious disfigurement while armed; evidence showed that after defendant shot victim once and realized that this had not totally disabled him, defendant deliberately pointed the gun above victim's right eye, angled the muzzle downward, and shot victim point blank in the face, destroying his eyeball and causing permanent disfigurement. *Wages v. United States*, 952 A.2d 952, 2008 D.C. App. LEXIS 293 (2008), writ of certiorari denied by 556 U.S. 1238, 129 S. Ct. 2417, 173 L. Ed. 2d 1298, 2009 U.S. LEXIS 3796, 77 U.S.L.W. 3633 (2009).

Evidence was sufficient to support defendant's convictions for aggravated assault and malicious disfigurement while armed; jury was well within its authority in rejecting defendant's claim that he acted in self-defense in seriously burning victim with an electric iron, and it likewise had ample grounds on which to conclude that her injuries constituted disfigurement. *Burton v. United States*, 818 A.2d 198, 2003 D.C. App. LEXIS 135 (2003).

Evidence that defendant maliciously beat and burned the victim, leaving a permanent scar on her leg from a clothes iron, because in

working for him as a prostitute she had failed to turn over an indeterminate sum of money, supported conviction for malicious disfigurement while armed. *Hudson v. United States*, 790 A.2d 531, 2002 D.C. App. LEXIS 8 (2002).

Identification evidence was sufficient to support defendants' convictions for assault with dangerous weapon and mayhem while armed, where several witnesses positively identified defendants as assailants who beat victim. D.C. Code 1981, §§ 22-501, 22-506, 22-3202. *Sterling v. United States*, 691 A.2d 126, 1997 D.C. App. LEXIS 38 (1997), amended by 1997 D.C. App. LEXIS 107 (D.C. May 13, 1997).

Evidence that the skin is an organ system of the body and that second and third-degree burns greatly impair, if not destroy, the normal functioning of that organ system, and that burn victims suffered impairment of that system including injury to hair roots and sweat and oil glands, was sufficient evidence of the element of mayhem that victims suffered injury which rendered organ of the body either wholly useless or left its "usefulness greatly impaired." D.C. Code 1981, § 22-506. *Peoples v. United States*, 640 A.2d 1047, 1994 D.C. App. LEXIS 64 (1994).

Evidence that defendant deliberately set fire to home, using flammable liquid accelerant, in early morning hours while those inside were sleeping, and that defendant previously threat-

ened to blow up the house and everyone in it if girlfriend left him, was sufficient to permit jury to find that defendant had requisite specific intent to permanently disfigure, to support convictions for malicious disfigurement of burn victims. D.C. Code 1981, § 22-506. *Peoples v. United States*, 640 A.2d 1047, 1994 D.C. App. LEXIS 64 (1994).

Evidence that victim had facial scars from cuts and had lost some use of her right arm and hand was sufficient to support finding that she was permanently disabled required to support conviction for mayhem. D.C. Code 1981, § 22-506. *Whitaker v. United States*, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

In defendant's trial for mayhem, testimony by physician that, both before and after victim underwent surgery, he exhibited a weakness in his left arm and leg which could be characterized as paralysis was insufficient to permit an inference that the victim would be paralyzed for life. D.C. Code § 22-506. *Cohoon v. United States*, 387 A.2d 1098, 1978 D.C. App. LEXIS 521 (1978).

Government's evidence, although partly circumstantial, reasonably permitted finding that juvenile was guilty of mayhem and malicious disfigurement and robbery by force and violence. D.C. Code §§ 22-506, 22-2901. *In re E.G.C.*, 373 A.2d 903, 1977 D.C. App. LEXIS 321 (1977).

§ 22-407. Threats to do bodily harm.

Whoever is convicted in the District of threats to do bodily harm shall be fined not more than \$500 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.

(July 16, 1912, 37 Stat. 193, ch. 235, § 2; June 29, 1953, 67 Stat. 98, ch. 159, § 212; Dec. 23, 1963, 77 Stat. 618, Pub. L. 88-241, § 11(b).)

Cross references. — Firearms control, registration certificates, prerequisites for issuance, see § 7-2502.02.

Section references. — This section is referred to in § 7-2502.03.

Prior Codifications. — 1981 Ed., § 22-507. 1973 Ed., § 22-507.

CASE NOTES

ANALYSIS

Adequacy of representation.
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Adequacy of representation.

Evidence did not sustain claim of ineffective assistance of counsel who presented all substantial defenses, made appropriate motions and objections, attempted to suppress evidence on charge of unlawful possession of pistol after conviction of felony, and was able to obtain acquittal on charge of threats to do bodily harm and directed verdict in defendant's favor on charge of assault by threatening in menacing manner. D.C. Code §§ 22-504, 22-507, 22-3203. *Gressette v. United States*, 256 A.2d 418, 1969 D.C. App. LEXIS 286 (App. 1969).

Admissibility of evidence.

Even assuming defendant was under unlawful arrest when he threatened police officer with bodily harm, evidence of that crime would not be suppressed as "fruit of the poisonous tree," as the commission of the crime was an intervening act that purged any taint associated with the unlawful arrest. *Clark v. United States*, 755 A.2d 1026, 2000 D.C. App. LEXIS 151 (2000).

In prosecution for threats to do bodily harm, admission of testimony of victim concerning prior acts committed by defendant constituted reversible error where state of mind exceptions to rule against admissibility of accused's prior criminal conduct did not apply to case, there was no concurrence of unusual and distinctive facts about crime and prior wrongful conduct which showed with reasonable probability that same person that committed previous acts also committed instant crime, Government's need for evidence was minimal, and evidence had little probative value in comparison to its prejudicial impact in regard to other material issues in case. D.C. Code 1981, § 22-507. *Campbell v. United States*, 450 A.2d 428, 1982 D.C. App. LEXIS 416 (1982).

In prosecution for assault and threats to do bodily harm, admission of defendant's prior conviction of manslaughter was not error, where at time prior conviction was introduced and during final instructions trial court informed jury that it should consider the conviction only in evaluating defendant's credibility. D.C. Code §§ 14-305(b)(1), 22-504, 22-507. *Davis v. United States*, 313 A.2d 884, 1974 D.C. App. LEXIS 342 (1974).

In prosecution for threats to inflict bodily harm upon officers if they continued to arrest defendant's "girls", officer's testimony that defendant was a "pimp" was not prejudicial where descriptive words used by defendant in his threats made his relationship with girls patently clear and officer's characterization of relationship was not in conflict with defen-

dant's own description. D.C. Code § 22-507. *Postell v. United States*, 282 A.2d 551, 1971 D.C. App. LEXIS 221 (1971).

Trial court properly refused to allow defendant to testify to events occurring after date of alleged threats to do bodily harm to his wife, where defendant made no proffer of excluded testimony other than that he wished to cast disparity on elements of offense, testimony concerning wife's conduct at a later time would not shed light on whether or not offense was committed and testimony concerning defendant's conduct after offense would have been merely self-serving. D.C. Code § 22-507. *Wilson v. United States*, 261 A.2d 513, 1970 D.C. App. LEXIS 204 (App. 1970).

Admission of testimony that defendant charged with threatening to do bodily harm to complainant had made prior threats to do bodily harm and to shoot her was admissible to show state of mind of defendant and complainant. D.C. Code 1961, § 22-507. *McDonald v. U.S.*, 183 A.2d 396, 1962 D.C. App. LEXIS 313 (Cr.App. 1962).

Arrest.

Under District of Columbia law, police captain had probable cause to order officer's arrest and detention for making threat to do bodily harm, and thus captain was not liable for false arrest or false imprisonment, where officer had been involved in confrontation with another officer, captain consulted with physician who told him that officer told him that if left alone and unreported situation "[would] become deadly," and officer told captain that if other officer came at him again he would kill him. *Jackson v. District of Columbia*, 541 F.Supp.2d 334, 2008 U.S. Dist. LEXIS 25263 (2008).

Police officer's question to defendant while he was in handcuffs, posed after an alleged threat to officer and that inquired as to what he just said, was more asked reflexively in a context of wonderment than intended to elicit inculpatory information, and thus, it did not constitute custodial interrogation within the meaning of *Miranda*. *Clark v. United States*, 755 A.2d 1026, 2000 D.C. App. LEXIS 151 (2000).

Claim that defendant's finger-pointing gesture from car and mouthing of word "pow" to undercover police officers in unmarked vehicle justified Terry stop as coming very close to being crime in itself did not establish officer's reasonable articulable suspicion for investigatory stop, where officer testified that he stopped car because he thought defendant may have gun, not because he thought gesture was itself a crime, and there was no evidence that defendants knew that individuals in vehicle were police officers. D.C. Code 1981, §§ 22-504, 22-507, 22-1121. *United States v. Bellamy*, 619 A.2d 515, 1993 D.C. App. LEXIS 18 (1993).

Attempts.

Evidence supported conviction for attempted

threats; two police officers testified that they heard and saw defendant threaten to kill witness as defendant walked past officers in courtroom. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Attempted threats was criminal offense, even though threats were not crime at common law, and even though general attempts statute was enacted before statute proscribing threats. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

"Attempted threats" is a valid statutory offense; if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Government was permitted to charge defendant with attempted threats even though it could prove completed offense. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

The essential elements of the offense of threats to do bodily harm are: that the defendant uttered words to another person; that the words were of such a nature as to convey fear of serious bodily harm or injury to the ordinary hearer; that the defendant intended to utter the words which constituted the threat. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Construction with other statutes.

Convictions for attempted threats to do bodily harm and intent-to-frighten assault arising from same criminal transaction did not merge, so as to trigger double jeopardy protection; each of the two crimes required a proof of a fact that the other did not. *Joiner-Die v. United States*, 899 A.2d 762, 2006 D.C. App. LEXIS 218 (2006).

There is no positive repugnancy between misdemeanor statute prohibiting threats to do bodily harm and felony statute prohibiting threats to injure another person as would operate to repeal earlier misdemeanor statute. D.C. Code §§ 22-507, 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

That defendant's alleged conduct in threatening to injure another person and her property was punishable under both misdemeanor statute and felony statute did not require dismissal of indictment charging felony offense. D.C. Code §§ 22-507, 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

Detention or bail.

Record from pretrial hearing in misdemeanor threats prosecution did not support finding that victim was "prospective witness" in separate, ongoing child neglect proceeding involving de-

fendant, victim, and their daughter; thus, finding did not support hearing commissioner's order for preventive detention under statute authorizing such detention when there is serious risk that defendant will threaten, injure, or intimidate prospective witness. D.C. Code 1981, §§ 22-507, 23-1322(b)(1)(C). *Covington v. United States*, 698 A.2d 1033, 1997 D.C. App. LEXIS 199 (1997).

Pretrial detention of juvenile in secure juvenile facility for 213 days did not violate due process; illness of juvenile's attorney resulted in alteration of earlier trial date, reduced number of judges were available to try cases during summer months, juvenile sought relief from detention approximately one month prior to second trial date, and it was unlikely that decision of unconstitutionality would lead to juvenile's release, given filing of additional charges against juvenile for threats to do bodily harm to counselor during detention. D.C. Code 1981, §§ 16-2310, 22-507; Juvenile Rule 50; U.S. Const. Amend. 14. *In re K.H.*, 647 A.2d 61, 1994 D.C. App. LEXIS 148 (1994).

Man, who had been charged with crime, committed to mental hospital due to incompetency to stand trial and found unlikely to regain his competency in the reasonable foreseeable future, was not denied equal protection by Government's delaying commencing civil commitment proceedings for 42 days after the finding was made, where subsequent periods of confinement were relatively brief, civil commitment was accomplished within three months of finding and court was acquainted with medical report conclusion that man would be dangerous to himself or others if released. D.C. Code §§ 21-521, 21-523 to 21-525, 21-541, 21-541(a), 21-542 to 21-545, 22-501, 22-507, 22-2307, 24-301(a); U.S. Const. Amend. 14. *Thomas v. United States*, 418 A.2d 122, 1980 D.C. App. LEXIS 333 (1980).

Examination of witnesses.

Error arising from admission of defendant's prior conviction of threats for purposes of impeachment was harmless, where impeachment did not relate to element of the offense, but to collateral matter, Government's evidence was very strong and error was not compounded by improper sequencing of cross-examination questions. D.C. Code 1981, §§ 14-305(b)(1), (b)(1)(A, B), 22-507. *James v. United States*, 514 A.2d 793, 1986 D.C. App. LEXIS 416 (1986).

Defendant's prior conviction of threats did not qualify for admission under statute permitting introduction of prior convictions for purpose of attacking credibility of witness. D.C. Code 1981, §§ 14-305(b)(1), (b)(1)(A, B), 22-507. *James v. United States*, 514 A.2d 793, 1986 D.C. App. LEXIS 416 (1986).

Fact questions.

Words uttered by a defendant must be con-

sidered in the context in which they were used to determine if they constitute a threat to do bodily harm. *Jenkins v. United States*, 902 A.2d 79, 2006 D.C. App. LEXIS 426 (2006).

Whether a particular statement constitutes a threat is a question of fact for the jury. *Clark v. United States*, 755 A.2d 1026, 2000 D.C. App. LEXIS 151 (2000).

Instructions.

In prosecution of gas customer for assault, threats to do bodily harm, and unlawful possession of pistol after conviction of felony, arising out of customer's forcible ejection of gas man who was attempting to shut off his gas and remove meter, trial court did not commit reversible error by instructing jury that customer would not have right to use force to defend his property if employee's entry on property was for purposes related to gas services and did not exceed time and efforts necessary to accomplish those purposes. *Jackson v. United States*, 385 A.2d 786, 1978 D.C. App. LEXIS 510 (1978).

Jurisdiction.

Felony threat defendant committed offense within District of Columbia, even if victim did not understand English and third party who heard and understood threat did not interpret threat for victim within District of Columbia; crime was complete when made in presence of third party who heard and understood it. *D.C. Code* 1981, § 22-2307. *Joiner v. United States*, 585 A.2d 176, 1991 D.C. App. LEXIS 19 (1991).

Complainant's uncontroverted testimony identifying defendant as telephone caller, describing threatening content of telephone calls and fear which they instilled, and relating that she received calls at District of Columbia home sufficiently established jurisdiction of District of Columbia Superior Court over prosecution for making of threats to do bodily harm. *U.S.C. Const. Art. 3, § 2, cl. 3; Amend. 6; D.C. Code* 1973, §§ 22-507, 11-923(b)(1). *United States v. Baish*, 460 A.2d 38, 1983 D.C. App. LEXIS 363 (1983).

Proof that either utterance or communication of threatening language occurred within District of Columbia establishes basis for prosecution in District of Columbia Superior Court under statute proscribing making of threats to do bodily harm. *U.S. Const. Art. 3, § 2, cl. 3; Amend. 6; D.C. Code* 1973, §§ 22-507, 11-923(b)(1). *United States v. Baish*, 460 A.2d 38, 1983 D.C. App. LEXIS 363 (1983).

Judge, who sentenced alien defendant for offense of transmitting threat to injure person of another with intent to extort money, did exercise jurisdiction over defendant's motion for recommendation against deportation where judge removed any immediate threat of deportation by suspending imposition of sentence and judge denied the motion. *D.C. Code* § 22-

2306(2); *Immigration and Nationality Act*, §§ 212, 241(a)(4), (b)(2), 245-250, 8 U.S.C. §§ 1182, 1251(a)(4), (b)(2), 1255-1260. *Mariam v. United States*, 385 A.2d 776, 1978 D.C. App. LEXIS 500 (1978).

Nature and elements of offense.

No precise words are necessary to convey a threat to do bodily harm. *Jenkins v. United States*, 902 A.2d 79, 2006 D.C. App. LEXIS 426 (2006).

To prove threats to do bodily harm, the government must prove: (1) the defendant uttered words to another person; (2) that the words were of such a nature as to convey fear of bodily harm or injury to the ordinary hearer; and (3) that the defendant intended to utter the words which constituted the threat. *Joiner-Die v. United States*, 899 A.2d 762, 2006 D.C. App. LEXIS 218 (2006).

To constitute the offense of threats, an individual must do more than utter a threat; the evidence must show that the threatening message was conveyed to someone—either to the object of the threat or to a third party. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

An uncommunicated threat, by definition, cannot threaten. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

The elements of threats to do bodily harm are: (1) that the defendant uttered words to another person; (2) that the words were of such a nature as to convey fear of serious bodily harm to the "ordinary hearer"; and (3) that the defendant intended to utter the words as a threat. *Clark v. United States*, 755 A.2d 1026, 2000 D.C. App. LEXIS 151 (2000).

Words cannot always be read in the abstract and often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations of the speaker and the factual circumstances of their delivery in order to determine whether they constitute threats. *Clark v. United States*, 755 A.2d 1026, 2000 D.C. App. LEXIS 151 (2000).

Statutory prohibition against threats to do bodily harm applies to oral and written threats. *D.C. Code* 1981, § 22-507. *Tolentino v. United States*, 636 A.2d 433, 1994 D.C. App. LEXIS 6 (1994).

Felony threat defendant communicated threat to victim, even if victim could not understand English, where third party heard and fully understood threat. *D.C. Code* 1981, § 22-2307. *Joiner v. United States*, 585 A.2d 176, 1991 D.C. App. LEXIS 19 (1991).

Intent to extort is not element of felony threat statute. *D.C. Code* 1981, § 22-2307. *Holt v. United States*, 565 A.2d 970, 1989 D.C. App. LEXIS 227 (1989).

Crime of threatening to injure was complete as soon as threat was communicated to third

party, regardless of whether intended victim ever knew of plot to injure him. D.C. Code 1981, § 22-2307. *Beard v. United States*, 535 A.2d 1373, 1988 D.C. App. LEXIS 1 (1988).

Person "threatens," within meaning of criminal statutes prohibiting the making of threats to do bodily harm, when she utters words which are intended to convey her desire to inflict physical or other harm on any person or on property, and such words are communicated to someone. D.C. Code 1973, §§ 22-507, 22-2307. *United States v. Baish*, 460 A.2d 38, 1983 D.C. App. LEXIS 363 (1983).

To be subject to criminal prosecution for making threats to do bodily harm, individual must do more than utter a threat; evidence must show that threatening message was conveyed to someone, i.e., either to object of threat or to third party. D.C. Code 1973, § 22-507. *United States v. Baish*, 460 A.2d 38, 1983 D.C. App. LEXIS 363 (1983).

In context of statute proscribing making of threats to do bodily harm, both utterance and communication of threatening language are integral components of offense; once uttered, words must be communicated to complete offense. D.C. Code 1973, § 22-507. *United States v. Baish*, 460 A.2d 38, 1983 D.C. App. LEXIS 363 (1983).

Statute, which prohibits "any threat to injure the person of another," encompasses threats "to injure the person of another" which are communicated directly to intended victim. D.C. Code §§ 22-2306, 22-2306(2, 3). *Mariam v. United States*, 385 A.2d 776, 1978 D.C. App. LEXIS 500 (1978).

"Threats" statute merely proscribes "threat to do bodily harm" and thus, by its language, announces act of threatening to be intended unit of prosecution. D.C. Code § 22-507. *Murray v. United States*, 358 A.2d 314, 1976 D.C. App. LEXIS 282 (1976).

Statute making it unlawful for one to threaten to do bodily harm does not require that threats be communicated directly to the threatened individual. D.C. Code § 22-507. *Gurley v. United States*, 308 A.2d 785, 1973 D.C. App. LEXIS 340 (1973).

Defendant who was convicted of one count of petit larceny and two counts of threats to do bodily harm, but who, with respect to the latter offenses, merely uttered one threat on one occasion to two people could be found guilty of only one of the counts of threats to do bodily harm. D.C. Code §§ 22-507, 22-2202. *Smith v. United States*, 295 A.2d 60, 1972 D.C. App. LEXIS 257 (1972).

In view of phrasing of statute proscribing threats to do bodily harm, a single threat directed to more than one person constitutes but a single unit of prosecution. D.C. Code § 22-507. *Smith v. United States*, 295 A.2d 60, 1972 D.C. App. LEXIS 257 (1972).

Prosecution of juvenile, who told 13-year-old complainant that juvenile and another would kill him or get someone else to "jump him" if he did not go through broken window and remove certain items from ground-floor apartment, should be had, under statute proscribing threats to do bodily harm, for a threat by words conveying a menace or fear of bodily harm. D.C. Code § 22-507. *In re D. W. J.*, 293 A.2d 268, 1972 D.C. App. LEXIS 213 (1972).

To sustain conviction for a threat to do bodily harm, it is necessary only that threats impart expectation of bodily harm thereby inducing fear and apprehension in person threatened. D.C. Code § 22-507. *Postell v. United States*, 282 A.2d 551, 1971 D.C. App. LEXIS 221 (1971).

Threat on a condition that victim believes will never occur cannot be actionable under statute prohibiting threats to do bodily harm; however, mere fact that infliction of harm is threatened upon condition does not preclude it from being a "threat" within statute. D.C. Code § 22-507. *Postell v. United States*, 282 A.2d 551, 1971 D.C. App. LEXIS 221 (1971).

Fact that defendant's threats to inflict bodily harm upon officers were conditioned upon officers' continuing to arrest his "girls" did not preclude conviction of threatening to do bodily harm in violation of statute. D.C. Code § 22-507. *Postell v. United States*, 282 A.2d 551, 1971 D.C. App. LEXIS 221 (1971).

No precise words are necessary to convey a threat for purposes of offense of threatening to injure a person; it may be bluntly spoken, or done by innuendo or suggestion. *Griffin v. United States*, 861 A.2d 610, 2004 D.C. App. LEXIS 617 (2004).

Presumptions and burden of proof.

To establish prima facie case of making threats to do bodily harm, government must prove that defendant uttered words to another, as well as that words were of such nature as to convey fear of serious bodily harm or injury to ordinary hearer, and that defendant intended to utter words as threat. D.C. Code 1973, § 22-507. *United States v. Baish*, 460 A.2d 38, 1983 D.C. App. LEXIS 363 (1983).

Right to trial by jury.

Defendant's statutory right to trial by jury was not violated by prosecutor's decision to prosecute for attempted threats, rather than for threats, even though defendant would have enjoyed right to be tried by jury had he been prosecuted for threats; existence of right to jury trial depended on maximum punishment for offense that was charged, not on maximum punishment for offense that could have been charged but was not. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Prosecutions under threats and unlawful entry statutes, with their maximum penalties of six months in prison, entitled defendants to trials by jury. U.S. Const.Amend. 6; D.C. Code 1981, §§ 16-705(b), 22-507, 22-3102. *Turner v. Bayly*, 673 A.2d 596, 1996 D.C. App. LEXIS 39 (1996).

Sentence and punishment.

Defendant who individually threatened two victims as they sat together in truck could properly be convicted of two counts of felony threat; defendant distinctly singled out and focused on each of the two victims while uttering words and physically touching them, one after the other. D.C. Code 1981, § 22-2307. *Joiner v. United States*, 585 A.2d 176, 1991 D.C. App. LEXIS 19 (1991).

Felony threat defendant's sentence was illegal in that it failed to state mandatory minimum term. D.C. Code 1981, § 24-203(a). *Joiner v. United States*, 585 A.2d 176, 1991 D.C. App. LEXIS 19 (1991).

Suppression of or failure to disclose evidence.

Trial court was precluded from crediting the uncorroborated testimony of the complaining witness beyond a reasonable doubt, in light of its announced sanction to draw all inferences from the missing evidence against the government due to government's Jencks violation in failing to preserve recording of defendant's telephone call to the witness, given that the lost tape recording was of the conversation on which the threats charge was based, and therefore absolutely crucial to guilt or innocence, either corroborating the testimony of the government's only witness or completely undercutting the government's case. *Robinson v. United States*, 825 A.2d 318, 2003 D.C. App. LEXIS 306 (2003).

Government's Jencks violation in failing to preserve defendant's telephone call from correctional facility, during which his former girlfriend alleged that defendant threatened to beat her up and kill her, when officer knew or should have known of the existence of the recording, and had time to retrieve it, warranted sanction to draw all inferences from the missing evidence against the government, given the degree of governmental fault, the potential importance of the missing recording for resolving the complaining witness's credibility on whether defendant threatened her, and the fact that the complainant's uncorroborated testimony was the sole evidence of defendant's guilt in prosecution for threatening another person. *Robinson v. United States*, 825 A.2d 318, 2003 D.C. App. LEXIS 306 (2003).

Fact that the recorded statement was of the telephone call on which the threats charge was based did not exclude it from disclosure as a

Jencks statement, where there was no dispute that the tape recording would have been a verbatim, continuous, contemporaneous recording of the conversation between defendant and the victim, and the recording of the statements the victim made during her telephone call with defendant could have been used to test the accuracy of her in-court testimony about the threatening nature of the call. *Robinson v. United States*, 825 A.2d 318, 2003 D.C. App. LEXIS 306 (2003).

Police, as an integral part of the prosecution team, knew or should have known that defendant's alleged threatening telephone call from correctional facility had been recorded by correction authorities, so as to impose an obligation to secure the tape recording from Department of Corrections, and thus, tape recording was in government's possession for both Jencks and Rule 16 purposes. *Robinson v. United States*, 825 A.2d 318, 2003 D.C. App. LEXIS 306 (2003).

Government's failure to obtain and preserve the tape recording of defendant's telephone conversation to his former girlfriend did not constitute a Brady violation or deprive defendant of due process in prosecution for threatening another person, even though officer knew or should have known that defendant's telephone call to the victim was recorded, absent showing of prejudice to defendant or bad faith by government in not obtaining and preserving the recording; defendant did not assert that the tape recording would have been exculpatory. *Robinson v. United States*, 825 A.2d 318, 2003 D.C. App. LEXIS 306 (2003).

Validity.

Interpretation of statute which makes threatening to injure a crime, so as to include words threatening intended victim's life in context of business transaction aimed at hiring someone to kill a third party, did not violate First Amendment. U.S. Const.Amend. 1; D.C. Code 1981, § 22-2307. *Beard v. United States*, 535 A.2d 1373, 1988 D.C. App. LEXIS 1 (1988).

Weight and sufficiency of evidence.

Evidence was sufficient to support conviction for attempted threats to do bodily harm based on defendant's words while outside victim's residence, even though "open the door" and "come out" were not threatening in themselves; defendant less than three weeks earlier had in effect threatened to shoot victim over debt dispute, defendant's words at residence, which were uttered in angry manner and coupled with banging on and kicking door, might well have been intended to terrify victim, defendant's words made victim apprehensive enough to refuse to open door and to call 911 instead, and given previous threat, victim's apprehension was hardly unreasonable. *Jenkins v. United*

States, 902 A.2d 79, 2006 D.C. App. LEXIS 426 (2006).

Evidence was sufficient to support convictions for attempted threats to do bodily harm and intent-to-frighten assault; police officer testified that after he asked defendant to move his vehicle from an area in front of the night club, defendant exited his vehicle, with an angry look on his face, reached into his front jacket pocket and used cuss words to state a threat. *Joiner-Die v. United States*, 899 A.2d 762, 2006 D.C. App. LEXIS 218 (2006).

Evidence was sufficient to support conviction for threats to do bodily harm, though defendant's statements to police officer, that she "won't work here again" and "the boys" would take care of her, were ambiguous, where defendant was handcuffed when he made the statements, the statements were made in a serious and threatening tone, and police officer understood the statements to mean that defendant

would arrange for boys in the neighborhood to physically incapacitate her. *Clark v. United States*, 755 A.2d 1026, 2000 D.C. App. LEXIS 151 (2000).

Evidence was sufficient to sustain conviction for threatening to do bodily harm of defendant whose threats were overheard by police officer and not by the intended victim. D.C. Code § 22-507. *Gurley v. United States*, 308 A.2d 785, 1973 D.C. App. LEXIS 340 (1973).

Evidence was sufficient to support conviction for threatening to injure a person, even though specific words allegedly used by defendant were not presented to jury; although testifying witness could not remember defendant's precise words, message conveyed was that something "bad" and "life-threatening" would happen to eyewitness if she did not come to preliminary hearing and tell defendant's lawyer what she told police. *Griffin v. United States*, 861 A.2d 610, 2004 D.C. App. LEXIS 617 (2004).

§ 22-408. Penalty for assaulting, beating, or fighting on account of money won by gaming. [Repealed].

Repealed.

(9 Anne, ch. 14, § 8, 1710; Kilty's Rept., p. 248; Alex. Brit. Stat., p. 692; Comp. Stat. D.C., p. 245, § 17; May 21, 1994, D.C. Law 10-119, § 4, 41 DCR 1639; Apr. 29, 2004, D.C. Law 15-154, § 4, 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-508. 1973 Ed., § 22-508.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-505.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

CHAPTER 5. BIGAMY.

Sec.
22-501. Bigamy.

§ 22-501. Bigamy.

(a) Whoever, having a spouse or domestic partner living, marries or enters a domestic partnership with another shall be deemed guilty of bigamy, and on conviction thereof shall suffer imprisonment for not less than 2 nor more than 7 years; provided, that this section shall not apply to any person whose:

(1) Spouse or domestic partner has been continually absent for 5 successive years next before such marriage or domestic partnership without being known to such person to be living within that time;

(2) Marriage to said living spouse shall have been dissolved by a valid decree of a competent court, or shall have been pronounced void by a valid decree of a competent court on the ground of the nullity of the marriage contract; or

(3) Domestic partnership with said living domestic partner has been terminated in accordance with § 32-702(d).

(b) For the purposes of this section, the term:

(1) "Domestic partner" shall have the same meaning as provided in § 32-701(3).

(2) "Domestic partnership" shall have the same meaning as provided in § 32-701(4).

(Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 870; Sept. 12, 2008, D.C. Law 17-231, § 23(a), 55 DCR 6758.)

Prior Codifications. — 1981 Ed., § 22-601. 1973 Ed., § 22-601.

Effect of amendments. — D.C. Law 17-231 rewrote the section, which had read as follows: "Whoever, having a husband or wife living, marries another shall be deemed guilty of bigamy, and on conviction thereof shall suffer imprisonment for not less than 2 nor more than 7 years; provided, that this section shall not apply to any person whose husband or wife has been continually absent for 5 successive years next before such marriage without being known to such person to be living within that time, or whose marriage to said living husband or wife shall have been dissolved by a valid decree of a competent court, or shall have been

pronounced void by a valid decree of a competent court on the ground of the nullity of the marriage contract."

Legislative history of Law 17-231. — Law 17-231, the "Omnibus Domestic Partnership Equality Amendment Act of 2008", was introduced in Council and assigned Bill No. 17-135, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on April 1, 2008, and May 6, 2008, respectively. Signed by the Mayor on June 6, 2008, it was assigned Act No. 17-403 and transmitted to both Houses of Congress for its review. D.C. Law 17-231 became effective on September 12, 2008.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Arraignment.
Instructions.
Nature and elements of offense.
Presumptions and burden of proof.

Witnesses and evidence, generally.

Admissibility of evidence.

In prosecution for bigamy, permitting certificate of the first marriage to be introduced in evidence, together with evidence of admissions made by defendant to police officer, before evi-

dence of the corpus delicti had been introduced was not an abuse of discretion as to order of the evidence. *Matz v. U.S.*, 158 F.2d 190, 1946 U.S. App. LEXIS 2359 (1946).

Arraignment.

The fact that defendant entered a plea of guilty to charge of bigamy without advice of counsel and that not until some time later in the day was counsel, at his request, appointed for him, was not fatal under circumstances. D.C. Code 1940, § 22-601. *Alexander v. U.S.*, 136 F.2d 783, 1943 U.S. App. LEXIS 3132 (1943).

Instructions.

Where defendant, charged with bigamy, testified that he received letter stating that first wife had obtained divorce, but defendant made no effort to ascertain true facts, refusing instruction that defendant must be acquitted if he believed at time of second marriage that his first wife had procured a divorce and giving instruction that if jury believed beyond reasonable doubt that at time of second marriage first wife was living and that marriage had not been dissolved by valid decree jury should find defendant guilty was not prejudicial error. D.C. Code 1940, § 22-601. *Alexander v. U.S.*, 136 F.2d 783, 1943 U.S. App. LEXIS 3132 (1943).

Nature and elements of offense.

There must be some honest and effective effort made to ascertain truth before it can be claimed that conclusion of defendant, charged with bigamy, that first wife had obtained divorce had been reached in good faith. D.C. Code 1940, § 22-601. *Alexander v. U.S.*, 136 F.2d 783, 1943 U.S. App. LEXIS 3132 (1943).

Presumptions and burden of proof.

The degree of proof required in a criminal trial to establish a marriage which invalidates a subsequent marriage is higher than that required in a civil action, but such a marriage may be proven by the admissions of defendant,

or by circumstantial evidence, although it is not required that it be proven by an eye witness of the ceremony. *Matz v. U.S.*, 158 F.2d 190, 1946 U.S. App. LEXIS 2359 (1946).

Witnesses and evidence, generally.

In prosecution for bigamy, where trial court, after admitting in evidence the certificate of the prior marriage, inquired why the prosecution did not procure some one to prove that defendant and first wife had lived together, and the first wife's father, who had remained in the courtroom while other witnesses had been excluded, volunteered to testify to that effect, permitting him to so testify was not improper. *Matz v. U.S.*, 158 F.2d 190, 1946 U.S. App. LEXIS 2359 (1946).

In prosecution for bigamy, admission of the first marriage certificate prior to the time that defendant had been connected with it was not an abuse of discretion where the identification of defendant as the person named in the certificate was subsequently made. *Matz v. U.S.*, 158 F.2d 190, 1946 U.S. App. LEXIS 2359 (1946).

The theory on which a second wife is compelled to testify in a bigamy trial is that she is not legally the wife of the defendant once it is established that he has a lawful wife still living. *Matz v. U.S.*, 158 F.2d 190, 1946 U.S. App. LEXIS 2359 (1946).

In determining question of the competency of defendant's second wife to testify in a bigamy prosecution, the court was required to decide whether the first marriage was established to his satisfaction by the proof offered. *Matz v. U.S.*, 158 F.2d 190, 1946 U.S. App. LEXIS 2359 (1946).

In prosecution for bigamy, court did not err in compelling the second wife to testify where the certificate of the prior marriage was in evidence, together with testimony as to defendant's admissions directed toward that certificate, and other testimony that defendant and first wife had lived together as husband and wife. *Matz v. U.S.*, 158 F.2d 190, 1946 U.S. App. LEXIS 2359 (1946).

CHAPTER 6. BREAKING INTO DEVICES DESIGNED TO RECEIVE CURRENCY.

Sec.

22-601. Breaking and entering vending machines and similar devices.

§ 22-601. Breaking and entering vending machines and similar devices.

Whoever in the District of Columbia breaks open, opens, or enters, without right, any parking meter, coin telephone, vending machine dispensing goods or services, money changer, or any other device designed to receive currency, with intent to carry away any part of such device or anything contained therein, shall be sentenced to a term of imprisonment of not more than 3 years or to a fine of not more than \$3,000, or both.

(July 29, 1970, 84 Stat. 600, Pub. L. 91-358, title II, § 203.)

Prior Codifications. — 1981 Ed., § 22-3427. 1973 Ed., § 22-3427.

CASE NOTES

ANALYSIS

Construction with other statutes.
Indictment or information.
Presumptions and burden of proof.
Weight and sufficiency of evidence.

Construction with other statutes.

Chapter 19 referred to in § 22-103 — the “general attempts” statute—was actually Chapter 19 of the 1901 District of Columbia Code, which chapter is only a portion of the present Title 22 (and is a portion that does not and did not include this section or any of its predecessors). Thus, § 22-103 does not apply to this section and, no other basis for a crime of “attempted breaking and entering-vending machine” having been cited, such a crime does not exist in the District of Columbia. *United States v. Hughes*, 115 WLR 1077 (Super. Ct. 1987).

Indictment or information.

Indictment charging that defendant “broke open, opened, and entered without right a juke box, with intent to carry away a part of such device, and something contained therein” was insufficient for failure to aver that property belonged to someone other than defendant. D.C. Code § 22-3427; U.S. Const. Amend. 6. *United States v. Pendergrast*, 313 A.2d 103, 1973 D.C. App. LEXIS 408 (1973).

Presumptions and burden of proof.

In case concerning breaking and entering of parking meter, trial court properly assigned burden to government to prove a taking with-

out right where trial court instructed jury that government had burden of proving an attempt to break and enter without right. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

Statutes prohibiting breaking and entering, and taking property without right prohibit acts committed by defendant only if done without right and, therefore, government must prove beyond reasonable doubt that defendant lacked authority from rightful owner of the property. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

Weight and sufficiency of evidence.

Evidence that defendant had been seen trying to break into a parking meter was insufficient to support conviction for attempted breaking and entering of a parking meter, absent evidence that defendant lacked authority to open the meter. D.C. Code 1981, §§ 22-103, 22-3427. *Bolan v. United States*, 587 A.2d 458, 1991 D.C. App. LEXIS 50 (1991).

In view of evidence that neither police officer nor anyone else had investigated to determine whether defendant was authorized to enter parking meters by District of Columbia government, officer’s testimony “not to my knowledge,” when asked whether defendant worked for District of Columbia government, was not sufficient to support a conviction for breaking and entering or taking property without right. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v.*

United States, 490 A.2d 1173, 1985 D.C. App.
LEXIS 377 (1985).

CHAPTER 7. BRIBERY; OBSTRUCTING JUSTICE; CORRUPT INFLUENCE.

Subchapter I. Corrupt Influence

Sec.

22-701 to 22-703. [Repealed].

22-704. Corrupt influence; officials.

Subchapter II. Bribery

22-711. Definitions.

22-712. Prohibited acts; penalty.

Sec.

22-713. Bribery of witness; penalty.

Subchapter III. Obstructing Justice

22-721. Definitions.

22-722. Prohibited acts; penalty.

22-723. Tampering with physical evidence; penalty.

*Subchapter I. Corrupt Influence.***§§ 22-701 to 22-703. Definition and penalty; offering or receiving money, property, or valuable consideration to procure office or promotion from Council; obstructing justice [Repealed].**

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(b)-(d), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., §§ 22-701 to 22-703.**Legislative history of Law 4-164.** — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.**Legislative history of Law 4-164.** — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.**§ 22-704. Corrupt influence; officials.**

(a) Whosoever corruptly, directly or indirectly, gives any money, or other bribe, present, reward, promise, contract, obligation, or security for the payment of any money, present, reward, or thing of value to any ministerial, administrative, executive, or judicial officer of the District of Columbia, or any employee, or other person acting in any capacity for the District of Columbia, or any agency thereof, either before or after the officer, employee, or other person acting in any capacity for the District of Columbia is qualified, with intent to influence such official's action on any matter which is then pending, or may by law come or be brought before such official in such official's official capacity, or to cause such official to execute any of the powers in such official vested, or to perform any duties of such official required, with partiality or favor, or otherwise than is required by law, or in consideration that such official being authorized in the line of such official's duty to contract for any advertising or for the furnishing of any labor or material, shall directly or indirectly arrange to receive or shall receive, or shall withhold from the parties

so contracted with, any portion of the contract price, whether that price be fixed by law or by agreement, or in consideration that such official has nominated or appointed any person to any office or exercised any power in such official vested, or performed any duty of such official required, with partiality or favor, or otherwise contrary to law; and whosoever, being such an official, shall receive any such money, bribe, present, or reward, promise, contract, obligation, or security, with intent or for the purpose or consideration aforesaid shall be deemed guilty of bribery and upon conviction thereof shall be punished by imprisonment for a term not less than 6 months nor more than 5 years.

(b) Whosoever corrupts or attempts, directly or indirectly, to corrupt any special master, auditor, juror, arbitrator, umpire, or referee, by giving, offering, or promising any gift or gratuity whatever, with intent to bias the opinion, or influence the decision of such official, in relation to any matter pending in the court, or before an inquest, or for the decision of which such arbitrator, umpire, or referee has been chosen or appointed, and every official who receives, or offers or agrees to receive, a bribe in any of the cases above mentioned shall be guilty of bribery and upon conviction thereof shall be punished as hereinbefore provided.

(Feb. 26, 1936, 49 Stat. 1143, ch. 87; May 21, 1994, D.C. Law 10-119, § 5, 41 DCR 1639.)

Cross references. — Bribery, see § 22-712.

Section references. — This section is referred to in § 23-546.

Prior Codifications. — 1981 Ed., § 22-704. 1973 Ed., § 22-704.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned

Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Arrest.

Change of venue.

Conduct of trial.

Discovery.

Indictment and information.

Joint or separate trials of codefendants.

Retaliatory discharge.

Search and seizure.

Sentence and punishment.

Weight and sufficiency of evidence.

Admissibility of evidence.

On the whole record, including policeman's age, experience and position, issue of voluntariness of his confession which ultimately led to indictment for bribery which confession was made after superior read statutes regarding forfeiture of office or employ-

ment by District of Columbia employee who refuses to testify to matters relating to his office or employment was a factual one which, had it been decided in proper manner, would not necessarily have resulted in exclusion of the confession as evidence. 18 U.S.C. § 201; D.C. Code 1961, §§ 1-319, 4-175, 22-704; Fed.Rules Crim.Proc. rule 5(a), 18 U.S.C. *Hutcherson v. United States*, 351 F.2d 748, 1965 U.S. App. LEXIS 5625 (C.A.D.C. 1965).

Where no criminal charge was pending against policeman at time he made confession which ultimately resulted in indictment charging bribery, at time of confession he had not been arrested, and purpose of investigation was principally to obtain his resignation rather than to lead to a criminal charge, confession was not inadmissible on ground that it was made when defendant was without counsel or advice of counsel. 18 U.S.C. § 201; D.C. Code 1961, § 22-704; Fed.Rules Crim.Proc. rule 5(a),

18 U.S.C. *Hutcherson v. United States*, 351 F.2d 748, 1965 U.S. App. LEXIS 5625 (C.A.D.C. 1965).

In prosecution for conspiracy to bribe police officer and also for bribery itself to influence officer in enforcement of gambling laws, even if recordings of conversations between police officer who was subject of bribery, and defendants, were intercepted and recorded, and were introduced in evidence in violation of Federal Communications Act section, such question would not be reached in instant prosecution as instant use made of recordings was for refreshing recollection of police officer before giving his own testimony of the recorded conversations. D.C. Code 1951, § 22-704; 18 U.S.C. § 371; Communications Act of 1934, § 605, 47 U.S.C. § 605. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

In prosecution for conspiracy to bribe police officer and also for bribery itself, to influence officer in enforcement of gambling laws, contention that recordings of conversations between police officer, who was subject of the conspiracy and bribery, and defendants were illegally intercepted and used in preparation of Government's trial was without merit where police officer himself made the recordings and transmitted the same information legally to other police officers to be utilized in preparation for trial of defendants. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

In prosecution for conspiracy to bribe police officer and also for bribery itself to influence officer in enforcement of gambling laws, trial court did not abuse its discretion by admitting in evidence partially incoherent and inaudible recordings of conversations between the police officer and defendants. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

In prosecution for conspiracy to bribe police officer and also for bribery itself to influence officer in enforcement of gambling laws, recordings of conversations between police officer and defendants were admissible in evidence, where police officer testified as to operation of recording device, his method of operating such device, accuracy of the recordings, and identities of persons speaking. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Arrest.

Under circumstances including showing that policeman had been escorted to headquarters by another officer for purpose of questioning regarding alleged conduct which subsequently led to indictment charging bribery, that when investigation was concluded and confession placed in writing and signed policeman re-

signed from force and left building without being arrested, and that he was not indicted until about a month after investigatory session, conduct of policeman's superiors in pursuing inquiries fell short of an "arrest". 18 U.S.C. § 201; D.C. Code 1961, § 22-704. *Hutcherson v. United States*, 351 F.2d 748, 1965 U.S. App. LEXIS 5625 (C.A.D.C. 1965).

Change of venue.

In prosecution of police officers for conspiracy to violate federal narcotic laws, and for accepting bribes to influence their official action in detection and arrest of narcotic law violators, evidence of allegedly hostile publicity claimed to have resulted from Senate hearings, testimony at another narcotics trial to which defendants were not parties, and magazine articles, was insufficient to show that prejudice against defendants was so great as to preclude a fair trial. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.; 18 U.S.C. § 371; D.C. Code 1951, § 22-704. *U.S. v. Carper*, 13 F.R.D. 483, 1953 U.S. Dist. LEXIS 3876 (D.D.C.1953).

Conduct of trial.

In prosecution for conspiracy to bribe police officer and also for bribery to influence officer in enforcement of gambling laws, defendants, who were convicted on only part of the substantive counts, and who were not involved in the conspiracy, were not prejudiced by trial of the conspiracy charge and bribery charges together, in view of the different number of convictions entered against the different defendants indicating that the jury was selective and was returning verdicts only upon basis of evidence relevant to each count and each defendant and also where court charged in considerable detail as to the separate substantive counts. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Trial judge, who had recordings of conversations between defendants and police officer in prosecution for conspiracy to bribe and bribery of the police officer played out of presence of jury so that she could rule on any objections raised by defendants before jury heard recordings, followed correct procedure. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Discovery.

In prosecution for conspiracy to bribe police officer and also for bribery itself to influence officer in enforcement of gambling laws, refusal of trial court to grant defendants' request to make stenographic transcripts of recordings between police officers and defendants or to be furnished copies of transcripts by Government was not reversible error, where defendants were given opportunity to hear recordings and

where parts of recordings admitted in evidence were played out of presence of jury with defendant's counsel present. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Under Federal Criminal Procedure Rule providing for pre-trial inspection of books, papers, documents or other objects designated in subpoena, defendants, in prosecution for conspiracy to bribe police officer and bribery itself, could properly request pre-trial inspection of recordings of conversations between the police officer and defendants, and trial court in its discretion could have required pretrial production of such recordings, but trial court did not abuse its discretion in denying such requests, where defendants had already been accorded opportunity by Government to inspect the recordings. D.C. Code 1951, § 22-704; 18 U.S.C. § 371; Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Under Federal Criminal Procedure Rule providing for pre-trial discovery by order of court as to documents or tangible objects, obtained or belonging to defendant or obtained from others by seizure or process, recordings of conversations between police officer and defendants, who were charged with conspiracy to bribe and bribery of such police officer, were not subject to inspection. Fed.Rules Crim.Proc. rule 16, 18 U.S.C.; D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Under Federal Criminal Procedure Rule providing for pre-trial inspection of books, papers, documents or other objects designated in a subpoena, trial court was well within its discretion in declining to order inspection or original recordings of conversations between police officer and defendants, who were charged with conspiracy to bribe and bribery of police officer, where original recordings were too fragile to be used for discovery playing and where an affidavit was filed in which the accuracy of reproduction from the originals was certified and truth of affidavit was not brought into question. Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C.; D.C. Code 1951, § 22-704; 17 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Indictment and information.

Where defendants made motion before trial attacking indictment charging them with conspiracy to bribe police officer and also for bribery itself on ground of alleged misjoinder of substantive charges, such motion went to validity of indictment and not to question of advisability of separate trials. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234

F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

If alleged variance existed between count of indictment which charged one conspiracy of all the defendants to bribe police officer, and evidence which allegedly showed several conspiracies, such variance was not reversible error in regard to convictions of two of the defendants on the conspiracy count, where conspiracy of the two convicted embraced the other defendants in the plan, thus preventing surprise, and also in view of fact that the defendants would not be prejudiced by the variance in defending on ground of present conviction in event of attempted second prosecution for same offense, as resort could be had by defendants to record of evidence or even to parol evidence if necessary. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Where offenses of conspiracy to bribe and bribery charged in indictment were of the same or similar character, and defendants charged with such crimes were alleged to have participated in same conspiracy, joinder of offenses and defendants in the indictment was permissible under Federal Criminal Procedure Rule. Fed.Rules Crim.Proc. rule 8, 18 U.S.C.; D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Joint or separate trials of codefendants.

If defendants, who were charged with conspiracy to bribe police officer and also for bribery to influence officer in enforcement of gambling laws, wished to be tried separately on those charges, request for separate trial on such charges should have been made in the trial court by motion under Federal Criminal Procedure Rule providing for such relief. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.; D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Under Federal Criminal Procedure Rule providing for severance of offenses or defendants in event of prejudice as result of such joinder, defendants, who were only ones convicted in prosecution for conspiracy with other defendants, if they had requested separation of the substantive counts from the conspiracy count, would not have been prejudiced by refusal of trial court to grant motion, where evidence of their participation in conspiracy was complete and included other defendants on trial for substantive counts. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.; D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Retaliatory discharge.

Former employee's allegations that he was fired for refusing to participate in political

activities prohibited by federal tax laws and regulations were sufficient to state claim for wrongful discharge in violation of public policy under District of Columbia law. *Riggs v. Home Builders Inst.*, 203 F.Supp.2d 1, 2002 U.S. Dist. LEXIS 16329 (2002).

Policy set forth in federal tax laws and regulations of protecting against abuse of public treasury by utilizing public funds for partisan activity was sufficiently clear mandate of public policy to support claim for wrongful discharge in violation of public policy under District of Columbia law. *Riggs v. Home Builders Inst.*, 203 F.Supp.2d 1, 2002 U.S. Dist. LEXIS 16329 (2002).

Former employee's allegations that former employer, executives for employer and related organization combined together, agreed and conspired to terminate his employment for his refusal to advance their political and legislative agenda in violation of federal tax laws and regulations were sufficient to state claim for civil conspiracy under District of Columbia law. *Riggs v. Home Builders Inst.*, 203 F.Supp.2d 1, 2002 U.S. Dist. LEXIS 16329 (2002).

Former employee's allegations that trustee for former employee fell within exception to corporate privilege when he conspired with others to terminate his employment for his refusal to advance their political and legislative agenda in violation of federal tax laws and regulations were sufficient to state claim for civil conspiracy under District of Columbia law. *Riggs v. Home Builders Inst.*, 203 F.Supp.2d 1, 2002 U.S. Dist. LEXIS 16329 (2002).

Special police officer who was employed by medical center stated wrongful discharge claim under public policy exception to the at-will employment doctrine; officer alleged that he recorded and reported center's alleged bribe of government official, that he assisted Federal Bureau of Investigation (FBI) in the investigation of corrupt influence with respect to a federal government construction grant, and that he was terminated after he informed center of pending arrests and his role in the investigation of the bribe. D.C. Code 1981, §§ 4-114, 4-142, 4-175, 22-704. *Fingerhut v.*

Children's Nat'l Med. Ctr., 738 A.2d 799, 1999 D.C. App. LEXIS 227 (1999).

Even if special police officer employed by medical center initially engaged in conduct that violated District of Columbia's policies, that violation did not excuse center's like failure, itself an independent violation of public policy underlying the legal proscriptions, much less permit retaliatory discharge, and thus, officer who alleged that he reported center's alleged bribe of government official and that he was subsequently terminated stated claim for wrongful discharge under public policy exception to the at-will employment doctrine. D.C. Code 1981, §§ 4-114, 4-142, 4-175, 22-704. *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 1999 D.C. App. LEXIS 227 (1999).

Search and seizure.

Defendant charged with conspiracy to violate bribery statute lacked standing to challenge manner in which recordings, which contained admissions by codefendants through use of informer, were obtained. 18 U.S.C. § 371; D.C. Code § 22-704. *Wallace v. United States*, 412 F.2d 1097, 1969 U.S. App. LEXIS 12521 (C.A.D.C. 1969), writ of certiorari denied by 402 U.S. 943, 91 S. Ct. 1605, 29 L. Ed. 2d 110, 1971 U.S. LEXIS 2158 (1971).

Sentence and punishment.

Where defendant was convicted on count of conspiracy to bribe police officer, and also was convicted on intimately related bribery counts, and sentence under conspiracy count was for longer time than his concurrent sentence for bribery, conspiracy and bribery charges would be affirmed if no reversible error impaired conspiracy conviction. D.C. Code 1951, § 22-704; 18 U.S.C. § 371. *Monroe v. U.S.*, 234 F.2d 49, 1956 U.S. App. LEXIS 3665 (C.A.D.C. 1956).

Weight and sufficiency of evidence.

Evidence was sufficient to show knowledge of conspiracy to violate bribery statute. 18 U.S.C. § 371; D.C. Code § 22-704. *Wallace v. United States*, 412 F.2d 1097, 1969 U.S. App. LEXIS 12521 (C.A.D.C. 1969), writ of certiorari denied by 402 U.S. 943, 91 S. Ct. 1605, 29 L. Ed. 2d 110, 1971 U.S. LEXIS 2158 (1971).

Subchapter II. Bribery.

§ 22-711. Definitions.

For the purposes of this subchapter, the term:

(1) "Court of the District of Columbia" means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

(2) "Juror" means any grand, petit, or other juror, or any person selected or summoned as a prospective juror of the District of Columbia.

(3) "Official action" means any decision, opinion, recommendation, judg-

ment, vote, or other conduct that involves an exercise of discretion on the part of the public servant.

(4) "Official duty" means any required conduct that does not involve an exercise of discretion on the part of the public servant.

(5) "Official proceeding" means any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, or a grand jury proceeding.

(6) "Public servant" means any officer, employee, or other person authorized to act for or on behalf of the District of Columbia government. The term "public servant" includes any person who has been elected, nominated, or appointed to be a public servant or a juror. The term "public servant" does not include an independent contractor.

(Dec. 1, 1982, D.C. Law 4-164, § 301, 29 DCR 3976; May 7, 1993, D.C. Law 9-268, § 2(a), 39 DCR 5702.)

Prior Codifications. — 1981 Ed., § 22-711.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-701.

Legislative history of Law 9-268. — Law 9-268, the "Law Enforcement Witness Protection Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-385 which

was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 2, 1992, and July 7, 1992, respectively. Signed by the Mayor on July 21, 1992, it was assigned Act No. 9-256 and transmitted to both Houses of Congress for its review. D.C. Law 9-268 became effective on May 7, 1993.

CASE NOTES

ANALYSIS

In general.
Public servant.

In general.

Government need prove only one mode of violation of prescribed offense under the bribery statute. D.C. Code 1981, § 22-712(a)(2). *Colbert v. United States*, 601 A.2d 603, 1992 D.C. App. LEXIS 18 (1992).

Public servant.

Finding that defendant was a "public ser-

vant" for purposes of bribery statute was supported by evidence that he was employed by the Washington Metropolitan Area Transit Authority (WMATA). D.C. Code 1981, § 22-712(a)(2). *Colbert v. United States*, 601 A.2d 603, 1992 D.C. App. LEXIS 18 (1992).

§ 22-712. Prohibited acts; penalty.

(a) A person commits the offense of bribery if that person:

(1) Corruptly offers, gives, or agrees to give anything of value, directly or indirectly, to a public servant; or

(2) Corruptly solicits, demands, accepts, or agrees to accept anything of value, directly or indirectly, as a public servant; in return for an agreement or understanding that an official act of the public servant will be influenced thereby or that the public servant will violate an official duty, or that the public servant will commit, aid in committing, or will collude in or allow any fraud against the District of Columbia.

(b) Nothing in this section shall be construed as prohibiting concurrence in official action in the course of legitimate compromise between public servants.

(c) Any person convicted of bribery shall be fined not more than \$25,000 or 3 times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than 10 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 302, 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-712.

Legislative history of Law 4-164. — For

legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-701.

CASE NOTES

ANALYSIS

Construction and application.

Jurisdiction.

Presumptions and burden of proof.

Weight and sufficiency of evidence.

Construction and application.

Clause in compact creating Washington Metropolitan Area Transit Authority (WMATA), which approved transportation agreement between the District of Columbia, Maryland and Virginia did not transform WMATA into a federal agency for purposes of the bribery statute. D.C. Code 1981, §§ 1-2431, § 2, 22-712(a)(2). *Colbert v. United States*, 601 A.2d 603, 1992 D.C. App. LEXIS 18 (1992).

Jurisdiction.

Superior Court of the District of Columbia had jurisdiction over criminal charge alleging

that employee for Washington Metropolitan Area Transit Authority (WMATA) had solicited a bribe. D.C. Code 1981, §§ 1-2439, 22-712(a)(2). *Colbert v. United States*, 601 A.2d 603, 1992 D.C. App. LEXIS 18 (1992).

Presumptions and burden of proof.

Government need prove only one mode of violation of prescribed offense under the bribery statute. D.C. Code 1981, § 22-712(a)(2). *Colbert v. United States*, 601 A.2d 603, 1992 D.C. App. LEXIS 18 (1992).

Weight and sufficiency of evidence.

Finding that defendant was a "public servant" for purposes of bribery statute was supported by evidence that he was employed by the Washington Metropolitan Area Transit Authority (WMATA). D.C. Code 1981, § 22-712(a)(2). *Colbert v. United States*, 601 A.2d 603, 1992 D.C. App. LEXIS 18 (1992).

§ 22-713. Bribery of witness; penalty.

(a) A person commits the offense of bribery of a witness if that person:

(1) Corruptly offers, gives, or agrees to give to another person; or

(2) Corruptly solicits, demands, accepts, or agrees to accept from another person;

anything of value in return for an agreement or understanding that the testimony of the recipient will be influenced in an official proceeding before any court of the District of Columbia or any agency or department of the District of Columbia government, or that the recipient will absent himself or herself from such proceedings.

(b) Nothing in subsection (a) of this section shall be construed to prohibit the payment or receipt of witness fees provided by law, or the payment by the party upon whose behalf a witness is called and receipt by a witness of a reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such proceeding, or, in case of expert witnesses, a reasonable fee for time spent in the preparation of a technical or professional opinion and appearing and testifying.

(c) Any person convicted of bribery of a witness shall be fined not more than \$2,500 or imprisoned for not more than 5 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 303, 29 DCR 3976.)

Cross references. — Obstruction of justice, see § 22-722.

Prior Codifications. — 1981 Ed., § 22-713.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-701.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Persons liable.

Questions of law and fact.

Weight and sufficiency of evidence.

Admissibility of evidence.

In prosecution of doctor and his wife for attempted bribery of witness in abortion case against the doctor, where facts, other than the statements and acts of wife, were shown from which it could be concluded that a conspiracy between doctor and his wife in fact existed, the evidence of witness and police sergeant concerning the declarations of wife, including the offer of the bribe, was admissible against the doctor, though the declarations were made out of the doctor's presence. D.C. Code 1940, § 22-701. *Ladrey v. U.S.*, 155 F.2d 417, 1946 U.S. App. LEXIS 2214 (1946).

In prosecution of doctor and his wife for attempted bribery of witness in abortion case against the doctor, evidence that doctor took his wife to a point near the scene of her attempt at bribery, that after her arrest he was found with his automobile parked at a nearby corner, that he made a statement so incredible as to be prima facie false, as well as conflicting statements, together with fact that doctor had a strong motive to eliminate the witness, tended

to show a secret combination or conspiracy between doctor and his wife, notwithstanding that indictment did not specifically charge that they had conspired. D.C. Code 1940, § 22-701. *Ladrey v. U.S.*, 155 F.2d 417, 1946 U.S. App. LEXIS 2214 (1946).

Persons liable.

In prosecution of doctor and his wife for attempted bribery of witness in abortion case against the doctor, where there was sufficient evidence to justify the jury's conclusion that doctor was an accessory before the fact to the attempt at bribery by his wife, he was properly found guilty as a principal. D.C. Code 1940, 22-105, 22-701. *Ladrey v. U.S.*, 155 F.2d 417, 1946 U.S. App. LEXIS 2214 (1946).

Questions of law and fact.

In prosecution for attempted bribery of witness in abortion case, evidence was sufficient for the jury. D.C. Code 1940, 22-701. *Ladrey v. U.S.*, 155 F.2d 417, 1946 U.S. App. LEXIS 2214 (1946).

Weight and sufficiency of evidence.

In prosecution for attempted bribery of witness in abortion case, evidence sustained conviction. D.C. Code 1940, 22-701. *Ladrey v. U.S.*, 155 F.2d 417, 1946 U.S. App. LEXIS 2214 (1946).

Subchapter III. Obstructing Justice.

§ 22-721. Definitions.

For the purpose of this subchapter, the term:

(1) "Court of the District of Columbia" means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

(2) "Criminal investigator" means an individual authorized by the Mayor or the Mayor's designated agent to conduct or engage in a criminal investigation, or a prosecuting attorney conducting or engaged in a criminal investigation.

(3) "Criminal investigation" means an investigation of a violation of any criminal statute in effect in the District of Columbia.

(4) "Official proceeding" means any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, or a grand jury proceeding.

(Dec. 1, 1982, D.C. Law 4-164, § 501, 29 DCR 3976; May 7, 1993, D.C. Law 9-268, § 2(b), 39 DCR 5702.)

Prior Codifications. — 1981 Ed., § 22-721.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-701.

Legislative history of Law 9-268. — For legislative history of D.C. Law 9-268, see Historical and Statutory Notes following § 22-711.

CASE NOTES

ANALYSIS

Due administration of justice.

In general.

Official proceeding.

Due administration of justice.

Phrase “due administration of justice,” as used in statute defining obstruction of justice, in part, as corruptly, or by threats of force, obstructing or impeding or endeavoring to instruct or impede the due administration of justice in any official proceeding, does not include an initial police response to the scene of a crime. *Wynn v. United States*, 48 A.3d 181, 2012 D.C. App. LEXIS 321 (2012).

Phrase “due administration of justice,” as used in statute defining obstruction of justice, in part, as corruptly, or by threats of force, obstructing or impeding or endeavoring to instruct or impede the due administration of justice in any official proceeding, is used primarily, if not exclusively, to describe the proper functioning and integrity of a court or hearing. *Wynn v. United States*, 48 A.3d 181, 2012 D.C. App. LEXIS 321 (2012).

In general.

Defendant could be convicted of obstructing official proceeding, i.e., criminal investigation,

even though neither he nor witness whose murder gave rise to obstruction charge was target of that investigation. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Conviction of defendants for obstruction of justice was not reversed under theory that element of crime was not proven, where threats made by defendants to witness occurred shortly after crime was committed and during time witness was assisting in investigation rather than at time of trial; therefore, defendants attempted to impede investigation rather than to keep witness from testifying at grand jury. D.C. Code 1981, §§ 22-721, 22-722; § 22-703 (repealed). *Payne v. United States*, 516 A.2d 484, 1986 D.C. App. LEXIS 455 (1986).

Official proceeding.

An “official proceeding,” as that term is used in statute defining obstruction of justice, in part, as corruptly, or by threats of force, obstructing or impeding or endeavoring to instruct or impede the due administration of justice in any official proceeding, does not include the actions of police officers first responding to a crime. *Wynn v. United States*, 48 A.3d 181, 2012 D.C. App. LEXIS 321 (2012).

§ 22-722. Prohibited acts; penalty.

(a) A person commits the offense of obstruction of justice if that person:

(1) Knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a juror in the discharge of the juror's official duties;

(2) Knowingly uses intimidating or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a witness or officer in any official proceeding, with intent to:

(A) Influence, delay, or prevent the truthful testimony of the person in an official proceeding;

(B) Cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding;

(C) Evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding; or

(D) Cause or induce the person to be absent from a legal official proceeding to which the person has been summoned by legal process;

(3) Harasses another person with the intent to hinder, delay, prevent, or dissuade the person from:

(A) Attending or testifying truthfully in an official proceeding;

(B) Reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense;

(C) Arresting or seeking the arrest of another person in connection with the commission of a criminal offense; or

(D) Causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding;

(4) Injures or threatens to injure any person or his or her property on account of the person or any other person giving to a criminal investigator in the course of any criminal investigation information related to a violation of any criminal statute in effect in the District of Columbia;

(5) Injures or threatens to injure any person or his or her property on account of the person or any other person performing his official duty as a juror, witness, or officer in any court in the District of Columbia; or

(6) Corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.

(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than 30 years, or shall be fined not more than \$10,000, or both. For purposes of imprisonment following revocation of release authorized by § 24-403.01, obstruction of justice is a Class A felony.

(Dec. 1, 1982, D.C. Law 4-164, § 502, 29 DCR 3976; May 7, 1993, D.C. Law 9-268, § 2(c), 39 DCR 5702; May 23, 1995, D.C. Law 10-256, § 3, 42 DCR 20; June 8, 2001, D.C. Law 13-302, § 5, 47 DCR 7249; Dec. 10, 2009, D.C. Law 18-88, § 214(m), 56 DCR 7413.)

Cross references. — Detention prior to trial, applicability to offenses under this section, see § 23-1322.

Prior Codifications. — 1981 Ed., § 22-722.

Effect of amendments. — D.C. Law 13-302, in subsec. (b), in the first sentence, substituted “30 years” for “life”; and added the second sentence.

D.C. Law 18-88, in subsecs. (a)(4), (5), substituted “Injures or threatens to injure” for “Injures”.

Emergency legislation. — For temporary (90-day) amendment of section, see § 5 of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of section, see § 5 of the Sentencing Reform Congressional Review Emergency Amendment Act of

2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 5 of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 5 of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

For temporary (90 day) amendment of section, see § 102(l) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) amendment of section, see § 214(m) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(m) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-701.

Legislative history of Law 9-268. — For legislative history of D.C. Law 9-268, see Historical and Statutory Notes following § 22-711.

Legislative history of Law 10-256. — Law 10-256, the “Public Safety and Law Enforcement Support Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-628, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and

December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-375 and transmitted to both Houses of Congress for its review. D.C. Law 10-256 become effective May 23, 1995.

Legislative history of Law 13-302. — Law 13-302, the “Sentencing Reform Amendment Act of 2000”, was introduced in Council and assigned Bill No. 13-696, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 26, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 2, 2000, it was assigned Act No. 13-406 and transmitted to both Houses of Congress for its review. D.C. Law 13-302 became effective on June 8, 2001.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Arguments and conduct of counsel.
Constitutional rights.
Double jeopardy and collateral estoppel.
Examination of witnesses.
Indictment and information.
Instructions.
Joint or separate trial.
Jurisdiction.
Merger of offenses.
Nature and elements of offenses.
—In general.
—Preventing witness from attending or testifying, nature and elements of offenses.
Review.
Searches and seizures.
Speedy trial.
Weight and sufficiency of evidence.

Admissibility of evidence.

Crime-fraud exception to attorney-client privilege did not apply to communications between murder defendant and his attorney regarding alleged witness tampering; the alleged tampering occurred before any communications between attorney and defendant about the statements procured from witness through intimidation, there was no suggestion that attorney did anything that was conducive to the fulfillment of the tampering, and attorney only undertook to investigate the bona fides of witness's statement recanting his testimony against defendant. In re Public Defender Serv., 831 A.2d 890, 2003 D.C. App. LEXIS 550 (2003).

Evidentiary hearing was not required in prosecution for murder and obstruction of justice to determine admissibility of statements made by witness whose murder gave rise to obstruction charge, but rather, trial court could

properly consider this issue by means of proffer; government had to present same evidence at trial to prove obstruction count, trial court recognized explicitly that it would have to monitor evidence at trial to ensure that proffer was fulfilled and that equation of admissibility remained valid, government's proffer was extensive, and defense was afforded equally extensive opportunity to rebut proffer, but failed to proffer any significant evidence to counter government's factual allegations. Crutchfield v. United States, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

In prosecution of police officer for assaulting arrestee and obstruction of justice, prosecutorial motives were not probative of whether evidence sought to be introduced was obtained from legitimate independent source or whether officer's compelled immunized testimony given during administrative police investigation was improperly used as investigative lead or focused investigation on officer; officer's Fifth Amendment protections did not depend upon integrity and good faith of prosecuting authorities. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const. Amend. 5. United States v. Anderson, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Arguments and conduct of counsel.

Prosecutor misstated law, in prosecution of two physicians for obstruction of justice based on their alleged attempts to prevent patient from testifying against one physician on charge of sexually abusing patient, by asserting that it did not matter legally whether jury believed sexual abuse occurred; only attempts to prevent truthful testimony were punishable as obstruction of justice. Brown v. United States, 766 A.2d 530, 2001 D.C. App. LEXIS 31 (2001).

Prosecutor's comment during rebuttal argument in obstruction of justice case, that defen-

dant had “turn[ed] away smugly[,] laughing” while complaining witness was testifying was inappropriate; in effect, prosecutor gave unsworn testimony regarding defendant’s conduct and demeanor, and prosecutor’s assertions on the subject were not subject to cross-examination by the defense. *Brown v. United States*, 766 A.2d 530, 2001 D.C. App. LEXIS 31 (2001).

Prosecutor’s rebuttal argument in obstruction of justice case, that defense attorney had decided to “trash” and “denigrate” the patient whom defendant, a physician, had allegedly attempted to keep from testifying against him in sexual abuse case, was improper verbal assault on defense attorney for exercising obligation to defend client and to explore patient’s credibility. *Brown v. United States*, 766 A.2d 530, 2001 D.C. App. LEXIS 31 (2001).

Constitutional rights.

Under Constitution’s prohibition against unreasonable searches, and its guaranties of due process of law and effective representation by counsel, government agent’s intrusion upon conferences between accused and his counsel invalidated conviction under federal “obstruction of justice” statute and District of Columbia bribery statute. 18 U.S.C. § 1503; D.C. Code 1951, § 22-701. *Caldwell v. U.S.*, 205 F.2d 879, 1953 U.S. App. LEXIS 2686 (C.A.D.C. 1953).

Police officer’s claim that District of Columbia retaliated against him for his First Amendment protected speech was precluded, on grounds that officer spoke pursuant to his official duties as he complained about conduct that he was obligated to report, including complaints of alleged attempts by District of Columbia lawyers to influence officer to give false testimony, alleged pattern of retaliation and harassment from police department due to officer’s refusal to participate in sabotage of another officer’s career, and alleged unlawful search by police department on rental property that officer owned. *Gresham v. District of Columbia*, 639 F.Supp.2d 17, 2009 U.S. Dist. LEXIS 66858 (2009), dismissed by 2009 U.S. Dist. LEXIS 81915 (D.D.C. Sept. 9, 2009).

Defendants’ sentences of 10-30 years’ imprisonment and 11-33 years, respectively, did not constitute cruel and unusual punishment, on conviction for obstructing justice by attempting to intimidate a juror; sentences were within statutory limits, and defendants’ effort to influence juror not only intimidated her, but caused a mistrial in the case. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Double jeopardy and collateral estoppel.

In view of facts that in prosecution of defendant for three counts of “threats” and four

counts of “obstructing justice” instructions indicated that only one of the four essential elements of an obstruction of justice charge involved proof of “threats”, that proof of “threats” was not absolutely necessary to defendant’s conviction since proof of force would also have led to his conviction, and that defendant was acquitted of threats against one witness, although the jury found him guilty of obstructing justice with regard to the same conduct towards the same witness, proof of guilt on the obstruction of justice counts did not necessarily establish guilt of the “threats” counts, and therefore defendant’s convictions of both offenses did not constitute double jeopardy. D.C. Code §§ 22-703(a), 22-2307; U.S. Const. Amend. 5. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

After accused was acquitted of a threat to do bodily harm and bribery and jury “hung” on charge of obstruction of justice, Government was not collaterally estopped from retrying accused on charge of obstruction of justice on theory that verdict of not guilty on “threats” charge determined the issue with respect to identical threats alleged in obstruction of justice charge. D.C. Code §§ 22-701, 22-703, 22-2307; U.S. Const. Amend. 5. *United States v. Smith*, 337 A.2d 499, 1975 D.C. App. LEXIS 375 (1975).

Examination of witnesses.

Person who was asked by defendant if she would lie and tell investigators that she was with defendant at crime scene was a “witness,” within meaning of witness tampering statute, notwithstanding defendant’s argument that he did not know person would be called as witness to case; defendant’s request vested person with status of one who may know or was supposed to know, so as to require her testimony. *Jones v. United States*, 999 A.2d 917, 2010 D.C. App. LEXIS 414 (2010).

Prior uncharged robberies of drug dealers were not sufficiently similar to instant offenses to warrant cross-examination of witness concerning such uncharged robberies in prosecution for, inter alia, murder, obstruction of justice and burglary, arising from drug-related triple murder and subsequent murder of potential prosecution witness; uncharged robberies occurred more than three years before triple murder, and beyond fact that victims were believed to be drug dealers, defense counsel proffered no similarities between those earlier robberies and triple homicide. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Indictment and information.

Count of indictment charging defendants, who were police detectives, with corruptly or by threats of force obstructing justice in connec-

tion with murder investigation, in violation of District of Columbia (DC) Code, by arguing that the assigned Assistant United States Attorney (AUSA) should have signed arrest warrant based on the false information provided by three witnesses, who were allegedly coerced by defendants into providing false information and withholding truthful information, and provided by defendants themselves, involved different criminal act on the part of defendants than those acts set forth in separate counts of indictment charging defendants with obstruction of justice by the coercion of the witnesses, in violation of separate DC Code provision, and, thus, was not improperly multiplicitous. *United States v. Brown*, 503 F.Supp.2d 217, 2007 U.S. Dist. LEXIS 59304 (2007).

Count of indictment charging defendants, who were police detectives, with corruptly or by threats of force obstructing justice in connection with murder investigation, in violation of District of Columbia (DC) Code, by failing to provide to the United States Attorney or to the metropolitan police department exculpatory evidence that the defendants were causing three witnesses to provide untruthful information and withhold truthful information, did not involve separate or distinct act on the part of defendants from separate counts of indictment charging defendants with obstructing justice by knowingly using intimidating or physical force or threats to influence, intimidate, or impede a witness or officer in any official proceeding, in violation of separate DC Code provision, and, thus, was improperly multiplicitous of these separate counts. *United States v. Brown*, 503 F.Supp.2d 217, 2007 U.S. Dist. LEXIS 59304 (2007).

Count of indictment charging defendants, who were police detectives, with corruptly or by threats of force obstructing justice in connection with murder investigation, in violation of District of Columbia (DC) Code, based upon predicate acts of alleged coercion of witnesses, was improperly multiplicitous of separate counts of indictment charging defendants with obstructing justice by knowingly using intimidating or physical force or threats to influence, intimidate, or impede a witness or officer in any official proceeding, in violation of separate DC Code provision, where separate counts were based upon the same predicate acts, and the sections of the DC Code that defendants were charged with violating required proof of the same facts. *United States v. Brown*, 503 F.Supp.2d 217, 2007 U.S. Dist. LEXIS 59304 (2007).

Variance between government's pre-trial bill of particulars on obstruction of justice charge, in which government stated that evidence of obstruction of justice was contained in defendant's letter to his girlfriend telling her not to testify in court and the evidence elicited at trial

by defense counsel on cross-examination of witness that defendant told witness to lie to police, which evidence government primarily relied on at trial, did not amount to plain error; defendant was not prejudiced by the variance, in that the obstruction theory ultimately pursued at trial was not entirely divergent from that proffered by government before trial, and variance was the direct result of defense counsel's actions. *Marshall v. United States*, 15 A.3d 699, 2011 D.C. App. LEXIS 141 (2011).

Showing of substantial probability that defendant committed charged offense of corruptly obstructing due administration of justice in official proceeding, considered in conjunction with nature and circumstances of charged offense, which related to defendant's conduct as juror during murder trial, did not provide clear and convincing evidence of future dangerousness, as basis for pretrial detention; substantial evidence of defendant's obstructive behavior as juror in someone else's trial did not constitute clear and convincing evidence that defendant would engage in obstructive behavior to derail her own prosecution if she was released pending trial, no matter what restrictive conditions were placed upon her. *Blackson v. United States*, 897 A.2d 187, 2006 D.C. App. LEXIS 151 (2006).

Phrase "within the District of Columbia" in indictment for obstruction of justice, arising from murder in Maryland of witness to triple murder in District of Columbia that was under investigation at time witness was murdered, referred to location of effect of that act, i.e., District. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Defendant physicians, who were indicted for obstruction of justice based on alleged attempts to prevent patient from testifying against one of them on charge of sexually abusing patient, were not entitled to dismissal of indictment based on grand jury's failure to find, as required under applicable version of statute, probable cause that the testimony defendants sought to prevent was truthful; by also indicting one defendant for sexual abuse, grand jury effectively found probable cause to believe patient's testimony was truthful. *Brown v. United States*, 766 A.2d 530, 2001 D.C. App. LEXIS 31 (2001).

Murder and weapons charges against one defendant could be joined with obstruction of justice charges against second defendant, in multi-defendant prosecution arising from stabbing death of victim, where defendants both participated in attack on victim and second defendant's attempt to keep his girlfriend from talking to police, which was basis for obstruction of justice charges, was logically related to attack. D.C. Code 1981, §§ 22-722(a)(3), 22-2401, 22-3202, 22-3204(b); Criminal Rule 8(b). *Sams v. United States*, 721 A.2d 945, 1998 D.C.

App. LEXIS 229 (1998), writ of certiorari denied by 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 928, 2000 U.S. LEXIS 832, 68 U.S.L.W. 3479 (2000), writ of certiorari denied by 531 U.S. 1015, 121 S. Ct. 575, 148 L. Ed. 2d 492, 2000 U.S. LEXIS 7864, 69 U.S.L.W. 3363 (2000).

Indictment charging obstruction of justice was not constructively amended at trial, so as to deprive defendant of constitutional right to be indicted by grand jury, even though indictment, charging use of threats and physical force to prevent murder witness from communicating with police, tracked language of former version of statute, while jury instructions were based on current version and permitted conviction if defendant harassed witness; like current statute, jury instruction encompassed conduct prohibited under prior statute, defendant had notice of statute under which he was charged and specific conduct underlying charge, and was tried and convicted of same charge. U.S. Const. Amend. 5; D.C. Code 1981, § 22-722(a)(3). *Woodall v. United States*, 684 A.2d 1258, 1996 D.C. App. LEXIS 223 (1996), writ of certiorari denied by 520 U.S. 1130, 117 S. Ct. 1278, 137 L. Ed. 2d 354, 1997 U.S. LEXIS 1864, 65 U.S.L.W. 3631 (1997).

Amendment of obstruction of justice count in indictment to charge of willfully endeavoring to object, delay, or prevent communication to investigator relating to crime, from prior charge of corruptly attempting to influence or intimidate witness, resulted in defendant being convicted of offense different from that charged in indictment, thus requiring reversal of conviction. D.C. Code 1981, § 22-722(a)(1, 3). *Hayward v. United States*, 612 A.2d 224, 1992 D.C. App. LEXIS 221 (1992).

In view of facts that the offenses of "threats" and "obstructing justice" include provisions not included in the other, so that conduct prohibited by the threat statute would not necessarily be prohibited under the obstruction of justice statute, that the "threats" sentence carries a much more severe penalty than the "obstructing justice" offense, and that the two offenses lack a similar purpose and the "inherent relationship" required to apply the doctrines of merger and lesser included offenses, the offense of "threats" is not a lesser included offense of "obstructing justice." D.C. Code §§ 22-703(a), 22-2307. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

Instructions.

Jury instructions in prosecution for obstruction of justice arising from murder of witness to triple murder did not diminish government's burden of proof below "beyond a reasonable doubt" standard by stating that defendant must have had "reasonable expectation" that witness would testify, as jury was still required to find beyond reasonable doubt that defendant had

such expectation. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Mistrial was not warranted by admission of other acts of witness intimidation against murder witness who defendant, charged with obstruction of justice, attempted to keep from communicating with police at crime scene; evidence had some relevance once defendant questioned witness' motives for entering witness protection program, and any harm caused by admission was ameliorated by limiting instruction given by trial court, which emphasized that evidence was not linked to defendant and not to be considered against defendant. D.C. Code 1981, § 22-722(a)(3). *Woodall v. United States*, 684 A.2d 1258, 1996 D.C. App. LEXIS 223 (1996), writ of certiorari denied by 520 U.S. 1130, 117 S. Ct. 1278, 137 L. Ed. 2d 354, 1997 U.S. LEXIS 1864, 65 U.S.L.W. 3631 (1997).

Jury instruction given by trial court which focused on particular means by which government alleged defendant had obstructed justice, that defendant knowingly and by threatening letter or communication endeavored to influence or intimidate or impede witness, comported with statutory definition of offense. D.C. Code 1981, § 22-722(a)(2). *Scott v. United States*, 672 A.2d 579, 1996 D.C. App. LEXIS 35 (1996).

Joint or separate trial.

Obstruction of justice charge arising from murder of witness to triple murder was properly joined with charges stemming from triple murder, based on substantial connections between them; it could fairly be inferred that witness was murdered because of her knowledge about triple murder, weapons from those two separate murders were found together among defendant's belongings, and even though obstruction took place in different location, location where witness's body was discovered was very close to home of defendant's mother. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Evidence of obstruction of justice charge arising from murder of witness to triple murder would be admissible in separate trial for triple murder, and thus, defendant was not entitled to severance of obstruction charge; evidence of obstruction would be admissible as evidence of defendant's consciousness of guilt and as direct evidence of triple homicide, and probative value of evidence of witness's murder was not substantially outweighed by danger of impermissible prejudice because it was unlikely that jury regarded facts of witness's murder as evidence of general proclivity of defendant to behave violently, and because of unique relationship between that evidence and lone contested issue, i.e., identity. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

No conflict existed between defenses presented by defendant and codefendant which would warrant severance of charges, in multi-defendant prosecution arising from stabbing death of victim; codefendant's theory was one of self-defense, defendant maintained that defendant was acting in defense of codefendant, and there was testimony from several government witnesses as to activities of both defendants so that jury could not have been confused or misled simply by their joinder in single indictment. D.C. Code 1981, §§ 22-722(a)(3), 22-2401, 22-3202, 22-3204(b). *Sams v. United States*, 721 A.2d 945, 1998 D.C. App. LEXIS 229 (1998), writ of certiorari denied by 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 928, 2000 U.S. LEXIS 832, 68 U.S.L.W. 3479 (2000), writ of certiorari denied by 531 U.S. 1015, 121 S. Ct. 575, 148 L. Ed. 2d 492, 2000 U.S. LEXIS 7864, 69 U.S.L.W. 3363 (2000).

Trial court's failure to sever charges in multi-defendant prosecution arising from stabbing death of victim did not create "spillover" prejudice against defendant by making trial so complex that jury was unable to decide guilt or innocence of each defendant separately from others, where one codefendant was acquitted of all charges, and thus, no basis existed for concluding that jury was confused or frustrated by complexity of evidence, or that jury could not fairly decide guilt or innocence of one defendant separately from others. D.C. Code 1981, §§ 22-722(a)(3), 22-2401, 22-3202, 22-3204(b). *Sams v. United States*, 721 A.2d 945, 1998 D.C. App. LEXIS 229 (1998), writ of certiorari denied by 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 928, 2000 U.S. LEXIS 832, 68 U.S.L.W. 3479 (2000), writ of certiorari denied by 531 U.S. 1015, 121 S. Ct. 575, 148 L. Ed. 2d 492, 2000 U.S. LEXIS 7864, 69 U.S.L.W. 3363 (2000).

Reversal was required due to misjoinder of charges connected with armed robbery of two vending trucks and misjoinder of those charges with charge against defendant's brother for being accessory after fact, receiving stolen property, and obstructing justice; trial was essentially swearing contest in which identifications by government witnesses were met by contradictory testimony from alibi witnesses; no physical evidence linked defendants to either robbery; identifications were impeached by discrepancies and inconsistencies in description of defendants; statements of defendant's brother implicating one defendant in second robbery were admitted; and prosecutor's closing argument tried to link offenses together. D.C. Code 1981, §§ 22-106, 22-722(a)(3), 22-2101, 22-2901, 22-3202; Criminal Rules 8(b), 14. *Morris v. United States*, 548 A.2d 1383, 1988 D.C. App. LEXIS 189 (1988).

Defendant's conversation with witness to robbery, in which defendant admitted having robbed store and threatened witness in order to

prevent witness from testifying would be admissible in separate trial on armed robbery count, as well as in trial for obstruction of justice count, in that it was probative of defendant's consciousness of guilt, and was thus admission against interest, and it was directly probative of defendant's identity as one of robbers, and thus admissible under recognized exception to prohibition against evidence of other crimes, and therefore counts did not have to be severed. D.C. Code 1981, §§ 22-722(a)(3), 22-3202. *Byrd v. United States*, 502 A.2d 451, 1985 D.C. App. LEXIS 536 (1985).

Jurisdiction.

Prosecution for obstruction of justice, arising from murder in Maryland of witness to triple murder in District of Columbia that was under investigation at time witness was murdered, did not violate rule of vicinage or jurisdictional statute, as proceeding that defendant sought to obstruct, i.e., investigation of triple murder, was pending in District of Columbia. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

A prosecution for obstruction of justice may be brought in the district where the judicial proceeding that the accused sought to obstruct is pending, even if the obstructing acts took place in a different district. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Superior court has jurisdiction over prosecutions for conduct in Maryland which is designed to bribe witnesses in District of Columbia proceedings and thus to obstruct administration of justice in courts of District of Columbia. D.C. Code 1981, §§ 11-923(b), 22-722(a); Md. Code 1975, Art. 27, § 27. *Ford v. United States*, 616 A.2d 1245, 1992 D.C. App. LEXIS 297 (1992).

Merger of offenses.

Defendant's conviction for conspiracy to murder and obstruction of justice did not merge with his convictions for substantive offenses of murder and obstruction of justice, for purposes of determining whether there are two offenses or only one, thus requiring merger of the sentences, since conspiracy count did not merge with any underlying offense. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Defendant's convictions under separate provisions of obstruction of justice statute did not merge, for purposes of determining whether there are two offenses or only one, thus requiring merger of the sentences; one provision required proof of actual injury to another person based on person's giving information to criminal investigator, whereas other provision required proof of intimidation or force intended to influence witness or officer in any official pro-

ceeding. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Offenses of subornation of perjury and obstruction of justice each required proof of an element the other did not, and thus the offenses did not merge; subornation of perjury dealt with wide variety of statements under oath, covered multitude of instances which would not be reached by obstruction of justice statute, and obstruction of justice covered far more than attempts to seek false testimony. D.C. Code 1981, §§ 22-722, 22-2512. *Riley v. United States*, 647 A.2d 1165, 1994 D.C. App. LEXIS 169 (1994).

Nature and elements of offenses.

— In general.

Evidence that the accused sought to impede a witness from testifying is circumstantial evidence of consciousness of guilt. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Ordinarily, the intent to intimidate or influence a juror must be inferred from the context and nature of the alleged criminal conduct. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Gist of crime of obstruction of justice is endeavor to interfere with administration of justice. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Use of term “endeavor” in obstruction of justice statute does not require success or even overt attempt; it merely requires that defendant have made any effort or essay to accomplish evil purpose that statute was enacted to prevent. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

If threatening communication is part of effort to impede administration of justice, as long as requisite knowledge and mens rea is otherwise established, conduct is properly proscribed by obstruction of justice statute. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Threatening communication need not be heard by target at whom it was directed in order to constitute obstruction of justice, but need only be part of “endeavor” defendant has undertaken to obstruct justice. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Crime of threatening to injure was complete as soon as threat was communicated to third party, regardless of whether intended victim

ever knew of plot to injure him. D.C. Code 1981, § 22-2307. *Beard v. United States*, 535 A.2d 1373, 1988 D.C. App. LEXIS 1 (1988).

— Preventing witness from attending or testifying, nature and elements of offenses.

Evidence that the accused sought to impede a witness from testifying is circumstantial evidence of consciousness of guilt. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Witness to prior triple murder qualified as “witness” for purposes of obstruction of justice charge arising from witness’s murder; evidence showed that witness had knowledge of relevant facts immediately surrounding triple murder, because she had accompanied defendant to crime scene, heard him say that he planned to collect on debt, and thereafter heard his admission about triple murder, and it was largely irrelevant that witness had not cooperated with authorities investigating murder and that she had made statements to friends denying any knowledge, as defendant had reasonable expectation that witness might be called to testify, given defendant’s awareness of witness’s knowledge of relevant facts, and his continued contact with her. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

“Witness,” as used in obstruction of justice statute, is not limited to person whom defendant knows to have already assented to testify or otherwise cooperate in ongoing official proceeding. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Obstruction of justice is a specific intent crime, and the pertinent inquiry is whether the defendant was aware that the victim knew material facts about a crime to which she might later testify. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Defendant could be convicted of obstructing official proceeding, i.e., criminal investigation, even though neither he nor witness whose murder gave rise to obstruction charge was target of that investigation. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Endeavor to impede witness, so as to commit obstruction of justice, is established where threats are directly communicated to person whose testimony defendant seeks to deter. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Obstruction of justice statute may reach threats communicated to third parties, rather than to person whose testimony defendant seeks to deter, when it is clear from other

evidence presented, and from actions of defendant, that defendant actually sought to implement those threats. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Idle talk without additional evidence of active intent to deter testimony is beyond purview of obstruction of justice statute. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Proof that person allegedly contacted by defendant was witness or potential witness in case pending in superior court was required to support conviction for witness tampering. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

Person who had no knowledge of murder charges against defendant but who was approached by defendant in attempt to get that person to testify favorably to defendant at murder trial could be considered a "witness" for purposes of witness tampering charges. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

Statute prohibiting subornation of perjury, dealing with wide variety of statements under oath, covers instances which would not be reached by witness tampering statute, and witness tampering statute covers more than attempts to seek false testimony. 18 U.S.C. § 1503; D.C. Code 1981, § 22-722; § 22-703 (repealed). *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

Person who was approached by defendant in attempt by defendant to get him to testify favorably in pending murder prosecution became knowledgeable of facts material to pending litigation, and was a "witness" for purposes of witness tampering statute when defendant contacted him for a second and third time, by becoming aware of defendant's consciousness of guilt in seeking fabricated testimony. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

Conviction of defendants for obstruction of justice was not reversed under theory that element of crime was not proven, where threats made by defendants to witness occurred shortly after crime was committed and during time witness was assisting in investigation rather than at time of trial; therefore, defendants attempted to impede investigation rather than to keep witness from testifying at grand jury. D.C. Code 1981, §§ 22-721, 22-722; § 22-703 (repealed). *Payne v. United States*, 516 A.2d 484, 1986 D.C. App. LEXIS 455 (1986).

Review.

Even if holding jury trial on charges of obstructing justice by attempting to intimidate juror was erroneous, defendants invited error, where they participated in jury selection process, evincing their continued desire to have

jury trial, as they demanded. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

There was no error in holding jury trial on charges of obstruction of justice by attempting to intimidate a juror; defendants demanded a jury trial, and steps were taken to assure that jurors would not be affected by the nature of the case. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Prosecutor's unobjected-to statements in closing argument appealing to jurors' sense of civic duty to send message that defendant's alleged attempt to avoid justice would not stand, and that his alleged effort to obstruct justice would not go unchallenged, did not require trial court to intervene in order to avoid plain error. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Prosecutor's rhetorical question to jury, "But do you know whether or not he's sick, very sick?," as offered in obstruction to justice case in response to defense counsel's assertion that complaining witness' account of charged incident was uncorroborated even though her husband had been present, was not reversible error, where judge told jurors at beginning of instructions that there was no evidence before them as to why husband did not appear as a witness and that jury should not speculate as to why he did not appear. *Brown v. United States*, 766 A.2d 530, 2001 D.C. App. LEXIS 31 (2001).

Cumulative impact, in obstruction of justice case against two physicians arising from alleged attempts to prevent patient from testifying against one of them on sexual abuse charge, of improperly excluding expert opinion from patient's psychiatrist concerning patient's diagnosis, of prosecutor's misstatement that it did not matter legally whether sexual abuse occurred, and of prosecutor's assaults on opposing counsel and improper appeals to sympathy, including unsupported assertion that patient was "going blind," was sufficiently prejudicial to warrant reversal. *Brown v. United States*, 766 A.2d 530, 2001 D.C. App. LEXIS 31 (2001).

Refusal to strike police officer's testimony as sanction for loss of officer's contact card regarding obstruction of justice defendant, which was Jencks material, did not warrant reversal, when defendant's identification was not issue at trial, defendant was not prejudiced by lost card in that three other witnesses, including another officer, also testified about incident, and trial court determined that loss resulted from negligence but not gross negligence. 18 U.S.C. § 3500; D.C. Code 1981, § 22-722(a)(3). *Woodall v. United States*, 684 A.2d 1258, 1996

D.C. App. LEXIS 223 (1996), writ of certiorari denied by 520 U.S. 1130, 117 S. Ct. 1278, 137 L. Ed. 2d 354, 1997 U.S. LEXIS 1864, 65 U.S.L.W. 3631 (1997).

Defendant's guilty plea to obstruction of justice rendered moot his prior notice of appeal from pretrial order detaining defendant without bail, and thus, Court of Appeals would not consider that issue; issue involved narrow class of potential detainees, namely, those who attempt to obstruct justice in pending criminal case not of themselves but of another and whom Government seeks to detain solely under provision for obstructing justice. D.C. Code 1981, §§ 22-722(a)(1), 23-1322. *McClain v. United States*, 601 A.2d 80, 1992 D.C. App. LEXIS 6 (1992).

Defendant was not prejudiced by indictment's incorrect citation of statute repealed three weeks prior to alleged commission of defendant's act, where the statute was replaced with another statute proscribing not only the same, but a broader range of conduct. D.C. Code 1981, § 22-722. *Scutchings v. United States*, 509 A.2d 634, 1986 D.C. App. LEXIS 342 (1986).

Searches and seizures.

Government had met its burden at suppression hearing of establishing that arrestee's second statement and all subsequently obtained evidence, upon which Government proposed to prosecute police officer for assaulting arrestee and obstruction of justice, were derived from Government's independent knowledge of arrestee's identity and not from officer's compelled immunized testimony given during administrative police investigation, and thus error occurred in suppressing such evidence. D.C. Code 1973, §§ 22-504, 22-703; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Trial court was plainly wrong in finding that Government had not carried its burden to affirmatively prove that arrestee's second statement and all subsequently obtained evidence, upon which Government proposed to prosecute police officer for assaulting arrestee and obstruction of justice, were derived from legitimate source wholly independent of officer's compelled immunized testimony given during administrative police investigation, and thus error occurred in suppressing such evidence. D.C. Code 1973, §§ 17-305(a), 22-504, 22-703; U.S. Const. Amend. 5. *United States v. Anderson*, 450 A.2d 446, 1982 D.C. App. LEXIS 427 (1982).

Speedy trial.

Where defendant failed to assert his speedy trial right until three days before trial, never requested an expedited resolution of his trial or

appeal, never objected to the trial court's granting continuances during the pendency of the government's appeal of the pretrial dismissal of several "threats" counts, and failed to point to any specific examples of prejudice attributable to the pretrial delay, eight and one-half-month delay in deciding the government's interlocutory appeal did not entitle defendant to reversal on speedy trial grounds. U.S. Const. Amend. 6; D.C. Code § 22-2307. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

Weight and sufficiency of evidence.

Evidence was sufficient to show that codefendant intended to prevent victim from giving truthful testimony regarding gang-related shooting, as required to support convictions for obstruction of justice and related conspiracy; defendant formulated plan to bribe victim to not identify him at trial as one of assailants, he first asked former girlfriend to contact victim with offer to pay victim money to not appear, codefendant joined with her brother in urging girlfriend to contact victim to bribe him "so he won't come to court," and codefendant also approached another person for help in locating victim so that she could offer bribe herself. *Campos-Alvarez v. United States*, 16 A.3d 954, 2011 D.C. App. LEXIS 153 (2011).

Evidence was sufficient to support conviction for obstruction of justice; a witness testified that, while in a courthouse holding cell on one of defendant's scheduled court dates, defendant was told of an expected government witness who was planning to cooperate with the government, and defendant responded that he "was not going to let" the expected witness "do that," and that he would put a bullet in expected witness's head, or the head of anyone who "snitched." *Castillo-Campos v. United States*, 987 A.2d 476, 2010 D.C. App. LEXIS 10 (2010), writ of certiorari denied by 131 S. Ct. 1514, 179 L. Ed. 2d 336, 2011 U.S. LEXIS 1556, 79 U.S.L.W. 3477 (U.S. 2011).

Evidence was insufficient to support conviction for obstruction of justice based on defendant's hindering or delaying person from reporting a criminal offense; defendant's act of assaulting victim in a police conference room and ripping off her clothing in an attempt to find used condom, which would support victim's claim that defendant, a police officer, had engaged in inappropriate sexual contact with victim, did not hinder or delay the victim's report, especially since a police sergeant had already been called to speak with victim, at the victim's request. *Andrews v. United States*, 981 A.2d 571, 2009 D.C. App. LEXIS 376 (2009).

Evidence was sufficient to support co-defendant's conviction for obstruction of justice; the timing of correction officer's murder, which co-defendant admitted committing, along with

other evidence, indicated that co-defendant specifically intended to prevent the officer from testifying at a trial. *Hammond v. United States*, 880 A.2d 1066, 2005 D.C. App. LEXIS 414 (2005), writ of certiorari denied by 547 U.S. 1184, 126 S. Ct. 2373, 165 L. Ed. 2d 287, 2006 U.S. LEXIS 4430, 74 U.S.L.W. 3677 (2006), writ of certiorari denied by 549 U.S. 931, 127 S. Ct. 374, 166 L. Ed. 2d 231, 2006 U.S. LEXIS 6404, 75 U.S.L.W. 3174 (2006).

Evidence was insufficient to support finding that defendant's specific intent, in instructing that something "life-threatening" would happen to eyewitness if she did not come to preliminary hearing and tell defendant's lawyer what she told police, was to influence or prevent witness's truthful testimony as required to support conviction for obstruction of justice, even though witness had made prior false statements to police; defendant did not instruct witness to testify or lie on his behalf, and evidence did not indicate what defendant knew about witness's statements to police. *Griffin v. United States*, 861 A.2d 610, 2004 D.C. App. LEXIS 617 (2004).

Evidence did not support conviction of obstructing justice by attempting to intimidate a juror, on theory of aiding and abetting; evidence showed that defendant was present with other persons during encounter with juror at hot dog stand during which the other persons intimidated witness, but that defendant urged the others not to say anything to juror. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Evidence supported conviction for obstructing justice by attempting to intimidate a juror in accused's trial; evidence showed that juror encountered defendant at a hot dog stand, that defendant initiated remarks about voting not guilty in accused's trial, that juror identified defendant in pretrial lineup, and that he referred to her by name during encounter. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Evidence supported conviction of obstructing justice by attempting to intimidate a juror in accused's trial; evidence showed that juror encountered defendant at hot dog stand on day after she had seen defendant and accused together at courthouse, that juror was serving on only one jury, that defendant said that he remembered juror from the day before, and that he told her to vote not guilty in accused's trial. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L.

Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Sufficient evidence supported conviction for obstruction of justice; testimony of two witnesses demonstrated that defendant knew that victim was witness in another murder trial, and it was he who later confirmed her informant status for rest of conspirators, killing victim impeded her testimony, and victim was killed in retaliation for giving information to police about criminal activity. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Sufficient evidence supported conviction for conspiracy to commit first-degree premeditated murder and obstruct justice; evidence showed that defendant participated in conversations with his co-conspirators about murdering victim, and that he and others took actions designed to implement agreed upon murder. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Evidence supported finding that defendant was aware of ongoing investigation into triple murder when he allegedly murdered witness to triple murder, for purposes of obstruction of justice charge arising from witness's murder; evidence showed that less than two weeks before witness's death, she and defendant were at courthouse inquiring as to status of case against accomplice pertaining to triple murder, and within day of her estimated time of death, witness called relative who worked at courthouse to find out "what was going on with case" of accomplice. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

State presented sufficient evidence that letter attempting to obstruct justice, in which defendant wrote friend and stated that he had to speak with witness to program him on what to say, but that he needed friend's help as intermediary because it was not safe for him to do so over the telephone, was written between time defendant was incarcerated and date it was discovered by police, to support conviction of obstruction of justice, in light of evidence that defendant's reluctance to speak over telephone would be understandable if he were incarcerated since his conversation could be monitored by corrections authorities, and defendant could have arranged his own meeting with witness and personally advised him on what to say if it was written before defendant was incarcerated. D.C. Code 1981, § 22-722(a). *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

Evidence that conspirator told police informant that he was going to murder targeted victim and that conspirator took affirmative steps to locate and identify targeted victim with knowledge and ultimate purpose of preventing targeted victim from testifying in coconspirator's murder prosecution was sufficient to es-

tablish that conspirator endeavored to influence targeted victim's testimony in violation of obstruction of justice statute. D.C. Code 1981, § 22-722. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Evidence did not support conviction for obstruction of justice arising from defendant's alleged complicity in threatening his former wife by letter in attempt to force her to abandon criminal contempt charges against defendant; defendant neither wrote letter nor delivered it, and references in letter to defendant and his wife's former address, and threat to harm "Maryleah" (defendant's former wife) and "the children" did not imply knowledge unique to defendant or a confederate. D.C. Code 1981, § 22-105. *Green v. United States*, 651 A.2d 817, 1994 D.C. App. LEXIS 247 (1994).

Evidence was sufficient to support defendant's conviction of obstruction of justice; witness testified that defendant told witness to lie to grand jury, stated that on day she was to testify, she and defendant fought about her

testimony, and that she left vehicle and skipped testifying that day. D.C. Code 1981, § 22-722(a)(2). *Riley v. United States*, 647 A.2d 1165, 1994 D.C. App. LEXIS 169 (1994).

Defendant could be convicted of obstruction of justice based on fact that he told witness "don't tell them nothing" in regard to her testimony before grand jury; defendant corruptly influenced witness to carry out her duties as a witness improperly. D.C. Code 1981, § 22-722. *Riley v. United States*, 647 A.2d 1165, 1994 D.C. App. LEXIS 169 (1994).

Evidence that defendant charged with murder attempted to influence testimony of person who had accompanied defendant to general area of killing was sufficient to establish that that person was a "witness" within meaning of witness tampering statute; person had knowledge of relevant facts immediately surrounding offense and could reasonably be expected to testify concerning them. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

§ 22-723. Tampering with physical evidence; penalty.

(a) A person commits the offense of tampering with physical evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding.

(b) Any person convicted of tampering with physical evidence shall be fined not more than \$5,000, imprisoned for not more than 3 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 503, 29 DCR 3976; July 15, 2004, D.C. Law 15-174, § 301, 51 DCR 3677.)

Prior Codifications. — 1981 Ed., § 22-723.

Effect of amendments. — D.C. Law 15-174 rewrote subsec. (b) which had read as follows: "(b) Any person convicted of tampering with physical evidence shall be fined not more than \$1,000 or imprisoned for not more than 3 years, or both."

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-701.

Legislative history of Law 15-174. — Law

15-174, the "Millicent Allewelt Amendment Act of 2004", was introduced in Council and assigned Bill No. 15-34, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on January 6, 2004, and March 2, 2004, respectively. Signed by the Mayor on March 23, 2004, it was assigned Act No. 15-408 and transmitted to both Houses of Congress for its review. D.C. Law 15-174 became effective on July 15, 2004.

CASE NOTES

ANALYSIS

Evidence.
Jurisdiction.

Evidence.

There was sufficient evidence to establish that defendant knew an official proceeding was

likely to be instituted against him, so as to support defendant's conviction of tampering with physical evidence; defendant placed drugs into his mouth on hearing the shouted warning that a police cruiser was in the vicinity, and defendant struggled with police officer in a continued attempt to conceal packets of drugs

that he had placed in his mouth. *Timberlake v. United States*, 758 A.2d 978, 2000 D.C. App. LEXIS 208 (2000).

Because the object of the knowledge element of the offense of tampering with physical evidence is "official proceeding," there must be a meaningful distinction between concealment to avoid detection by a suspect, i.e. concealment to prevent an official proceeding from ever being instituted, and the concealment of evidence that constitutes tampering, i.e. concealment which occurs after an individual knows or has reason to know that the official proceeding has begun or knows that such proceeding is likely to be instituted, the purpose of which is to make that evidence unavailable to the proceeding. *Timberlake v. United States*, 758 A.2d 978, 2000 D.C. App. LEXIS 208 (2000).

Statute, which makes it a crime to tamper with physical evidence, does not require that an individual be the focus of the official proceeding in question, only that the individual tamper with evidence knowing or having reason to believe that an official proceeding has begun or

is likely to be instituted. *Timberlake v. United States*, 758 A.2d 978, 2000 D.C. App. LEXIS 208 (2000).

Statute, which makes it a crime to tamper with physical evidence, requires there to be a nexus between the evidence allegedly tampered with and the official proceeding that the individual believes has begun or is likely to be instituted. *Timberlake v. United States*, 758 A.2d 978, 2000 D.C. App. LEXIS 208 (2000).

Jurisdiction.

Where District of Columbia police officer was charged with obstruction of justice under federal statute and with tampering with evidence and theft in violation of the District of Columbia Code, and the federal charge was dismissed, it would not be appropriate for United States District Court for the District of Columbia to retain jurisdiction over the local offenses, even if it had discretion to do so, in that no matters of legitimate federal concern remained. 18 U.S.C. § 1503; D.C. Code 1981, §§ 22-723, 22-3811, 22-3812. *United States v. Smith*, 729 F. Supp. 1380, 1990 U.S. Dist. LEXIS 1092 (1990).

CHAPTER 8. BURGLARY.

Sec.

22-801. Definition and penalty.

§ 22-801. Definition and penalty.

(a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.

(Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 823; Dec. 27, 1967, 81 Stat. 736, Pub. L. 90-226, title VI, § 602.)

Cross references. — Firearm possession, additional, see § 22-4502.

Theft, see § 22-3211.

Unlawful entry, see § 22-3302.

Section references. — This section is referred to in §§ 11-502, 23-546 and 23-581.

Prior Codifications. — 1981 Ed., § 22-1801.

1973 Ed., § 22-1801.

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 —Possession of burglars' tools, weight and sufficiency of evidence.
 —Possession of stolen property, weight and sufficiency of evidence.
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Adequacy of representation.

Record in prosecution for housebreaking and larceny established that defendant received effective assistance of counsel, though defendant's counsel failed to seek to impeach complaining witness by use of police investigation report containing statements attributed to complaining witness. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202. *Williams v. U.S.*, 282 F.2d 867, 1960 U.S. App. LEXIS 4117 (C.A.D.C. 1960).

Defendant was not prejudiced by trial counsel's failure to seek a mistrial after prosecutor made remarks during closing arguments of burglary trial regarding defendant's failure to testify, and thus defendant was not denied effective assistance; defendant could not show that a motion for mistrial would have been granted even if it had been made, as trial court

told jury to disregard prosecutor's remark and instructed jury on law regarding defendant's absolute right not to testify. *Butler v. United States*, 884 A.2d 1099, 2005 D.C. App. LEXIS 513 (2005).

Admissibility of evidence.

— Acts and declarations of codefendants, admissibility of evidence.

Testimony by police officer concerning a conversation in which codefendant stated that defendant was with him in a housebreaking was pure hearsay as to defendant and was not admissible against him and should not have been admitted at all when it was no essential part of co-defendant's own confession of guilt, and objection by defendant that testimony was not admissible was adequate, and its admission over objection was prejudicial. D.C. Code 1961, § 22-1801. *Kramer v. United States*, 317 F.2d 114, 1963 U.S. App. LEXIS 6331 (C.A.D.C. 1963).

— Admissions and confessions, admissibility of evidence.

Evidence established that defendant's confession made at jail to police officer was voluntary. D.C. Code 1951, §§ 22-1801, 22-2401. *U.S. v. Naples*, 192 F.Supp. 23, 1961 U.S. Dist. LEXIS 3087 (D.D.C.1961).

A defendant's failure to object to or deny a codefendant's statements at time they were made is especially probative of defendant's acquiescence if they are made in presence of a third party who was not an accomplice in the crime. D.C. Code §§ 22-1801(a), 22-2401, 22-2901. *Brown v. United States*, 464 A.2d 120, 1983 D.C. App. LEXIS 437 (1983).

In prosecution for burglary and larceny, evidence was sufficient to sustain finding that defendant's waiver of his Miranda rights was knowing, intelligent and voluntary and that defendant had the mental capacity to knowingly and voluntarily waive his rights. D.C. Code 1973, §§ 22-103, 22-1801(b), 22-2202; U.S. Const. Amend. 4. *Wilkerson v. United States*, 432 A.2d 730, 1981 D.C. App. LEXIS 316 (1981), writ of certiorari denied by 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628, 1981 U.S. LEXIS 4758, 50 U.S.L.W. 3447 (1981).

Evidence in prosecution for burglary while armed, armed rape, first-degree burglary and petit larceny was sufficient to support conclusion that defendant executed valid waiver of rights and voluntarily signed written confession. D.C. Code §§ 22-1801(a), 22-2202, 22-2801, 22-3202. *Bridges v. United States*, 392 A.2d 1053, 1978 D.C. App. LEXIS 330 (1978), writ of certiorari denied by 440 U.S. 938, 99 S. Ct. 1286, 59 L. Ed. 2d 498, 1979 U.S. LEXIS 1044 (1979).

— Demonstrative and documentary evidence, admissibility of evidence.

Defendant was not entitled to argue to the

jury in closing arguments of burglary prosecution regarding the government's failure to introduce evidence of blood from the scene of the crime, where government had available evidence of blood at crime scene, but had been prohibited from introducing such evidence by trial court at the urging of defense counsel. *Williams v. United States*, 805 A.2d 919, 2002 D.C. App. LEXIS 489 (2002).

In prosecution for second-degree burglary of underground subway station at which farecard machine had been broken into, hatchet recovered from bed of pickup truck driven by defendant was admissible, since Government's locksmith witness testified that likely tool used to break into farecard machine at station was an axe, chisel, or hatchet, second hatchet recovered from beside escalator shaft at station further supported inference that hatchets were used to break into the machine, additional incriminating evidence was recovered from the truck, and truck, prior to the burglary, had been reported to police as suspiciously parked in an alley one-half block from station. D.C. Code 1981, § 22-1801(b). *Swinson v. United States*, 483 A.2d 1160, 1984 D.C. App. LEXIS 529 (1984).

In proceeding in which defendants were convicted of second-degree burglary of jewelry business offices while armed, admission into evidence of the money and jewelry taken from defendant when he was arrested was not abuse of discretion, in view of fact that custody was established showing that such items had been taken from defendant and that a second defendant identified the property being carried by first defendant as the jewelry business' property. D.C. Code 1981, §§ 22-1801, 22-3202. *Lee v. United States*, 454 A.2d 770, 1982 D.C. App. LEXIS 511 (1982), writ of certiorari denied by 464 U.S. 972, 104 S. Ct. 409, 78 L. Ed. 2d 349, 1983 U.S. LEXIS 2324, 52 U.S.L.W. 3368 (1983).

In proceeding in which defendants were convicted of second-degree burglary while armed, admission of tape recording of prearrest negotiations and videotape of arrest scene was not abuse of discretion due to fact that the tapes were potentially highly prejudicial, in view of fact that the tapes had some probative value, at least as corroborative evidence, that their actual prejudicial impact was probably minimal and that trial judge gave a cautionary instruction to jury. D.C. Code 1981, §§ 22-1801, 22-3202. *Lee v. United States*, 454 A.2d 770, 1982 D.C. App. LEXIS 511 (1982), writ of certiorari denied by 464 U.S. 972, 104 S. Ct. 409, 78 L. Ed. 2d 349, 1983 U.S. LEXIS 2324, 52 U.S.L.W. 3368 (1983).

Exhibits consisting of gloves, screwdriver and flashlight found on defendant when he was apprehended in basement entrance of burglary victim's house at about 4:00 in the morning

were relevant to charge of second degree burglary. D.C. Code § 22-1801(b). *Johnson v. United States*, 293 A.2d 269, 1972 D.C. App. LEXIS 226 (1972).

— **Identification of persons or things, admissibility of evidence.**

Admission of testimony of robbery victims who, at time when defendant was not represented by counsel, identified defendant on his being brought into house by officers following his being restrained by men observing him fleeing from house, did not violate defendant's right to counsel, as defendant neither said nor did anything at that time that his counsel could have stopped had he been present. U.S. Const. Amends. 5, 6; D.C. Code 1961, §§ 22-1801, 22-2901. *Kennedy v. U.S.*, 353 F.2d 462, 1965 U.S. App. LEXIS 4529 (C.A.D.C. 1965).

Even if jury's request during deliberations to view burglary defendant's facial profile up close at multiple angles constituted a request for "new evidence," and if court erred by allowing jury to examine such "new evidence" without reopening case to allow the introduction of the evidence and any appropriate argument, such error would have been harmless; jury's view of defendant did not result in swaying jury in either direction, as only a few hours after observing defendant, jury sent a note to trial court indicating that it was unable to reach a decision, substantial evidence weighed in favor of defendant's guilt, and government freely acknowledged that the pictures of burglary perpetrator captured on security camera were of such poor quality that they could not be used to compare defendant to the perpetrator. *Washington v. United States*, 881 A.2d 575, 2005 D.C. App. LEXIS 454 (2005), writ of certiorari denied by 547 U.S. 1171, 126 S. Ct. 2348, 164 L. Ed. 2d 855, 2006 U.S. LEXIS 4278, 74 U.S.L.W. 3668 (2006).

Jury's request during deliberations to view burglary defendant's facial profile "up close and from multiple angles" did not constitute a request for "new evidence" requiring the trial court to reopen the case; jury did not request to view any part of defendant which it had not observed at trial, a contrary holding might have disadvantaged those jurors with poor vision, especially where the sole issue at trial was identification of the assailant, and an "up close" view of defendant was just as likely to exonerate him as it was to be incriminating. *Washington v. United States*, 881 A.2d 575, 2005 D.C. App. LEXIS 454 (2005), writ of certiorari denied by 547 U.S. 1171, 126 S. Ct. 2348, 164 L. Ed. 2d 855, 2006 U.S. LEXIS 4278, 74 U.S.L.W. 3668 (2006).

Photo array identification procedure used by police was not unnecessarily suggestive, nor conducive to irreparable misidentification, even though defendant's photo was the only one that

appeared in both the first and second array, in prosecution for various offenses; defendant's appearance in first photo array was different from that in the second, and men depicted in each photo array were similar in size and appearance, and thus, defendant's picture exhibited in first array would not have directed witness's attention to his photo in second array, and defendant did not stand out dramatically in either photo array. *Jones v. United States*, 879 A.2d 970, 2005 D.C. App. LEXIS 409 (2005).

Victim's identification of contents of bag that defendant was carrying when he was stopped in connection with burglary did not render contents of bag admissible under inevitable discovery doctrine, where it was unclear from record whether improper search of bag and retrieval of its contents entered into decision to summon victim to the scene. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

Complaints about the reliability of identifications made by law enforcement officers in burglary prosecution went to the weight of that testimony, not its admissibility. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

In prosecution for felony-murder while armed during commission of burglary in the first degree and first-degree burglary, government was not required to negate most reasonable explanation of fingerprint evidence which was consistent with innocence and to show that fingerprint was made during commission of crime, where it did not rely solely on fingerprint evidence to show that entry and theft had occurred. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3201. *Hawthorne v. United States*, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

Failure of burglary eyewitness, who had observed man in hallway close to scene of crime making his way into scene of crime as burglar alarm sounded and then, carrying two paper bags, emerging into hallway and leaving the premises, and who selected photograph of defendant from among 13 shown by police 12 hours later, to attend lineup did not render her in-court identification testimony inadmissible. D.C. Code § 22-1801(b). *Brown v. United States*, 327 A.2d 539, 1974 D.C. App. LEXIS 295 (1974).

Refusal to suppress in-court identification testimony of burglary eyewitness, who had observed man in hallway close to scene of crime making his way into scene of crime as burglar alarm sounded and then, carrying two paper bags, emerging into the hallway and leaving

the premises, and who selected photograph of defendant from among 13 shown her by police 12 hours later, on theory that witness' view of defendant while sitting in courtroom prior to trial, during extended bench conference with respect to defendant's representation, irreparably tainted her in-court identification, was not error. D.C. Code § 22-1801(b). *Brown v. United States*, 327 A.2d 539, 1974 D.C. App. LEXIS 295 (1974).

— **In general.**

Housebreaking, robbery and burglary are merely aggravated forms of larceny and evidence competent in one case is competent, also, in the others. *Edwards v. U.S.*, 139 F.2d 365, 1943 U.S. App. LEXIS 2287 (1943).

— **Incriminating circumstances, admissibility of evidence.**

Finding of burglarious tools in automobile at scene of alleged burglary and near where defendant was found was circumstance which jury could consider. *United States v. Mullen*, 278 F. Supp. 410, 1967 U.S. Dist. LEXIS 7422 (1967), affirmed by 416 F.2d 456, 1969 U.S. App. LEXIS 10483 (4th Cir. Va. 1969).

— **Intent, admissibility of evidence.**

Proffered testimony indicating that, at least several hours before charged burglary, defendant had asked witness to advance him some money to take to his estranged wife could be excluded as irrelevant on issue of whether defendant's entry of estranged wife's home several hours later was with intent to commit assault, as required for burglary; proffer could not establish state of mind when defendant broke into home several hours later, and alleged conversation had minimal probative value when weighed against direct evidence of manner of his entry and his assault inside home. D.C. Code 1981, § 22-1801(a); Fed. Rules Evid. Rule 803(3), 18 U.S.C. *Bowman v. United States*, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

— **Other offenses, admissibility of evidence.**

Where codefendants denied actual knowledge of the stolen contents of two boxes with which they were connected, rebuttal evidence relating to prior suspicious acts not charged in indictment was properly admitted on question of intent or absence of mistake; since codefendants were only charged as aiders and abettors, with respect to theft of government property and second-degree burglary counts such testimony was appropriately admitted to establish possible common scheme or plan whereby codefendants might be directly connected with the actual perpetrator of the crime; testimony of codefendants rendered evidence of prior suspicious activity of sufficient probative value in

rebuttal to overcome possible prejudicial effect. 18 U.S.C. § 641; D.C. Code § 22-1801(b). *United States v. Fench*, 470 F.2d 1234, 1972 U.S. App. LEXIS 7351 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 909, 93 S. Ct. 964, 35 L. Ed. 2d 271, 1973 U.S. LEXIS 3588 (1973).

In prosecution for housebreaking and larceny, United States District Court, under the circumstances, did not abuse its discretion in admitting evidence of defendant's participation in another alleged crime of similar character committed the same evening. D.C. Code 1951, §§ 22-1801, 22-2206. *Adams v. U.S.*, 239 F.2d 451, 1956 U.S. App. LEXIS 4180 (C.A.D.C. 1956).

Witness's reference to prior drug dealings with defendant was admissible to show defendant's motive for committing the crimes, his intent in entering house, and his knowledge of where to find the hidden safe, in prosecution arising from double murder during a residential robbery. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

In prosecution for felony-murder, second-degree murder, assault with intent to commit rape, and first-degree burglary, trial judge did not abuse his discretion in admitting evidence of defendant's prior conviction for assault and robbery where there were significant similarities in modus operandi which were probative of defendant's identity as attacker of victim, where the testimony was probative of defendant's motive and intent, and where eight-year gap between the two incidents did not so reduce probity of the evidence that it should have been excluded. D.C. Code §§ 22-501, 22-1801(a), 22-2401, 22-2403. *Calaway v. United States*, 408 A.2d 1220, 1979 D.C. App. LEXIS 492 (1979).

In criminal proceeding in which accused was charged with armed robbery and burglary offenses alleged to have occurred in carryout restaurant on June 29 and July 8 and in which restaurant employee testified that she recognized accused when he entered on July 8, employee's remark that she knew accused "from two previous robberies where he robbed us before" was not admissible for purpose of establishing identity, in that there was no need for reference to uncharged offense because employee could have testified that she recognized accused on basis of having seen him in restaurant on two prior occasions. D.C. Code §§ 22-1801(b), 22-2901, 22-3202. *Harris v. United States*, 366 A.2d 461, 1976 D.C. App. LEXIS 432 (1976).

— **Possession of stolen property, admissibility of evidence.**

Admitting into evidence radio, one of alleged fruits of housebreaking charged, was not improper, especially where defendant admittedly

possessed stolen ring taken at same time and as product of same housebreaking. *Chambers v. U.S.*, 301 F.2d 564, 1962 U.S. App. LEXIS 5541 (C.A.D.C. 1962).

— **Probative value, admissibility of evidence.**

Probative value of evidence of defendant's heroin addiction to place what happened at the crime scene in an understandable context was substantially outweighed by the prejudicial effect its admission would have for defendant, such that the evidence was inadmissible for this purpose, in prosecution for burglary, robbery, kidnapping, and felony murder; jury did not need the drug-addiction evidence to derive a coherent story of the evidence, in that even without the evidence of drug addiction, the evidence suggested that the crimes likely were the acts of a desperate person, and it did not appear that the drug-addiction evidence would be indispensable to the jury's understanding of the charged offenses. *U.S. v. Morton*, 2012 WL 3242844 (2012).

Remand was required for trial court to conduct anew its discretionary balancing of the probative value of the evidence of defendant's heroin addiction as corroborative of inferences that pointed to defendant as the perpetrator against its prejudicial effect, in prosecution for burglary, robbery, kidnapping, and felony murder; defendant's addiction had probative value as corroborative of defendant's identity as the perpetrator, while evidence of his addiction might be reflective of his character and might suggest that he had criminal propensities, the relevance of the evidence was logically independent of those possibilities, and a fuller assessment by trial court of probative value of the evidence could affect its balancing of probative value against prejudicial effect. *U.S. v. Morton*, 2012 WL 3242844 (2012).

In proceeding in which defendants were convicted of second-degree burglary of jewelry business offices while armed, and in which they contended that operator of the business and employee had hired defendants to stage a robbery as part of insurance fraud scheme, refusal to admit evidence that operator and employee were the focus of federal criminal investigation for racketeering and "fencing" stolen goods was not abuse of discretion, in view of fact that prejudicial impact of such evidence would have been substantial and that its probative value would not have been great. D.C. Code 1981, §§ 22-1801, 22-3202. *Lee v. United States*, 454 A.2d 770, 1982 D.C. App. LEXIS 511 (1982), writ of certiorari denied by 464 U.S. 972, 104 S. Ct. 409, 78 L. Ed. 2d 349, 1983 U.S. LEXIS 2324, 52 U.S.L.W. 3368 (1983).

— **Relevancy, admissibility of evidence.**

Testimony concerning motivation of detective in pursuing his investigation of defendant was

clearly not relevant to any material issue at defendant's trial for first-degree burglary and obstruction of justice and was, therefore, properly excluded. D.C. Code §§ 22-703, 22-1801(a). *Poteat v. United States*, 363 A.2d 295, 1976 D.C. App. LEXIS 355 (1976).

— **Res gestae, admissibility of evidence.**

Testimony by accomplices as to statements which were made to them by defendant during commission of crimes charged in prosecutions for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary and which incriminated codefendants, were admissible under either exception to hearsay rule for contemporaneous declarations which partake of the event or exception for spontaneous declarations or excited utterances. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Federal Rules of Evidence, rule 803(2), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

In prosecution for rape and housebreaking, testimony of complainant's mother relating to telephone call made by complainant immediately after alleged attack was properly received in evidence. D.C. Code 1961, §§ 22-1801, 22-2801. *Smith v. U.S.*, 312 F.2d 867, 1962 U.S. App. LEXIS 3335 (C.A.D.C. 1962).

Argument and conduct of counsel.

In prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, unvariegated emphasis of word "they" by counsel for defendant in counsel's closing argument, in which he often referred to perpetrators as "they," was not plain error prejudicing two codefendants where at least six men were in group which ransacked victim's apartment at time of charged offenses. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where only identification witness in housebreaking and larceny case testified that he saw one of defendants in entrance or in vicinity of door of house and that two men were working or doing something in truck, but prosecuting attorney in opening statement told jury that witness had observed one of defendants come out of doorway and had observed them working in or loading something into truck and on redirect prosecuting attorney in question to witness assumed such as a fact, new trial was required, notwithstanding instructions. D.C. Code 1961, §§ 22-1801, 22-2202. *Jones v. United States*, 338 F.2d 553, 1964 U.S. App. LEXIS 4154 (C.A.D.C. 1964).

In prosecution for housebreaking, fact that prosecutor remarked to jury, in his summation, about defendant's failure to call certain witnesses, did not mean that trial court was re-

quired to instruct jury that it was not the duty of defendant to make any defense, and trial court did not err in refusing such a requested instruction. D.C. Code 1951, § 22-1801. *Lawson v. U.S.*, 248 F.2d 654, 1957 U.S. App. LEXIS 3849 (C.A.D.C. 1957).

In prosecution for housebreaking and larceny, record supported government's theory that, while witness had made conflicting statements regarding whether he would testify, prosecutor reasonably believed that he would testify, and therefore action of prosecutor in calling witness who identified certain tools, but then relied on his privilege and refused to connect himself or defendant with the crime, was not objectionable on ground that defendant was deprived of a fair trial, where court instructed the jury to disregard witness' testimony and the tools which he identified. D.C. Code 1940, §§ 22-1801, 22-2201, 22-2202. *Bord v. U.S.*, 133 F.2d 313, 1942 U.S. App. LEXIS 2501 (1942).

Prosecutor's closing argument to consider defendant before painting government witnesses "as to the low life that you might want to believe they are" was improper in prosecution for murder, burglary, and carrying of pistol without license. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *James v. United States*, 580 A.2d 636, 1990 D.C. App. LEXIS 223 (1990).

Prosecutor's rebuttal argument which was to the effect that all of the evidence came from the Government, which did not mention defendant, which followed defense counsel's previous reminder to the jury that defendant did not testify, and which was not objected to, did not amount to plain error. D.C. Code § 22-1801(b). *Manago v. United States*, 331 A.2d 335, 1975 D.C. App. LEXIS 310 (1975).

Arrest.

Where officers were investigating reported burglary, and defendants were seen carrying coffee table, and their distinctive clothing matched clothing of men seen in vicinity of burglary, and there was a furtive disposal of instrumentalities of burglary by one defendant, and other defendant attempted to get his gun out of pocket as officers approached, there was probable cause for arrest of defendants and for their search and search of their automobile. D.C. Code §§ 22-1801(b), 22-2201, 22-3204. *United States v. Cunningham*, 424 F.2d 942, 1970 U.S. App. LEXIS 10048 (C.A.D.C. 1970), writ of certiorari denied by 399 U.S. 914, 90 S. Ct. 2218, 26 L. Ed. 2d 572, 1970 U.S. LEXIS 1479 (1970).

Officers, who were investigating drugstore robbery, who knew that defendant had committed similar robbery two years before, and who discovered, on defendant's premises, heap of bottles and cigarettes, which were of type sto-

len from drugstore, had probable cause to believe defendant was guilty of felony, and, therefore, were justified in arresting defendant without warrant. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202. *Ellison v. U.S.*, 206 F.2d 476, 1953 U.S. App. LEXIS 2772 (C.A.D.C. 1953).

Police lacked probable cause to arrest defendant for burglary and to search bag he was carrying incident to an arrest, despite existence of reasonable suspicion to stop defendant and companion in connection with that burglary, where officer who stopped defendant and companion reported the stop 20 minutes after victim reported seeing burglars flee, stop occurred a mile and a half from scene of burglary, and neither individual was wearing red pants as reported by burglary victim. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

The entering of a building with intent to commit any offense is a felony, and where officer's information gave him probable cause to believe that defendant had entered building with intent to steal, and defendant's appearance fitted "lookout" description given officer, no warrant was needed and arrest of defendant was lawful; and fact that district attorney saw fit to reduce charge from housebreaking to petit larceny did not change circumstances of arrest or invalidate confession obtained while defendant was being held under such arrest. D.C. Code 1951, §§ 22-1801, 22-2202. *Scott v. U.S.*, 147 A.2d 767, 1959 D.C. App. LEXIS 219 (Cr.App. 1959).

Attempted burglary.

Conviction for attempted burglary, which differs from burglary only in that act remains incomplete, requires finding that defendant had already formed intent to commit criminal offense inside. D.C. Code 1981, § 22-1801. *Shelton v. United States*, 505 A.2d 767, 1986 D.C. App. LEXIS 283 (1986).

Common law.

Common-law crime of burglary has been replaced by statutory crime denominated first-degree burglary, in the District of Columbia, and the common-law crime no longer exists. D.C. Code § 22-1801(a). *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Common-law offense of burglary, defined as the breaking and entering of a dwelling at night with the intent to commit a felony, no longer exists in the District of Columbia: it has been replaced by a statutory crime. D.C. Code 1981, § 22-1801. *Swinson v. United States*, 483 A.2d 1160, 1984 D.C. App. LEXIS 529 (1984).

Much broader definition of burglary found in statute is in derogation of the common law, and

the statute is therefore to be construed strictly. D.C. Code 1981, § 22-1801. *Swinson v. United States*, 483 A.2d 1160, 1984 D.C. App. LEXIS 529 (1984).

Constitutional rights of defendant.

In prosecution for first-degree felony-murder while armed, second-degree burglary while armed, carrying a pistol without a license, second-degree burglary and grand larceny, pre-trial publicity concerning defendant's prior arrests and criminal history and cache of property recovered from defendant's home that had probable connections with similar offenses was not of such an extreme nature as to deprive defendant of a fair trial. D.C. Code 1981, §§ 22-1801(b), 22-2201, 22-2401, 22-3202, 22-3204; U.S. Const. Amend. 6. *Welch v. United States*, 466 A.2d 829, 1983 D.C. App. LEXIS 484 (1983).

Construction and application.

Federal statute for District of Columbia, defining crime of burglary in first degree and increasing minimum and maximum punishments therefor and increasing minimum punishment for robbery by amending prior laws on both crimes became effective at 3:05 p. m. when it was signed by the President, and not before. D.C. Code §§ 22-1801, 22-1801(a), 22-2901; 1 U.S.C. § 112; U.S. Const. art. 1, § 9, cl. 3. *United States v. Casson*, 434 F.2d 415, 1970 U.S. App. LEXIS 10177 (C.A.D.C. 1970).

Construction with other statutes.

Neither the unlawful entry statute nor the forcible entry statute engrafts any additional elements on first-degree burglary statute of the District of Columbia; unlawful entry statute does not purport to amend burglary statutes and does not do so by operation of law, expressly or impliedly, nor do requirements of unlawful entry statute constitute additional elements of every second-degree burglary. D.C. Code §§ 22-1801(a, b), 22-3102. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Defense of consent.

Under District of Columbia statute defining burglary as entry without breaking with intent to commit any criminal offense, consent to enter is not defense where one is shown to have entered with the requisite criminal intent. D.C. Code §§ 22-1801(a), 22-3102. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Even if entry against will of occupants was required for first-degree burglary in District of Columbia, there was vitiation of consent and thus entry against will of occupants, where consent to enter was obtained by use of pretense, subterfuge, misrepresentation and concealment. D.C. Code § 22-1801(a). *United*

States v. Kearney, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Consent to enter is not defense to burglary when consent is obtained by ruse with required criminal intent. D.C. Code 1981, § 22-1801(a). *McKinnon v. United States*, 644 A.2d 438, 1994 D.C. App. LEXIS 100 (1994), writ of certiorari denied by 513 U.S. 1005, 115 S. Ct. 523, 130 L. Ed. 2d 428, 1994 U.S. LEXIS 8113, 63 U.S.L.W. 3386 (1994).

Reasonable belief of right to enter premises and remain therein is a defense under the trespass statute. D.C. Code § 22-3102. *Gaetano v. United States*, 406 A.2d 1291, 1979 D.C. App. LEXIS 453 (1979).

As a defense to a trespass prosecution, the "reasonable belief" concept must be based in the pure indicia of innocence, in that there must be some evidence that, for example, the individual had no reason to know that he was trespassing on the rights of others, such as a belief that he had title to or possessed an interest in the land or that the land was publicly owned or that he was invited. D.C. Code § 22-3102. *Gaetano v. United States*, 406 A.2d 1291, 1979 D.C. App. LEXIS 453 (1979).

Defenses generally.

The "bona fide belief" defense to charge of criminal trespass was not meant to and does not exonerate individuals who believe they have a right, or even a duty, to violate the law in order to effect a moral, social or political purpose, regardless of the genuineness of the belief or the popularity of the purpose. D.C. Code § 22-3102. *Gaetano v. United States*, 406 A.2d 1291, 1979 D.C. App. LEXIS 453 (1979).

Belief that sit-in at private abortion facility was necessary to save human life did not rise to level of a "bona fide belief" defense in trespass action; also, evidence that abortion terminated life of the fetus did not support an immediate call to action in violation of the law. D.C. Code § 22-3102. *Gaetano v. United States*, 406 A.2d 1291, 1979 D.C. App. LEXIS 453 (1979).

Degrees of burglary.

Under District of Columbia law, second-degree burglary entails unlawful entering of a building with intent to commit a criminal offense. *United States v. Carter*, 522 F.2d 666, 1975 U.S. App. LEXIS 13956 (C.A.D.C. 1975).

Criminal intent at the time of entry is essential element of burglary in the second degree. D.C. Code § 22-1801(b). *United States v. Cooper*, 473 F.2d 95, 1972 U.S. App. LEXIS 6815 (C.A.D.C. 1972).

Crucial element of offense of second-degree burglary is the specific intent which impelled entry and is not the lawful or unlawful manner of entry. D.C. Code §§ 22-1801, 22-1801(b). *United States v. Jeffries*, 45 F.R.D. 110, 1968 U.S. Dist. LEXIS 12791 (D.D.C.1968).

An unlawful entry bears heavily on question of defendant's intent to commit second-degree burglary but it is not a prerequisite to the establishment of such an intent. D.C. Code §§ 22-1801, 22-1801(b). *United States v. Jeffries*, 45 F.R.D. 110, 1968 U.S. Dist. LEXIS 12791 (D.D.C.1968).

Burglary in first degree requires proof of entry of dwelling or room of another used as sleeping apartment, while occupied by any person, with intent to commit criminal offense. D.C. Code 1981, § 22-1801(a). *McKinnon v. United States*, 644 A.2d 438, 1994 D.C. App. LEXIS 100 (1994), writ of certiorari denied by 513 U.S. 1005, 115 S. Ct. 523, 130 L. Ed. 2d 428, 1994 U.S. LEXIS 8113, 63 U.S.L.W. 3386 (1994).

In order to prove armed first-degree burglary, government must establish armed entry into occupied dwelling with intent to commit crime therein, and intent to commit the crime must have been formed by time of entry inside the premises. D.C. Code 1981, § 22-1801(a). *Marshall v. United States*, 623 A.2d 551, 1992 D.C. App. LEXIS 165 (1992).

To commit first-degree burglary, person entering dwelling must already have formed intent to commit criminal offense while inside. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

First-degree burglary, an offense against habitation, is completed when individual enters occupied dwelling with intent to commit criminal offense. *Strickland v. United States*, 332 A.2d 746, 1975 D.C. App. LEXIS 325 (1975), writ of certiorari denied by 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67, 1975 U.S. LEXIS 2535 (1975).

Different offenses in same transaction.

Offenses of murder, housebreaking, and larceny each requires elements of proof which are not common to other two and each offense is historically an independent crime. D.C. Code § 22-2404. *United States v. Butler*, 462 F.2d 1195, 1972 U.S. App. LEXIS 10266 (C.A.D.C. 1972).

Ancient distinction that robbery offends person and burglary habitation has not been obliterated by Congress with respect to District of Columbia even where robbery inside dwelling follows closely on heels of housebreaking of that dwelling. D.C. Code 1961, §§ 22-1801, 22-2901. *Irby v. United States*, 250 F. Supp. 983, 1965 U.S. Dist. LEXIS 6690 (D.D.C.1965), affirmed by 390 F.2d 432, 129 U.S. App. D.C. 17, 1967 U.S. App. LEXIS 4497 (1967).

Burglary with intent to commit two assaults is still a single, unitary burglary. D.C. Code 1981, § 22-1801(a). *Bowman v. United States*, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

Defendant was properly subject to three separate convictions for second-degree burglary

where he made three separate entries into home following initial entry in order to remove and sell items, even though he had obtained complete control over the home by murdering its occupants. D.C. Code 1981, § 22-1801(b). *Byrd v. United States*, 618 A.2d 596, 1992 D.C. App. LEXIS 353 (1992).

Defendant was entitled to have one of two burglary convictions vacated where both convictions were predicated on a single transaction. D.C. Code 1981, § 22-1801(a). *Stewart v. United States*, 490 A.2d 619, 1985 D.C. App. LEXIS 342 (1985).

Housebreaking and robbery convictions can stand together since robbery and burglary statutes which codify common law protect distinct societal interests. D.C. Code §§ 22-1801(a), 22-2901, 22-3202. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

Discovery.

Where prosecution's case rested largely upon testimony of a sole key eyewitness and there was ample ground for suspicion of inconsistencies in eyewitness' identification, trial judge abused his discretion in failing to order production of those parts of the witness' grand jury testimony relating to same subject testified to at trial. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.; D.C. Code 1951, §§ 22-1801, 22-2201. *De Binder v. U.S.*, 292 F.2d 737, 1961 U.S. App. LEXIS 4462 (C.A.D.C. 1961).

Where there was no evidence that police officer had ever made detailed written notes at time victim reported burglary, it was not violation of Jencks Act for trial court to refuse to direct prosecution to produce such notes. D.C. Code §§ 22-1801(b), 22-2201; 18 U.S.C. § 3500. *In re R.D.J.*, 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

Double jeopardy.

Defendant's convictions for burglary, premeditated murder, and robbery arising from single criminal transaction did not merge, so as to trigger double jeopardy protection; the three convictions required separate and distinct elements of proof. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-2901, 22-3202; U.S.C. Const.Amend. 5. *Bennett v. United States*, 620 A.2d 1342, 1993 D.C. App. LEXIS 44 (1993).

Punishment for both first-degree burglary while armed and first-degree felony-murder predicated on armed robbery did not violate double jeopardy clause, where armed burglary charge required government to prove at least one fact that felony-murder did not, i.e., that defendant entered dwelling or other building, apartment or room, and felony-murder charge required proof of at least one fact that armed burglary did not, i.e., that defendant killed another person. D.C. Code 1981, §§ 22-1801(a), 22-3202, 22-2401, 23-112; U.S. Const.Amend. 5.

Waller v. United States, 531 A.2d 994, 1987 D.C. App. LEXIS 456 (1987).

Examination of witnesses.

— Confrontation rights, examination of witnesses.

In prosecution for armed burglary, armed robbery, and assault, trial court's ruling curtailing in limine defense counsel's inquiry of complainant concerning her possible status as a police informant in other cases, which allegedly would have caused jury to view her testimony with skepticism, was not an abridgement of defendant's Sixth Amendment right to confrontation, in that such evidence was not relevant given fact that complainant's status was that of a crime victim rather than that of a provider of information regarding criminal activities of others and fact that jury had before it complainant's admission that she engaged in after-hours sale of cigarettes and liquor contrary to law. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 25-102 et seq.; U.S. Const. Amend. 6. Smith v. United States, 389 A.2d 1364, 1978 D.C. App. LEXIS 543 (1978).

— Credibility and impeachment, examination of witnesses.

Refusal, in criminal prosecution, to admit testimony regarding effect of drug use on perception for purposes of impeaching testimony of accomplice, who testified for government and who was a heroin user, unless it was established that accomplice had used narcotics on day of offenses was not error. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. United States v. Leonard, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where defendant had testified that he lived at certain address during month in which burglary occurred, that he had returned to that address on date of burglary after finishing work, that he had worked every day, presumably including day of arrest, and that he had never lived around corner from home of eyewitness to burglary, trial judge did not abuse discretion by permitting Government to cross-examine defendant concerning employer's identification card which referred to the address around the corner from eyewitness' home and records indicating days he had worked during week of crime. D.C. Code §§ 22-1801(b), 22-2201. United States v. Rosebar, 463 F.2d 1255, 1972 U.S. App. LEXIS 9684 (C.A.D.C. 1972).

Cross-examination of defendant during which prosecution was permitted to develop that for some time prior to date of offense defendant had been absent from his military post without leave was improper, and prejudice was magnified by erroneous admission of government's rebuttal evidence as to defendant's absence from military post. D.C. Code §§ 22-502, 22-1801(a), 22-2901. United States v.

Shumate, 429 F.2d 777, 1970 U.S. App. LEXIS 8423 (C.A.D.C. 1970).

Where defendant's prior convictions of unauthorized use of vehicle and petit larceny were introduced in evidence on his own direct examination in effort to support contention that he was framed with respect to grand larceny charge by one of government's witnesses, he could not successfully complain of alleged error in permitting him to be impeached by prior convictions, notwithstanding decisions stating that the offense of taking property without right does not bear on credibility. D.C. Code §§ 22-1201, 22-1801(b), 22-2201. United States v. Lucas, 426 F.2d 663, 1970 U.S. App. LEXIS 9918 (C.A.D.C. 1970).

Under the circumstances defendant, who was convicted of housebreaking and grand larceny, was entitled to nonjury hearing to determine whether defendant would be allowed to take stand in front of jury without prosecution introducing evidence of defendant's prior convictions. D.C. Code §§ 22-1801, 22-2201; Fed. Rules Crim. Proc. rules 30, 52(a), 18 U.S.C. United States v. Coleman, 420 F.2d 1313, 1969 U.S. App. LEXIS 11537 (C.A.D.C. 1969).

In prosecution for rape and housebreaking, wherein defendant admitted sex relations and testified that prosecutrix had consented, prosecutor was properly allowed to impeach defendant's credibility by reading affidavit, which defendant had made as indigent defendant to secure subpoena and in which defendant had stated that witness whom he sought to subpoena could establish alibi for him. D.C. Code 1961, §§ 22-1801, 22-2801; Fed. Rules Crim. Proc. rule 17(b), 18 U.S.C. Smith v. U.S., 312 F.2d 867, 1962 U.S. App. LEXIS 3335 (C.A.D.C. 1962).

Prior uncharged robberies of drug dealers were not sufficiently similar to instant offenses to warrant cross-examination of witness concerning such uncharged robberies in prosecution for, inter alia, murder, obstruction of justice and burglary, arising from drug-related triple murder and subsequent murder of potential prosecution witness; uncharged robberies occurred more than three years before triple murder, and beyond fact that victims were believed to be drug dealers, defense counsel proffered no similarities between those earlier robberies and triple homicide. Crutchfield v. United States, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Defendant had the right to challenge credibility of victim, who was defendant's estranged girlfriend, by offering extrinsic evidence to show bias, in prosecution for various offenses including burglary and arson. D.C. Code 1981, §§ 22-401, 22-1801(b). Grayton v. United States, 745 A.2d 274, 2000 D.C. App. LEXIS 17 (2000).

Through cross-examination of witnesses in prosecution for felony-murder and first-degree burglary on subject of their plea agreement, defense counsel suggested that witnesses had a motive to lie at trial, and thereby triggered application of rules which permit admission of prior consistent statements, for purposes of determining whether such prior consistent statements were properly admitted. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

Trial court in prosecution for felony-murder and first-degree burglary erred in admitting previous statements of three prosecution witnesses during redirect to rehabilitate their testimony after defense counsel suggested that witnesses had a motive to lie at trial, where prior statements were made to law enforcement officials at a time when witnesses were under arrest and knew that they could be tried for first-degree murder, and thus, had a motive to lie to the detective who took the statements. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

In prosecution for attempted burglary in the second degree and attempted petit larceny, prosecutor's impeachment of defendant with a prior conviction of attempted petit larceny following several questions about the details of the offense was proper, in that the prosecutor's impeachment did not immediately follow defendant's general denial of the charged crime and there was no sequence of questioning concerning a key element of a charged offense intermingled with repeated impeachment by previous convictions of similar offenses. D.C. Code 1981, §§ 14-305, 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

In prosecution for attempted burglary in the second degree and attempted petit larceny, prosecutor's impeachment of defendant with a prior attempted robbery conviction following prosecutor's questioning defendant concerning defendant's alleged car breakdown, possession of pliers and wire cutters, and his discovery of a hole in the fence to the train yard in which the offenses occurred was proper. D.C. Code 1981, §§ 14-305, 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

In prosecution for attempted burglary in the second degree and attempted petit larceny, prosecutor's impeachment of defendant with a prior conviction for larceny at the outset of

defendant's cross-examination was proper. D.C. Code 1981, §§ 14-305, 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

In prosecution for attempted robbery, burglary, assault, and murder, trial court did not err in denying defendant's pretrial motion to limit his impeachment to fact but not nature of his prior convictions. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

— Privilege of witness.

Provisions of Organized Crime Control Act requiring prosecutor to obtain authorization from Attorney General before granting immunity to witnesses who refuse to testify did not bar prosecutor's grant of immunity to minor witnesses who at no time refused to testify and who were merely innocent bystanders of burglary with which defendant was charged. 18 U.S.C. §§ 6001-6005; D.C. Code §§ 22-1801(b), 22-2201. In re R.D.J., 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

Where evidence indicated that two minor witnesses were innocent bystanders to burglary, and where witnesses were at all times willing to testify against defendant, defendant did not have standing to assert that trial court's refusal to appoint counsel for such minor witnesses before they testified was violation of witnesses' Fifth Amendment privilege against self-incrimination. U.S. Const. Amend. 5; D.C. Code §§ 22-1801(b), 22-2201. In re R.D.J., 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

Harmless or prejudicial error.

— Admission of evidence, harmless or prejudicial error.

Error, if any, in introduction into evidence of recordings between since deceased accomplice-informer and first defendant was not reversible error, in prosecution for conspiracy, burglary, grand larceny, interstate transportation of stolen property and bringing stolen property into the District of Columbia. U.S. Const. Amends. 5, 6; 18 U.S.C. §§ 371, 2314; D.C. Code §§ 22-108, 22-1801, 22-2201. *United States v. Lemonakis*, 485 F.2d 941, 1973 U.S. App. LEXIS 9078 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 989, 94 S. Ct. 1586, 94 S. Ct. 1587, 39 L. Ed. 2d 885, 1974 U.S. LEXIS 757 (1974).

Evidence presented by the government in prosecution for housebreaking and grand larceny was so compelling that, even if the pretrial confrontation between defendant and two prosecution witnesses at police station was improper and in-court identification of defendant was not shown by clear and convincing evidence to have an independent source, error, if any, in the in-court identifications was harm-

less. D.C. Code §§ 22-1801, 22-2201. *Taylor v. United States*, 414 F.2d 1142, 1969 U.S. App. LEXIS 12390 (C.A.D.C. 1969).

In proceeding in which accused was charged with armed robbery and burglary offenses alleged to have occurred in carryout restaurant on June 29 and July 8 and in which restaurant employee testified that she recognized accused when he entered on July 8, error in admitting employee's remark that she knew accused "from two previous robberies where he robbed us before" was harmless, in that untainted testimony overpoweringly established that accused committed July 8th offenses, that jury was instructed that remark was not to be considered on issue of guilt and that accused was only convicted of July 8th offenses. D.C. Code §§ 22-1801(b), 22-2901, 22-3202. *Harris v. United States*, 366 A.2d 461, 1976 D.C. App. LEXIS 432 (1976).

Where, in prosecution for burglary of jewelry store, after prosecutor's introduction of evidence that store owner did not have insurance, court ruled that the evidence was not relevant and should be stricken from the record and gave cautionary instruction to the jury, defendant was amply protected from hazard of impermissible influence and the question and answer did not constitute such plain error as to require reversal. D.C. Code § 22-1801(b). *Manago v. United States*, 331 A.2d 335, 1975 D.C. App. LEXIS 310 (1975).

Where evidence clearly established defendant's guilt of burglary and petit larceny of grocery store, admission in evidence of hearsay testimony of proprietor of store that he had heard that defendant had stolen his keys to store was not substantial or prejudicial error. D.C. Code §§ 22-1801(b), 22-2202. *Fredericks v. United States*, 306 A.2d 268, 1973 D.C. App. LEXIS 309 (1973).

— Argument and conduct of counsel, harmless or prejudicial error.

Record disclosed uncontested facts so confirming defendant's guilt of second-degree burglary and petit larceny consisting in theft of money from coin-operated laundry machines located in locked basement room of an apartment building that any impropriety in prosecuting attorney's argument must be classed as harmless error. D.C. Code §§ 22-1801(b), 22-2202; Fed.Rules Crim.Proc. rule 52(a), 18 U.S.C. *United States v. Jones*, 433 F.2d 1107, 1970 U.S. App. LEXIS 11035 (C.A.D.C. 1970).

Use by prosecuting attorney, in prosecution for burglary II and petit larceny, of phrase "lucky enough to catch somebody right in the act," and to "catch them red-handed" was not so prejudicial as to constitute plain error. D.C. Code §§ 22-1801(b), 22-2202. *United States v. Stevenson*, 424 F.2d 923, 1970 U.S. App. LEXIS 10500 (C.A.D.C. 1970).

Statement of prosecuting attorney that if jury believed testimony of defendants, who were charged with burglary II and petit larceny, they must conclude that police officers were "out-and-out liars," was not so prejudicial as to require reversal. D.C. Code §§ 22-1801(b), 22-2202. *United States v. Stevenson*, 424 F.2d 923, 1970 U.S. App. LEXIS 10500 (C.A.D.C. 1970).

Even if prosecutor's statement that there was no death penalty in the city anymore, made during closing argument in prosecution for felony-murder and first-degree burglary, was improper, any error was harmless, in view of government's strong case against defendants coupled with court's instructions that the jury disregard the comment and fact that jurors eventually were instructed by the court, at defense's request, on penalties for various offenses, including first-degree murder. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

In proceeding in which defendant was convicted of second-degree burglary and destruction of private property and in which jury was instructed that arguments of counsel were not evidence and was repeatedly reminded that they were the sole judges of believability of witnesses, prosecution's improper comments, which were made during rebuttal argument and which were directed again and again at veracity of defendant's witnesses, constituted such prejudicial misconduct as to require new trial, in light of certain circumstances including fact that the matter for jury consideration consisted entirely of deciding whether to believe police officer or defense witnesses. D.C. Code §§ 22-403, 22-1801. *Dyson v. United States*, 418 A.2d 127, 1980 D.C. App. LEXIS 334 (1980).

Where defendant accused of first-degree burglary was identified by victim from both photographs and lineup, and was identified again at trial, and where defendant admitted he knew occupant of burglarized apartment and had been to apartment on prior occasions and had left note found near entrance to apartment, and where there was no missing witness instruction by court, jury was not substantially influenced in its deliberation by prosecutor's remarks inviting jury to speculate on reason for absence of witnesses whom defendant failed to call to corroborate his alibi. D.C. Code § 22-1801(a). *Conyers v. United States*, 309 A.2d 309, 1973 D.C. App. LEXIS 351 (1973).

— Conduct and deliberations of jury, harmless or prejudicial error.

Defendant in second-degree burglary prosecution could not have been prejudiced by

court's response to jury's question that aiding and abetting instruction applied to second-degree burglary, in that it was unnecessary for jury to agree on whether he was inside shoe store; one who aids and abets principal in committing crime is charged as principal. D.C. Code 1981, §§ 22-105, 22-1801(b). *Tyler v. United States*, 495 A.2d 1180, 1985 D.C. App. LEXIS 444 (1985).

— Examination of witnesses, harmless or prejudicial error.

Refusal, in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, to permit cross-examination of accomplice, who testified for government and whose counsel had been informed that government would be willing, with regard to unrelated narcotics and robbery charges against accomplice, to accept plea of guilty to one misdemeanor, as to whether government had made any disposition of such unrelated charges was reversible error when considered in conjunction with other errors. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where defendant was on trial for second-degree burglary and petit larceny, it was error to grant permission for impeachment by both of defendant's two-year-old convictions for attempted housebreaking and for petit larceny, but where the prosecution used only the attempted housebreaking conviction, no prejudice appeared. D.C. Code §§ 22-1801(b), 22-2202. *United States v. Isaac*, 449 F.2d 1040, 1971 U.S. App. LEXIS 9894 (C.A.D.C. 1971).

Error of trial court, in prosecution for felony-murder and first-degree burglary, in admitting previous statements of three prosecution witnesses to rehabilitate their testimony after defense counsel suggested that the witnesses had a motive to lie at trial was harmless, in view of government's evidence of defendant's active participation in the crimes, in conjunction with court's detailed charge to jury regarding limited use of prior consistent statements. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

In prosecution for armed burglary, armed robbery and assault, error of a constitutional dimension occurred in restricting scope of defense cross-examination of detective and complainant concerning her possible role as an informant in other cases, which might have demonstrated her need to curry favor with authorities, presumably in exchange for their overlooking her own illegal conduct of bootlegging liquor and cigarettes, but such error was

harmless, where complainant testified that she believed that police were aware of her illegal activities, complainant admitted status as law-breaker, evidence showed that complainant was victim of violent assault and record reflected that restricted cross-examination was of relatively little importance in trial below. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 25-102 et seq.; U.S. Const. Amend. 6. *Smith v. United States*, 389 A.2d 1364, 1978 D.C. App. LEXIS 543 (1978).

Improper prohibition on defendant from inquiring on cross-examination into federal narcotics charge pending against prosecution witness was harmless error where defendant was permitted to cross-examine witness extensively regarding his possession of narcotics paraphernalia and his possession and use of marijuana and cocaine on date of robbery, and where other evidence indicated defendant's guilt. D.C. Code §§ 22-1801(a), 22-2901. *Rhodes v. United States*, 354 A.2d 863, 1976 D.C. App. LEXIS 511 (1976).

— In general.

Where commissioner at preliminary hearing advised defendants, charged with housebreaking, of their rights as specified by rule, including right to retain counsel, and no evidence was received at hearing and used at trial and no prejudice was shown, on appeal from conviction, from their being unrepresented by counsel at time of preliminary hearing and allegedly being without adequate advice as to counsel at such time, conviction was affirmed. D.C. Code 1961, § 22-1801; Fed. Rules Crim. Proc. rule 5(b), 18 U.S.C. *Shelton v. United States*, 343 F.2d 347, 1965 U.S. App. LEXIS 6588 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 856, 86 S. Ct. 108, 15 L. Ed. 2d 93, 1965 U.S. LEXIS 814 (1965).

— Indictment or information, harmless or prejudicial error.

The attempt to identify particular room in indictment charging larceny of watch and entering a room with intent to commit larceny was harmless surplusage. D.C. Code 1940, §§ 22-1801, 22-2202. *Fretz v. U.S.*, 140 F.2d 468, 1944 U.S. App. LEXIS 3967 (1944).

Failure to allege an unlawful entry in count charging second-degree burglary amounted to no more than harmless error. Fed. Rules Crim. Proc. rule 7(c), 18 U.S.C.; D.C. Code §§ 22-1801, 22-1801(b). *United States v. Jeffries*, 45 F.R.D. 110, 1968 U.S. Dist. LEXIS 12791 (D.D.C. 1968).

Misjoinder of robbery counts with burglary counts in violation of rule was not harmless error in that it was likely that misjoinder prejudiced defendants' chances of acquittal on each charge because juxtaposition of the weaker burglary defense of innocent presence

with comparatively stronger robbery defense of temporary voluntary exchange may well have damaged defendants. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-2901; Criminal Rules 8, 8(a, b). *Ray v. United States*, 472 A.2d 854, 1984 D.C. App. LEXIS 319 (1984).

Even if indictment for burglary of apartment were defective for allegedly laying ownership wrongly in title rather than occupancy or possession at time crime was committed, such defect did not warrant reversal, absent allegation that indictment failed to fairly apprise defendant of charges against him or that it prejudiced his defense in any way. D.C. Code § 22-1801(b). *Ingram v. United States*, 392 A.2d 505, 1978 D.C. App. LEXIS 393 (1978).

Reversal was not required by reason of asserted variance between allegations in burglary indictment and Government's proof on charge that defendant had entered apartment of corporation while evidence indicated that on day of offense a particular individual was in possession of premises, since claimed variance would not permit defendant's reprosecution and conviction for burglary if indictment were amended to allege that occupant of apartment at time of offense was particular individual and not housing corporation and absent allegation that had occupancy been laid in particular individual, rather than corporation, defendant's right to break and enter premises would not have been negated. D.C. Code § 22-1801(b). *Ingram v. United States*, 392 A.2d 505, 1978 D.C. App. LEXIS 393 (1978).

— Instructions, harmless or prejudicial error.

Giving of instruction that jurors were permitted to infer that second defendant was "guilty of the crimes charged," if they determined, beyond a reasonable doubt, that he was found in unexplained, exclusive possession of recently stolen property was reversible error where the presumed fact of guilt of arson, possession of a Molotov cocktail and second-degree burglary while armed with a Molotov cocktail did not flow from possession of recently stolen military rifles. D.C. Code §§ 22-401, 22-1801(b), 22-3202, 22-3215a. *United States v. Carter*, 522 F.2d 666, 1975 U.S. App. LEXIS 13956 (C.A.D.C. 1975).

Failure to charge on unlawful entry in prosecution for housebreaking, an offense which required finding of larcenous intent in addition to elements of unlawful entry, was harmless where jury found defendant guilty of larceny as well as of housebreaking. Fed. Rules Crim. Proc. rule 31(c), 18 U.S.C.; D.C. Code 1961, §§ 22-1801, 22-3102. *Stewart v. United States*, 324 F.2d 443, 1963 U.S. App. LEXIS 4033 (C.A.D.C. 1963).

In prosecution for housebreaking and grand larceny, trial court committed no reversible

error in charging that if defendant's possession of recently stolen property was not accounted for in that satisfactory, straightforward and truthful way that would stamp it as an honest accounting, then such possession would be a foundation for a presumption of guilt against the possessor, even though trial court could have chosen more exact language in its attempt to express limited character of presumption to which it was referring. D.C. Code 1940, §§ 22-1801, 22-2201. *Wright v. U.S.*, 189 F.2d 699, 1951 U.S. App. LEXIS 3219 (C.A.D.C. 1951).

In prosecution where the same evidence, that is, unexplained possession of recently stolen goods, tended to support all counts charging second-degree burglary, grand larceny and receiving stolen property, failure to instruct that jury could not find defendants guilty of receiving stolen property if it also found them guilty of burglary or larceny was error requiring reversal and new trial. D.C. Code §§ 22-1801(b), 22-2201, 22-2205. *Franklin v. United States*, 382 A.2d 20, 1978 D.C. App. LEXIS 410 (1978).

Trial court's use of special verdict form did not confuse jury or prejudice defendant, in prosecution for first-degree burglary, murder, and assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202. *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

Failure to give standard instruction on identification in prosecution for burglary was not prejudicial error where identification was not a telling issue. D.C. Code § 22-1801(a, b). *Massey v. United States*, 320 A.2d 296, 1974 D.C. App. LEXIS 225 (1974).

Where jury had convicted defendant of more serious crime of attempted burglary, any error in instruction on lesser included offense of unlawful entry was not prejudicial. D.C. Code §§ 22-103, 22-1801. *Hebble v. United States*, 257 A.2d 483, 1969 D.C. App. LEXIS 332 (App. 1969).

— Remarks of judge, harmless or prejudicial error.

Trial judge's questioning of defense witnesses on certain aspects of testimony which they had given in support of alibi claim in order to obtain much needed clarification of their testimony rather than challenges thereto did not amount to advocacy against alibi theory in presence of jury, and in any event was not prejudicial where it was not significantly different in nature from judge's questioning of a vital government witness in prosecution for housebreaking and grand larceny. D.C. Code §§ 22-1801, 22-2201. *United States v. Barbour*, 420 F.2d 1319, 1969 U.S. App. LEXIS 10507 (C.A.D.C. 1969).

Comment by court, while co-defendant was on witness stand, that honest people are in bed at 3:00 in the morning was prejudicial and defendant, who was convicted of housebreaking, was entitled to a new trial. D.C. Code 1961, § 22-1801. *Cunningham v. U.S.*, 311 F.2d 772, 1962 U.S. App. LEXIS 3569 (C.A.D.C. 1962).

In prosecution for first-degree burglary, trial court erred in stating that evidence of defendant's prior convictions for assault and robbery was admissible to prove a predisposition to gratify sexual desires with victim since such testimony related to sexual conduct with a person other than victim and thus would have been admissible only if it had shown an unusual sexual taste or preference on defendant's part and, since it did not, its admission would have served only to prove that defendant was likely to commit rape; admission of such testimony, however, was harmless since it was admissible under intent, motive and identity exceptions. D.C. Code § 22-1801(a). *Calaway v. United States*, 408 A.2d 1220, 1979 D.C. App. LEXIS 492 (1979).

— **Sentence and punishment, harmless or prejudicial error.**

Where concurrent sentences were imposed on defendant for crimes of carnal knowledge and housebreaking, error, if any, in failure to make out prima facie case of housebreaking did not result in prejudice to defendant. D.C. Code §§ 22-1801, 22-2801. *Duckett v. United States*, 410 F.2d 1004, 1969 U.S. App. LEXIS 13297 (C.A.D.C. 1969).

Where general sentence imposed upon accused, who was charged under two count indictment with housebreaking and larceny, was within the maximum sentence permitted for housebreaking, reviewing court could affirm the judgment without considering alleged errors concerning conviction for larceny. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202. *Nelms v. U.S.*, 215 F.2d 678, 1954 U.S. App. LEXIS 2875 (C.A.D.C. 1954).

Indictment or information.

— **Amendments, indictment or information.**

Guilty plea to first-degree theft, rather than first-degree burglary, with respect to one charged incident did not amount to a constructive amendment of indictment, but rather an amendment of government's plea offer, where charge to which defendant was allowed to plead guilty was already contained in indictment. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Where count of indictment charging first-degree burglary alleged in the conjunctive that

defendant had entered the dwelling of another "with intent to steal the property of another and to commit an assault," count presented an unseverable, unitary charge and where Government's evidence of theft was legally insufficient, it was error for trial court to permit Government at the close of its case-in-chief to amend count to delete words "to steal the property of another and"; because it was at best speculative that grand jury would have returned a true bill on the count if the indictment had been presented to it as it appeared after the amendment, trial court's action intruded impermissibly on defendant's Fifth Amendment right to be charged for serious crimes only by grand jury indictment. U.S. Const. Amend. 5; D.C. Code § 22-1801(a). *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Where amendment of information charging attempted second-degree burglary, destroying private property, and petit larceny to reflect that property in question belonged to corporation in care and custody of individual, as opposed to individual alone as charged in original information, conformed to testimony at trial and no prejudice was occasioned by the defense, permitting such amendment was not error. D.C. Code §§ 22-103, 22-403, 22-1801(b), 22-2202; D.C. Code General Sessions Court Rules, Criminal Division rule 7(e). *King v. United States*, 271 A.2d 556, 1970 D.C. App. LEXIS 365 (App. 1970).

— **In general.**

Specific intent required for second-degree burglary must be charged with such particularity as to designate specific crime grand jury had in mind when it charged that accused intended to commit some offense. D.C. Code § 22-1801(b). *United States v. Seegers*, 445 F.2d 232, 1971 U.S. App. LEXIS 10574 (C.A.D.C. 1971).

Indictment charging that defendant entered building with intent to commit a criminal offense therein was insufficient to charge the offense of second-degree burglary for failure to allege the specific crime, and conviction of second-degree burglary thereunder must be vacated. *United States v. Seegers*, 445 F.2d 232, 1971 U.S. App. LEXIS 10574 (C.A.D.C. 1971).

Where evidence in burglary prosecution indicates that accused may have intended to commit several offenses following unlawful entry, indictment may allege intent to commit one or more ulterior crimes and jury may be instructed that accused may be found to have possessed necessary intent for burglary if they find beyond reasonable doubt that he had intent to commit one or more of specified ulterior offenses. *United States v. Thomas*, 444 F.2d

919, 1971 U.S. App. LEXIS 10575 (C.A.D.C. 1971).

Where evidence of ulterior crime be indefinite, indictment in burglary prosecution may allege intent to commit crime of larceny and jury may be instructed that such circumstances if not explained to their satisfaction may furnish basis for inference that entry was made with intent to commit larceny, but such conclusion is not required. *United States v. Thomas*, 444 F.2d 919, 1971 U.S. App. LEXIS 10575 (C.A.D.C. 1971).

Indictment charging that defendant entered dwelling "with intent to commit a criminal offense therein" in violation of burglary statute was insufficient to charge first-degree burglary in that it did not identify offense defendant intended to commit upon entry; however, indictment was sufficient to charge unlawful entry. D.C. Code § 22-1801(a). *United States v. Thomas*, 444 F.2d 919, 1971 U.S. App. LEXIS 10575 (C.A.D.C. 1971).

In indictment for burglary, ulterior crime need not be alleged as fully as would be necessary if ulterior crime were itself offense charged; it is ordinarily sufficient to allege offense in general terms. D.C. Code § 22-1801(a). *United States v. Thomas*, 444 F.2d 919, 1971 U.S. App. LEXIS 10575 (C.A.D.C. 1971).

Under statute providing that no person shall have in his possession any instrument, tool, or other implement for picking locks or pockets, or that is usually employed or reasonably may be employed in commission of any crime, if he is unable satisfactorily to account for possession of the implement, proof of intent is essential element of government's case. D.C. Code 1951, §§ 22-3302(2, 8), 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

The purpose of the law in requiring the name of the person, who occupied and used building entered, to be stated in indictment, is to negate the defendant's right to break and enter and to protect him from a second prosecution for the same offense. *Bord v. U.S.*, 133 F.2d 313, 1942 U.S. App. LEXIS 2501 (1942).

The purpose of requiring the indictment to state the name of the person who occupied and used the building entered is to negate defendant's right to break and enter and to protect him from a second prosecution for the same offense. *Cady v. U.S.*, 293 F. 829, 1923 U.S. App. LEXIS 1681 (1923).

Counts of housebreaking and robbery, to which petitioner pleaded guilty, charged independent crimes, since housebreaking count charged and made necessary proof of entry of dwelling with intent to steal property but proof of entry was not essential to robbery count, whereas robbery charge required proof of taking in particular manner of something of value from victim's person or immediate actual pos-

session, facts that were not essential elements of housebreaking. D.C. Code 1961, §§ 22-1801, 22-2901. *Irby v. United States*, 250 F. Supp. 983, 1965 U.S. Dist. LEXIS 6690 (D.D.C.1965), affirmed by 390 F.2d 432, 129 U.S. App. D.C. 17, 1967 U.S. App. LEXIS 4497 (1967).

Count of indictment charging housebreaking by entry of room with intent to violate Federal Communications Act would, in view of the nature of the offenses and in view of unusual character of punishments specified by Congress for Communications Act violations, be dismissed. Communications Act of 1934, §§ 301, 501, 502, 47 U.S.C. §§ 301, 501, 502; D.C. Code 1961, § 22-1801. *United States v. Frank*, 225 F. Supp. 573, 1964 U.S. Dist. LEXIS 6474 (D.D.C.1964), US Supreme Court certiorari dismissed by 382 U.S. 923, 86 S. Ct. 317, 15 L. Ed. 2d 338, 1965 U.S. LEXIS 261 (1965).

In prosecution for burglary or attempted burglary, Government must prove that building or other premises involved belonged to someone other than defendant, but it does not have to prove precisely who the owner was. D.C. Code 1981 § 22-1801(b). *Douglas v. United States*, 570 A.2d 772, 1990 D.C. App. LEXIS 34 (1990).

In case concerning breaking and entering of parking meter, information which did not directly allege that District of Columbia or anyone else owned parking meter was technically defective. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

Robbery counts should not have been tried jointly with burglary counts, and joinder of those counts was violative of rule governing joinder of defendants, where offenses were not directed toward the common goal of obtaining property from others, no evidence was produced that the robbery necessarily led to or caused the burglary, and proof of one did not necessarily overlap substantially upon the other since one crime was stealing coats from acquaintances and other crime was breaking into an empty gas station. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-2901; Criminal Rules 8, 8(a, b). *Ray v. United States*, 472 A.2d 854, 1984 D.C. App. LEXIS 319 (1984).

Indictment charging that defendant "broke open, opened, and entered without right a juke box, with intent to carry away a part of such device, and something contained therein" was insufficient for failure to aver that property belonged to someone other than defendant. D.C. Code § 22-3427; U.S. Const. Amend. 6. *United States v. Pendergrast*, 313 A.2d 103, 1973 D.C. App. LEXIS 408 (1973).

Joinder of counts concerning second-degree burglary, grand larceny, and attempted burglary, was not improper. D.C. Code §§ 22-103, 22-1801(b), 22-2201; D.C. Code SCR, Criminal Rule 8(a). *Coleman v. United States*, 298 A.2d 40, 1972 D.C. App. LEXIS 303 (1972), writ of certiorari denied by 413 U.S. 921, 93 S. Ct.

3070, 37 L. Ed. 2d 1043, 1973 U.S. LEXIS 1990 (1973).

Insanity defense.

In prosecution for housebreaking, psychiatrist's opinion that defendant had been of unsound mind on date when crime was committed was sufficient to satisfy "some evidence" test and thereby to shift to prosecution the burden of proving defendant's sanity, though psychiatrist could not state categorically that defendant had not known right from wrong. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202, 24-301. *Durham v. U.S.*, 214 F.2d 862, 1954 U.S. App. LEXIS 3901 (C.A.D.C. 1954).

In prosecution for housebreaking, trial court's acceptance of waiver of pretrial lunacy hearing from defendant who stated he needed hospitalization and whose testimony showed confusion was error notwithstanding certification from acting superintendent of mental hospital that defendant was mentally competent to stand trial. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202, 24-301. *Durham v. U.S.*, 214 F.2d 862, 1954 U.S. App. LEXIS 3901 (C.A.D.C. 1954).

Evidence that, inter alia, defendant suffered from severe personality disorder that caused him on occasion to disassociate when his sexual advances were rejected, and that while defendant was in this state, he did not have capacity for choice or control, was sufficient to allow jury to reasonably infer from all evidence that defendant had necessary mental capacity for first degree burglary when he entered victim's apartment armed with knife but that he did not have capacity for choice or control when he killed victim because of a then dissociative condition. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202, 24-301(j). *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

Instructions.

— Defenses.

In prosecution based on defendants' unconsented entry into offices of chemical company and their destruction of certain property in it, instruction that Vietnam war was not issue in case and that, if government proved beyond reasonable doubt that one or more of defendants committed elements of crimes charged, law does not recognize as defense that defendants were motivated to commit their acts by sincere political, religious or moral convictions or in obedience to some higher law was not improper despite contention that instructions were coercive, tantamount to directed verdict of guilty and outside proper scope of judicial instruction. *U.S. v. Dougherty*, 473 F.2d

1113, 1972 U.S. App. LEXIS 8684 (C.A.D.C. 1972).

In prosecution for housebreaking with intent to steal, where defendant admitted he entered complainant's office and took property, but contended that he did so with complainant's consent, instruction to jury that complainant's consent would not excuse the defendant if the property taken belonged to a corporation was improper, since if defendant took the property with the consent of a man he believed to be its owner, defendant had no intent to steal. *Mills v. U.S.*, 228 F.2d 645, 1955 U.S. App. LEXIS 3712 (C.A.D.C. 1955).

Defendant's testimony that he participated in the crimes because he was instructed to do so at gunpoint by his cousin, and that he was afraid of his cousin because "he's shot at people," warranted instruction on the defense of duress, in prosecution for armed robbery, kidnapping while armed, assault, and burglary. *McClam v. United States*, 775 A.2d 1100, 2001 D.C. App. LEXIS 138 (2001).

Defense theories for which defendant provided no supporting testimony did not require jury instructions in burglary prosecutions. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

Where existence of a bona fide belief of a right to enter is genuinely questionable, an issue proper for jury's determination arises, and defendant who is accused of unlawful entry is entitled to an instruction thereon, but where there is no evidence supportive of accused's claim of a bona fide belief of a right to enter there is no duty to instruct that such a belief constitutes a valid defense. D.C. Code § 22-3102. *Smith v. United States*, 281 A.2d 438, 1971 D.C. App. LEXIS 202 (1971).

To warrant an instruction that a bona fide belief of a right to enter constitutes a defense to a charge of unlawful entry it is not sufficient that an accused merely claim a belief of a right to enter; a bona fide belief must have some reasonable basis. D.C. Code § 22-3102. *Smith v. United States*, 281 A.2d 438, 1971 D.C. App. LEXIS 202 (1971).

Defendant was not entitled to an instruction that a good-faith belief by him that he could enter area was a defense to charge of unlawful entry where defendant's transgression of construction site in the daytime when construction activity was in progress and workers were present could not be said to have created a right, or a reasonable belief in such, to trespass on the locked unguarded site at night. D.C. Code § 22-3102. *Smith v. United States*, 281 A.2d 438, 1971 D.C. App. LEXIS 202 (1971).

— Failure to object or except, instructions.

Under circumstances that defense counsel did not object to instruction given when trial

court granted motion for judgment of acquittal on three counts and that jury had been instructed not to be influenced with respect to innocence or guilt of defendant by any ruling made during course of trial, there was no error in the instruction given. D.C. Code §§ 22-1801(a), 22-2801, 22-2901, 22-3502. *United States v. Thornton*, 498 F.2d 749, 1974 U.S. App. LEXIS 8356 (C.A.D.C. 1974).

— Issues relating to jury trial, instructions.

Defendant was not entitled to mistrial in burglary prosecution on ground that, during night following the first day of the trial, one of the jurors became victim of burglary and communicated such fact to the remaining jurors, where the juror in question was replaced by an alternate and where defendant did not demonstrate the existence of state of mind in some other juror strong enough to raise presumption of partiality, but on the contrary objected to voir dire of the remaining jurors. D.C. Code § 22-1801(b). *United States v. Morgan*, 443 F.2d 718, 1970 U.S. App. LEXIS 5911 (C.A.D.C. 1970).

In prosecution for housebreaking and larceny, where after jury had been out several hours the court recalled jury and stated that a juror should ask himself whether his view is reasonable or unreasonable, that he should not be bullheaded, that he should not be stubborn, and that if he found himself in a small minority he should ask himself "Would I be shocking my conscience or reason if I yielded", use of the words "bullheaded" and "stubborn" did not coerce the jury, in view of additional parts of the instruction. D.C. Code 1940, §§ 22-1801, 22-2201, 22-2202. *Bord v. U.S.*, 133 F.2d 313, 1942 U.S. App. LEXIS 2501 (1942).

In prosecution for burglary and robbery and assault with a dangerous weapon, appearance in jury room of bullet which had no relationship to case did not necessitate declaration of mistrial, in view of trial court's instructions to jury to disregard. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 22-3204. *Evans v. United States*, 392 A.2d 1015, 1978 D.C. App. LEXIS 327 (1978).

— Necessity and sufficiency, instructions.

Variance between court's instruction that jurors were no longer concerned with three counts on which motion for judgments of acquittal had been granted and "redbook" instruction was not substantial. D.C. Code §§ 22-1801(a), 22-2801, 22-2901, 22-3502. *United States v. Thornton*, 498 F.2d 749, 1974 U.S. App. LEXIS 8356 (C.A.D.C. 1974).

Refusal, in criminal prosecution, to instruct that testimony of accomplices, who testified for government after having been granted immunity, should be considered with caution was reversible error. D.C. Code §§ 22-1801(b), 22-

2401, 22-2901, 22-3202; 18 U.S.C. § 6002. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where there was complete absence of any evidence of an intent to commit crime after unlawful entry, defendant could not be found guilty of first-degree burglary and it was error to submit such charge thereby inviting jury to speculate on why defendant entered dwelling. D.C. Code § 22-1801. *United States v. Melton*, 491 F.2d 45, 1973 U.S. App. LEXIS 7763 (C.A.D.C. 1973).

Considerations of justice warranted dispensing with mutuality as essential prerequisite to defense's right to lesser included offense charge on unlawful entry in burglary prosecution. D.C. Code § 22-1801(a); Fed. Rules Crim. Proc. rule 31(c), 18 U.S.C. *United States v. Whitaker*, 447 F.2d 314, 1971 U.S. App. LEXIS 10023 (C.A.D.C. 1971).

In burglary prosecution, evidence that, during period of widespread disturbances and looting, defendant was found hiding in a clothing store which had broken window and locked door did not warrant instruction on lesser offense of unlawful entry. D.C. Code §§ 22-1801(b), 22-3102. *United States v. Sinclair*, 444 F.2d 888, 1971 U.S. App. LEXIS 11027 (C.A.D.C. 1971).

Court's charge fairly covered alibi defense of defendant, who was charged on counts of housebreaking and grand larceny, and also adequately indicated substance of defendant's position that he had no obligation to show that another was actually the transgressor. D.C. Code 1967, §§ 22-1801, 22-2201. *Wright v. U.S.*, 404 F.2d 1256, 1968 U.S. App. LEXIS 8232 (C.A.D.C. 1968).

Where defendant was charged with entering and stealing from theater and with entering and stealing from adjoining flower shop on same night, instruction that, if jury found defendant guilty of entering and stealing from theater, they might but need not draw the inference that it was he who entered and stole from the flower shop, was proper. D.C. Code 1940, §§ 22-1801, 22-2201, 22-2202. *Bord v. U.S.*, 133 F.2d 313, 1942 U.S. App. LEXIS 2501 (1942).

Defendant, who was charged with burglary based on entry of estranged wife's home with intent to commit assault therein, was not entitled to requested instruction that jury must unanimously find that defendant intended to assault a particular person; because burglary requires only entry with intent to commit another offense, it was irrelevant that defendant did not actually carry out intent by assaulting estranged wife once he was inside house, but instead allegedly assaulted another person, and defendant was not charged with assault. D.C. Code 1981, § 22-1801(a). *Bowman v.*

United States, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

Where both Government and defendant opposed instructions on lesser included offenses as to defendant charged with burglary, attempted robbery, assault, and murder, trial court's refusal to so instruct jury on request of codefendant was not error. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Instruction that jury had to find defendant guilty of charged crimes of burglary and assault if Government proved existence of each element of offenses beyond reasonable doubt was not equivalent to trial court directing guilty verdict in light of other instructions explaining, inter alia, presumption of innocence, Government's duty to prove each element of offense beyond reasonable doubt, meaning of reasonable doubt and Government's need to establish defendant's presence at time and place of offenses in face of his alibi defense and thus was not plain error. D.C. Code §§ 22-502, 22-1801(a). *Watts v. United States*, 362 A.2d 706, 1976 D.C. App. LEXIS 343 (1976).

Where evidence introduced at trial on charges of first-degree burglary while armed, murder, and assault with intent to commit rape while armed supported a multiple-offense charge, trial court did not err in requiring jury to make a separate determination of defendant's sanity on each count for which he had been found guilty. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202. *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

— Requests for instructions.

District court in housebreaking prosecution did not err in refusing instruction on lesser offenses, where request was not made until conclusion of charge and did not specify any particular offenses or show their inclusion within offense charged. Fed. Rules Crim. Proc. rules 30, 31(c), 18 U.S.C.; D.C. Code 1961, §§ 22-1801, 22-3101, 22-3102. *Britton v. U.S.*, 301 F.2d 531, 1962 U.S. App. LEXIS 5470 (C.A.D.C. 1962).

Trial court did not err in failing to sua sponte instruct, in prosecution for assault with a dangerous weapon and burglary in the second degree, on lesser included offenses of simple assault, carrying a dangerous weapon, and unlawful entry. D.C. Code §§ 22-502, 22-1801(b), 22-2201. *Jackson v. United States*, 377 A.2d 1151, 1977 D.C. App. LEXIS 392 (1977).

Joint or separate trial of charges and defendants.

Fact that there was conflict in accused's defenses, in that codefendants relied on separate

alibi defenses and defendant admitted his presence at scene of offenses and in that such defendant's efforts to discredit testimony that he and a codefendant knocked out victim assertedly undermined such codefendant's alibi defense and fact that defendant did not testify and thus codefendants were precluded from cross-examining him did not so prejudice codefendants as to render refusal to grant severance an abuse of discretion where damaging implications of defendant's defense were corroborated by substantial testimony. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Refusal to grant severance in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, was not prejudicial to defendant due to fact that evidence placing a codefendant at scene of crime was quantitatively and qualitatively greater than evidence against defendant where evidence against defendant was both substantial and compelling, jury was specifically instructed to determine guilt of each defendant by considering only his own conduct and evidence which applied to him and where verdicts demonstrated that jury fulfilled its obligation under charge. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed. Rules Crim. Proc. rules 8(b), 14, 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where count of indictment charging defendant with carrying pistol on day of his arrest was dismissed for failure of proof before case was submitted to jury and indictment was retyped, omitting count, defendant was not prejudiced by court's refusal to sever such properly joined count from counts charging felony murder, first-degree burglary and armed robbery. D.C. Code §§ 22-1801(a), 22-2401, 22-2901; Fed. Rules Crim. Proc. rule 8(a), 18 U.S.C. *United States v. Joyner*, 492 F.2d 650, 1974 U.S. App. LEXIS 10133 (C.A.D.C. 1974), writ of certiorari denied by 419 U.S. 852, 95 S. Ct. 94, 42 L. Ed. 2d 83, 1974 U.S. LEXIS 2566 (1974).

Trial court did not abuse its discretion in prosecution for conspiracy, burglary, grand larceny, interstate transportation of stolen property, and bringing stolen property into the District of Columbia by denying severance to second defendant on ground of antagonistic defenses. 18 U.S.C. §§ 371, 2314; D.C. Code §§ 22-108, 22-1801, 22-2201. *United States v. Lemonakis*, 485 F.2d 941, 1973 U.S. App. LEXIS 9078 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 989, 94 S. Ct. 1586, 94 S. Ct. 1587, 39 L. Ed. 2d 885, 1974 U.S. LEXIS 757 (1974).

Granting of government's motion for severance of counts in prosecution for grand larceny and housebreaking was within trial judge's

discretion where government made at least a threshold showing of prejudice, in that, unexpectedly, the necessary witnesses as to two transactions could not be available at the same time, and where there was a lack of any specific prejudice claimed by defendant. D.C. Code §§ 22-1801, 22-2201; Fed.Rules Crim.Proc. rule 14, 18 U.S.C. *Garris v. United States*, 418 F.2d 467, 1969 U.S. App. LEXIS 12665 (C.A.D.C. 1969).

Defendant was not entitled to severance of robbery counts arising from three separate incidents, as evidence of each joined crime would be admissible in separate trials of others on issue of identity; while incidents were not identical in every detail, there were enough points of similarity in combination of circumstances, including fact that in each case robbers escaped in same distinctive vehicle, to make it reasonably probable that same person committed all offenses. *Shotikare v. United States*, 779 A.2d 335, 2001 D.C. App. LEXIS 181 (2001).

Defendant failed to show that joinder in single trial of robbery counts arising from three separate incidents was unfairly prejudicial, despite claim that he would be unable to testify as to one incident and still remain silent as to others; defendant failed to make requisite convincing showing that he had both important testimony to give concerning one count and strong need to refrain from testifying in other. *Shotikare v. United States*, 779 A.2d 335, 2001 D.C. App. LEXIS 181 (2001).

Offense of carrying dangerous weapon could be tried with burglary and robbery charges, where proof of the robberies and burglaries included substantially all of the proof of the weapons charge; although crimes were not similar, they were sufficiently connected to warrant joinder. Criminal Rules 8, 8(a); D.C. Code 1981, §§ 22-1801(a, b), 22-2101, 22-2901, 22-3209, 22-3811, 22-3812(a), 22-3901. *Coleman v. United States*, 619 A.2d 40, 1993 D.C. App. LEXIS 6 (1993).

Denial of motion to sever counts of indictment in proceeding in which accused was convicted of four rape offenses and other offenses was not abuse of discretion, in view of similar characteristics of such offenses, in which assailant entered through rear of apartments, awoke victims, threatened them with weapon, demanded silence and submission and committed no act of violence if there was compliance with his orders, in which, in three of the cases, he sought to prevent victims from getting good look at him and cut or threatened to cut phone lines and in which he cut off any pants worn by victims. D.C. Code §§ 22-502, 22-1801(a), 22-2801, 22-3202, 23-311(a), 23-313; D.C. Code SCR, Criminal Rules 8(a), 14. *Bridges v. United States*, 381 A.2d 1073, 1977 D.C. App. LEXIS 304 (1977), writ of certiorari denied by 439 U.S.

842, 99 S. Ct. 135, 58 L. Ed. 2d 141, 1978 U.S. LEXIS 2828 (1978).

Refusal to sever counts, in prosecution for second-degree burglary, grand larceny, and attempted burglary, was not an abuse of discretion where, inter alia, if there had been separate trials on each of the counts there would have been a substantial overlap of the evidence. D.C. Code §§ 22-103, 22-1801(b), 22-2201; D.C. Code SCR, Criminal Rules 8, 8(a), 14. *Coleman v. United States*, 298 A.2d 40, 1972 D.C. App. LEXIS 303 (1972), writ of certiorari denied by 413 U.S. 921, 93 S. Ct. 3070, 37 L. Ed. 2d 1043, 1973 U.S. LEXIS 1990 (1973).

Jurisdiction.

Federal court must dismiss criminal prosecution when federal charges have faded from case prior to trial, leaving only District of Columbia offenses for adjudication, unless court determines, in its discretion, that retention of case is warranted by remaining matters of legitimate federal concern. D.C. Code 1981, §§ 11-502(3), 22-1801(b); 18 U.S.C. §§ 371, 2511(1)(a). *United States v. Kember*, 685 F.2d 451, 1982 U.S. App. LEXIS 21250 (C.A.D.C. 1982), writ of certiorari denied by 459 U.S. 832, 103 S. Ct. 73, 74 L. Ed. 2d 72, 1982 U.S. LEXIS 3180, 51 U.S.L.W. 3254 (1982).

Federal district court for District of Columbia did not abuse its discretion by failing to divest itself of jurisdiction over prosecution of defendants for local burglary offenses, notwithstanding that defendants, who had also been indicted for federal offenses of conspiracy, interception of oral communications, and theft of government documents, had been extradited for trial only for local burglary offenses, where violations of District of Columbia Code for which defendants were tried, i.e., illegally entering United States government offices with intent to steal property owned by United States, were offenses against United States, prosecuted in name of United States, and were of unique concern to United States. D.C. Code 1981, §§ 11-502(3), 22-1801(b); 18 U.S.C. §§ 371, 641, 2511(1)(a). *United States v. Kember*, 685 F.2d 451, 1982 U.S. App. LEXIS 21250 (C.A.D.C. 1982), writ of certiorari denied by 459 U.S. 832, 103 S. Ct. 73, 74 L. Ed. 2d 72, 1982 U.S. LEXIS 3180, 51 U.S.L.W. 3254 (1982).

Jury selection.

Two jurors, in prosecution for first-degree burglary and forcible rape, who had previously served on jury in another case wherein, after verdict, judge remarked to jury that codefendants had absconded after release on bail and that acquitted defendant would remain in jail pending another trial for armed robbery, were not biased against defendant by judge's remarks in earlier case; remarks were relatively mild and constituted more of an allusion to

problems of recidivism than direct criticism-of-verdict, defendant's trial judge held hearings to question the two jurors and his decision that they were not prejudiced had abundant evidentiary support, two trials were quite dissimilar, with different charges, judges, lawyers, witnesses and defendants, and evidence of defendant's guilt was undisputed. D.C. Code §§ 22-1801(a), 22-2801, 24-301(j). *Grady v. United States*, 376 A.2d 437, 1977 D.C. App. LEXIS 356 (1977).

Where trial judge asked each prospective juror to stand as his or her name was called, gave defendant and his counsel opportunity to turn their chairs to better view panel and offered to have any panel member stand again to aid defendant in connecting faces with names, procedure for jury selection was fair to both sides, and court did not err in refusing to seat in jury box first 12 members who had passed challenge for cause and thereby allegedly depriving defendant of opportunity to visually inspect jurors before exercising peremptory strikes. D.C. Code §§ 22-1801(b), 22-2401, 22-2902, 22-3202; D.C. Code SCR, Criminal Rule 24(b). *Taylor v. United States*, 372 A.2d 1009, 1977 D.C. App. LEXIS 467 (1977).

Juvenile offenders and proceedings.

Where youth was found guilty of unlawful entry, an offense punishable by fine or imprisonment in jail for not more than six months, he was subject to sentence under District of Columbia Code or under Youth Corrections Act, and was properly sentenced under latter, which authorizes sentence thereunder on conviction of offense punishable by imprisonment, despite youth's service of seven months' presentence jail time for which he claimed credit under statute. D.C. Code §§ 22-1801(b), 22-3102, 22-3201, 22-3202, 22-3202(d)(1); 18 U.S.C. §§ 3568, 5010(b), 5017(c), 5021, 5024. *United States v. Lewis*, 447 F.2d 1262, 1971 U.S. App. LEXIS 8961 (C.A.D.C. 1971).

There was ample evidence in juvenile delinquency proceedings involving charges of burglary and first-degree theft to support trial court's finding that juvenile signed a waiver of his rights before any conversation with police detective and without any coercion or compulsion, and thus, the Court of Appeals was bound to accept it; furthermore, inherent in such finding was a finding that conversation about which juvenile testified, concerning difference between burglary and receiving stolen property, and whether he would have to be incarcerated, never took place, and thus there was no factual support for juvenile's legal argument that his statement was inadmissible and should have been suppressed. D.C. Code 1981, §§ 17-305(a), 22-1801(b), 22-3812(a). In re D.L., 486 A.2d 1180, 1985 D.C. App. LEXIS 317 (1985).

Trial court properly accepted rulings of motions judge as law of the case on juvenile's motion to suppress statement he made to police in delinquency proceedings involving charges of second-degree burglary and first-degree theft. D.C. Code 1981, §§ 22-1801(b), 22-3812(a). In re D.L., 486 A.2d 1180, 1985 D.C. App. LEXIS 317 (1985).

Evidence consisting of minor's admissions that he went to store with other "fellows" and that he was in store just before it closed and his flight from general vicinity of store was insufficient to support adjudication that minor was guilty as an aider and abettor in burglary and larceny of store. D.C. Code §§ 22-105, 22-1801(b), 22-2201. *Matter of R. A. B.*, 399 A.2d 81, 1979 D.C. App. LEXIS 312 (1979).

A defendant's asserted right to disposition of charge in juvenile proceedings is forever lost if not resolved in his or her favor before jeopardy has attached. D.C. Code §§ 16-2301(3), 16-2302, 16-2302(b), 16-2307, 22-1801(a, b), 23-1327. *Choco v. United States*, 383 A.2d 333, 1978 D.C. App. LEXIS 492 (1978).

Where prosecution of juvenile in juvenile court proceeded before judge without jury, court did not commit reversible error when it refused to grant juvenile separate trial after hearing witness testify that juvenile's corespondent had implicated him in corespondent's statements about burglary for which juvenile was being tried. D.C. Code §§ 22-501, 22-1801, 22-2901. In re W., 370 A.2d 1333, 1977 D.C. App. LEXIS 430 (1977).

Where complaining witness, who charged 15-year-old juvenile with burglary and robbery, could only have been considered presumptively hostile to juvenile's interest at hearing to determine whether probable cause existed of juvenile's delinquency, complainant's testimony could properly have been compelled only if meaningful proffer were made showing that her testimony would negate probable cause, and thus it was not abuse of discretion for trial court to refuse to continue probable cause hearing or to issue subpoena to order complainant to appear, absent such proffer. D.C. Code §§ 22-1801(a), 22-2901. In re R.D.S., 359 A.2d 136, 1976 D.C. App. LEXIS 291 (1976).

Finding by juvenile court that juvenile charged with burglary in the second degree and petit larceny was "involved as charged" did not constitute a "final order or judgment," and juvenile court's release of juvenile in his mother's custody with a warning did not constitute a "sentence," and Court of Appeals lacked jurisdiction to review action of juvenile court. D.C. Code §§ 11-741(a)(3), 16-2301 et seq., 16-2330, 22-1801(b), 22-2202. *Langley v. District of Columbia*, 277 A.2d 101, 1971 D.C. App. LEXIS 323 (1971).

Evidence in juvenile court proceeding was sufficient to support finding that the minor was

guilty of housebreaking and petty larceny. D.C. Code §§ 22-1801, 22-2202. In re Ellis, 253 A.2d 789, 1969 D.C. App. LEXIS 256 (App. 1969), remanded by 429 F.2d 214, 139 U.S. App. D.C. 30, 1970 U.S. App. LEXIS 8461 (1970).

Lesser included offenses.

Second-degree burglary was lesser included offense of second-degree burglary while armed with Molotov cocktail. D.C. Code §§ 22-1801(b), 22-3202. *United States v. Carter*, 522 F.2d 666, 1975 U.S. App. LEXIS 13956 (C.A.D.C. 1975).

Whether unlawful entry is lesser included offense with respect to any particular crime that is charged depends not solely upon comparison of statutory requirements for respective crimes but also upon analysis of facts of offense as charged in each indictment and as proved at trial. D.C. Code §§ 22-502, 22-1801(a, b), 22-2901, 22-3101, 22-3202. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Under evidence that defendant battered down door of dwelling house in order to gain entry and, to prove burglary, prosecution had only to establish additional element of entry with intent to commit a crime therein, unlawful entry was lesser included offense of greater offense of burglary. D.C. Code § 22-1801(a). *United States v. Whitaker*, 447 F.2d 314, 1971 U.S. App. LEXIS 10023 (C.A.D.C. 1971).

Where defendant was charged with entry into the dwelling of another person, with armed robbery of that person, assault with intent to commit robbery while armed as to the person's companion, and with assault with a dangerous weapon against each of two eyewitnesses to the crime, none of the crimes was a lesser included offense. D.C. Code §§ 22-501, 22-1801(a), 22-2901, 22-3202. *Brown v. United States*, 388 A.2d 451, 1978 D.C. App. LEXIS 527 (1978).

Except for requirement of attempt to commit crime, unlawful entry is substantially identical to and hence lesser included offense of burglary in second degree. D.C. Code §§ 22-103, 22-1801. *Hebble v. United States*, 257 A.2d 483, 1969 D.C. App. LEXIS 332 (App. 1969).

Line-up.

On-the-scene showup identification within minutes of burglary did not violate due process, despite claim that showup was unduly suggestive because one of detectives had told victim that they thought they had captured the burglar and even though defendant and his companion were shown to victim separately. U.S. Const. Amend. 5. *United States v. Yates*, 524 F.2d 1282, 1975 U.S. App. LEXIS 12018 (C.A.D.C. 1975).

Where an intruder broke into apartment of two women, and shortly thereafter defendant was arrested as a suspect, and about 30 min-

utes after the attack the women were asked to come down to the street in front of their apartment and view defendant who was sole occupant of patrol wagon, use of "one-man showup" did not deny defendant due process of law. D.C. Code §§ 22-502, 22-1801. *Bates v. U.S.*, 405 F.2d 1104, 1968 U.S. App. LEXIS 4485 (C.A.D.C. 1968).

Even if witness' showup identification of defendant had been flawed, dismissal of theft and burglary charges was not required, where there was other sufficient evidence pointing to defendant as person who had been climbing on witness' window; officer saw defendant in alley behind witness' house wearing clothing that matched witness' description 15 minutes after witness had called police, officer followed distinctive footprints left in snow by defendant's boots to site of two televisions stolen from witness' house, and red stain on defendant's jacket matched color on surface of witness' house. *Turner v. United States*, 622 A.2d 667, 1993 D.C. App. LEXIS 69 (1993).

Merger of offenses.

Defendant's convictions for possession of a firearm during a crime of violence (PFCV), one of which was predicated on a first-degree burglary charge and the others of which were based on armed robbery charges, did not merge, where the underlying convictions involved different victims and were not based on a single violent act in that defendant could have turned around and left the house after the burglary, but instead he elected to proceed with the robberies. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Defendant's two convictions for first-degree burglary while armed merged with each other, his convictions for felony murder merged with his respective premeditated murder convictions, and his conviction of felony murder merged with his conviction of first-degree burglary upon which it was predicated. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

First-degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon (ADW) counts from same criminal incident, since burglary required proof of element that other crimes did not, and kidnapping, armed robbery and assault with dangerous weapon all required proof of elements that burglary did not. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Possession of firearm during crime of violence (PFCV) count did not merge with any kidnapping "while armed" count, burglary while armed count, armed robbery count, or assault with dangerous weapon (ADW) count from same criminal incident. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(b). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with armed robbery count or with assault with dangerous weapon (ADW) count, since each required proof of element the other did not. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Two first-degree burglary while armed counts from same criminal incident merged, since both were based on defendants' entry into one apartment. D.C. Code 1981, §§ 22-1801(a), 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with single carrying pistol without license (CPWL) count from same criminal incident, since burglary count required proof that defendant entered dwelling of another person while armed with or "having readily available" a weapon which CPWL did not, and CPWL count specifically required "carrying" operable, unlicensed pistol which burglary did not. D.C. Code 1981, §§ 22-1801(a), 22-3202, 22-3204(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with single possession of prohibited weapon (PPW) count, from same criminal incident, since first-degree burglary required entry which PPW did not, and PPW required possession of specific prohibited weapon which first-degree burglary did not. D.C. Code 1981, §§ 22-1801(a), 22-3202, 22-3214(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Two first-degree burglary while armed charges from same criminal incident merged, where both were based on defendants' entry into one apartment. D.C. Code 1981, §§ 22-1801(a), 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Defendant's conviction for unauthorized use of motor vehicle did not merge with his robbery conviction, and his theft conviction did not merge with burglary conviction, where each conviction required a different element of proof. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b), 22-3815. *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

Conviction of robbery merged with conviction of felony-murder and, hence, was subject to being reversed. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-2901. *Graves v. United States*, 490

A.2d 1086, 1984 D.C. App. LEXIS 586 (1984), writ of certiorari denied by 474 U.S. 1064, 106 S. Ct. 814, 88 L. Ed. 2d 788, 1986 U.S. LEXIS 2427, 54 U.S.L.W. 3461 (1986).

Defendants' convictions for felony-murder while armed and the underlying felony of first-degree burglary while armed merged, and thus, case would be remanded with instructions to vacate the armed burglary conviction. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204; 18 U.S.C. §§ 5005 et seq., 5010(c). *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

Convictions of rape, robbery, and burglary, which underlay felony-murder convictions, merged into those felony-murder convictions and, accordingly, convictions of rape, robbery, and burglary would be vacated. D.C. Code 1981, §§ 22-1801, 22-2401, 22-2801, 22-2901, 22-3502. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

Convictions for first-degree burglary, robbery and assault with a dangerous weapon merged with more serious offenses, i.e., burglary in first degree while armed and armed robbery, and case was accordingly remanded with instructions to vacate convictions and related sentences for the first-mentioned convictions. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 22-3204. *Evans v. United States*, 392 A.2d 1015, 1978 D.C. App. LEXIS 327 (1978).

Nature and elements of offenses.

— Breaking and entry, nature and elements of offenses.

While burglary does not include element of breaking or force, offense of forcible entry does. D.C. Code § 22-3101. *United States v. Melton*, 491 F.2d 45, 1973 U.S. App. LEXIS 7763 (C.A.D.C. 1973).

To prove that defendant entered a dwelling of another used as a sleeping apartment, as first element of first-degree burglary, the state was required only to establish that victim occupied and used apartment, despite defendant's status as legal lessee of apartment, given that apartment was in sole name of defendant. *Bodrick v. United States*, 892 A.2d 1116, 2006 D.C. App. LEXIS 80 (2006).

"Entry," for purposes of burglary in the first degree, occurred when defendant crossed threshold of victim's apartment after forcing her to open door and enter before him, rather than point at which he stopped her outside apartment and ordered her to let him in. D.C. Code 1981, § 22-1801(a). *Edelen v. United States*, 560 A.2d 527, 1989 D.C. App. LEXIS 120 (1989).

One does not have to enter a building completely for conviction of crime of unlawful entry.

Roane v. United States, 432 A.2d 1218, 1981 D.C. App. LEXIS 313 (1981).

Crime of burglary requires, inter alia, breaking or entering without breaking and such must be established before an inference from possession of recently stolen property may properly be indulged to establish defendant's guilt of burglary. D.C. Code §§ 22-1801(b), 22-2201. White v. United States, 300 A.2d 716, 1973 D.C. App. LEXIS 233 (1973).

Where construction company, the occupant of lot, had posted signs indicating its rightful control of the site, it had never authorized defendant to use the site at night when no one was present, and where site was protected at night by locked gates and a mesh chain link fence topped by barbed wire, there was no need that an explicit "keep out" sign be posted to establish that defendant was acting against the will of the construction company when he entered the site. D.C. Code § 22-3102. Smith v. United States, 281 A.2d 438, 1971 D.C. App. LEXIS 202 (1971).

— Character of building, nature and elements of offenses.

Where porch was so situated that walls of apartment building formed three walls around porch and fourth or open side had a heavy iron grating which was without openings and came within about two and one-half feet from ceiling and only openings onto porch were a door from apartment living room and bedroom windows, porch was a part of "apartment" within meaning of statute denouncing the breaking and entering of an apartment. D.C. Code 1940, § 22-1801. Henderson v. U.S., 172 F.2d 289, 1949 U.S. App. LEXIS 2697 (C.A.D.C. 1949).

Underground subway station was a "building" for purposes of the District of Columbia burglary statute. D.C. Code 1981, § 22-1801(b). Swinson v. United States, 483 A.2d 1160, 1984 D.C. App. LEXIS 529 (1984).

— Homicide in commission of burglary, nature and elements of offenses.

Underlying felony of burglary in the first degree permitted jury to infer state of mind required for conviction of first-degree murder. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3201. Hawthorne v. United States, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

A killing subsequent to a burglary does not negate the fact of the burglary or invasion of the societal interests; the burglary is a separate and distinct act from the succeeding killing, yet may be deemed to be a "continuing offense" for purposes of the felony-murder statute. D.C. Code §§ 22-1801(a), 22-2401. Blango v. United States, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

— In general.

The term "burglary" refers to the breaking and entering of a house of another in the

nighttime, with intent to commit a felony therein, whether the felony be actually committed or not. United States v. Bailey, 585 F.2d 1087, 1978 U.S. App. LEXIS 10218 (C.A.D.C. 1978), reversed by 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575, 1980 U.S. LEXIS 69 (1980).

Where defendant made peaceable entry into savings and loan association and waited some seven to eight minutes before announcing robbery, defendant could not be convicted of assaulting or putting life of person in jeopardy by use of dangerous weapon in committing offense of entering savings and loan association with intent to commit felony, but could only be convicted of entering savings and loan association with intent to commit felony. 18 U.S.C. § 2113(a, d). United States v. Harrison, 522 F.2d 693, 1975 U.S. App. LEXIS 12016 (C.A.D.C. 1975).

Entry into closed store constituted burglary if entry coincided, in point of time, with intent to steal once therein, even though intended theft was not consummated. D.C. Code § 22-1801(b). United States v. Fox, 433 F.2d 1235, 1970 U.S. App. LEXIS 8426 (C.A.D.C. 1970).

Elements of burglary do not include identity of the victim of crime which the burglar intends to commit after entering burglarized premises. Lee v. United States, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Intended additional offense is often committed soon after entry, but even if it is not, already completed burglary is not vitiated or affected in any way by its omission. D.C. Code 1981, § 22-1801(a). Bowman v. United States, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

Damage to property is not element of burglary or attempted burglary. D.C. Code 1981, §§ 22-103, 22-1801(b). Freeman v. United States, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

Crime of burglary requires entry, with or without breaking, and contemporaneous intent to commit criminal offense. D.C. Code 1981, § 22-1801(a). Hawthorne v. United States, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

It is not necessary to burglary conviction that the theft or crime intended at time of entry be consummated. D.C. Code § 22-1801(a, b). Massey v. United States, 320 A.2d 296, 1974 D.C. App. LEXIS 225 (1974).

— Intent, nature and elements of offenses.

Element that distinguishes burglary from unlawful entry is the intent to commit crime once unlawful entry has been accomplished. D.C. Code §§ 22-1801, 22-3102. United States v. Melton, 491 F.2d 45, 1973 U.S. App. LEXIS 7763 (C.A.D.C. 1973).

Under statute defining burglary the offense is committed if the act of entering was with the intent to commit the misdemeanor of petty larceny. D.C. Code § 22-1801(b). United States

v. Cooper, 473 F.2d 95, 1972 U.S. App. LEXIS 6815 (C.A.D.C. 1972).

The crime of burglary is established by entering with intent to steal, though that intent was conditional on locating property the offender desired to remove. D.C. Code § 22-1801(b). *United States v. Cooper*, 473 F.2d 95, 1972 U.S. App. LEXIS 6815 (C.A.D.C. 1972).

Crime of burglary is established by unlawful entry accompanied by intent to steal, though such intent may be conditioned on locating property which the offender desires to remove. D.C. Code § 22-1801(b). *United States v. Sinclair*, 444 F.2d 888, 1971 U.S. App. LEXIS 11027 (C.A.D.C. 1971).

"Criminal offense", within burglary statute prohibiting entry with intent to commit any criminal offense, includes petit larceny. D.C. Code § 22-1801(b). *United States v. Fox*, 433 F.2d 1235, 1970 U.S. App. LEXIS 8426 (C.A.D.C. 1970).

While in some circumstances elements of unlawful entry are comprehended within those of housebreaking, latter requires also finding of larcenous intent. D.C. Code 1961, §§ 22-1801, 22-3102. *Stewart v. United States*, 324 F.2d 443, 1963 U.S. App. LEXIS 4033 (C.A.D.C. 1963).

An intent to steal is an essential ingredient of larceny and of housebreaking with intent to steal. *Mills v. U.S.*, 228 F.2d 645, 1955 U.S. App. LEXIS 3712 (C.A.D.C. 1955).

There is no statutory requirement for either robbery or assault with a dangerous weapon, that there be a specific intent to commit the other. D.C. Code 1961, §§ 22-501, 22-502, 22-1801, 22-2901, 22-3102, 22-3202. *United States v. Suggs*, 269 F. Supp. 732, 1967 U.S. Dist. LEXIS 8793 (D.D.C.1967).

Generally, entry with intent to commit a misdemeanor, such as petit larceny, is sufficient to support charge of housebreaking. D.C. Code 1961, § 22-1801. *United States v. Frank*, 225 F. Supp. 573, 1964 U.S. Dist. LEXIS 6474 (D.D.C.1964), US Supreme Court certiorari dismissed by 382 U.S. 923, 86 S. Ct. 317, 15 L. Ed. 2d 338, 1965 U.S. LEXIS 261 (1965).

Intent to commit criminal offense at time of entry is element of crime of burglary. D.C. Code 1981, § 22-1801(a). *Williams v. United States*, 725 A.2d 455, 1999 D.C. App. LEXIS 14 (1999).

Elements of burglary do not include identity of victim of crime that burglar intends to commit after entering burglarized premises, as crime of burglary is complete at moment of entry, and victim is owner or lessee of premises, not whoever happens to be there at the time. D.C. Code 1981, § 22-1801(a). *Bowman v. United States*, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

Intent to commit a crime inside premises, for purposes of conviction for first-degree burglary, is state of mind of accused at time of entry

which is ordinarily proved by circumstantial evidence. D.C. Code 1981, § 22-1801(a). *Marshall v. United States*, 623 A.2d 551, 1992 D.C. App. LEXIS 165 (1992).

Conviction for burglary requires finding that defendant entered premises having already formed intent to commit criminal offense inside. D.C. Code 1981, § 22-1801. *Shelton v. United States*, 505 A.2d 767, 1986 D.C. App. LEXIS 283 (1986).

In order to support conviction of burglary, intent to commit any criminal offense must be present at time of entry. (Per Ferren, J., with one Judge concurring in the result and one Judge dissenting.) D.C. Code 1973, § 22-1801(b). *Parker v. United States*, 449 A.2d 1076, 1982 D.C. App. LEXIS 414 (1982).

An intent to steal or commit a crime at the time of entry is a requisite element of proof in burglary case. D.C. Code § 22-1801(a, b). *Massey v. United States*, 320 A.2d 296, 1974 D.C. App. LEXIS 225 (1974).

Where person enters a place with a good purpose and with a bona fide belief of the right to enter, he lacks the element of criminal intent required by statute and is not guilty of unlawful entry. D.C. Code § 22-3102. *Smith v. United States*, 281 A.2d 438, 1971 D.C. App. LEXIS 202 (1971).

— Occupancy of building, nature and elements of offenses.

Burglary victim was "in" her dwelling, for purposes of first-degree burglary, when assailant stopped her in front of door of her apartment and ordered her to enter, which she did a few seconds before burglar entered. D.C. Code 1981, § 22-1801(a). *Edelen v. United States*, 560 A.2d 527, 1989 D.C. App. LEXIS 120 (1989).

— Unauthorized entry, nature and elements of offenses.

In case concerning breaking and entering of parking meter, question of defendant's authority to enter parking meter was not an affirmative defense and was not but was an essential element of the offense which government had to prove. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

Entry without lawful authority is requisite element of offense of unlawful entry. D.C. Code § 22-3102. *Jones v. United States*, 282 A.2d 561, 1971 D.C. App. LEXIS 211 (1971).

To be against the will of the lawful occupant the entry must be against the expressed will, that is, after warning to keep off the premises. D.C. Code § 22-3102. *Smith v. United States*, 281 A.2d 438, 1971 D.C. App. LEXIS 202 (1971).

Persons liable.

Even if there had been no prior consultation or agreement between defendant and person

who took property from government building, defendant would still be guilty as "aider and abettor" if he aided perpetrator of crime by assisting in continuing asportation of property with guilty knowledge of the theft. D.C. Code § 22-1801(b); 18 U.S.C. §§ 2(a), 641. *United States v. Barlow*, 470 F.2d 1245, 1972 U.S. App. LEXIS 7354 (C.A.D.C. 1972).

Where defendant was not present at government building when actual theft of equipment occurred, he could only be convicted of theft of government property and second-degree burglary as an aider and abettor. D.C. Code § 22-1801(b); 18 U.S.C. § 641. *United States v. Barlow*, 470 F.2d 1245, 1972 U.S. App. LEXIS 7354 (C.A.D.C. 1972).

Where jury could find beyond a reasonable doubt that both defendant and his companion entered a room with intent to steal and that either defendant or his companion stole watch, defendant's conviction of larceny of a watch and of entering a room with intent to commit larceny was authorized, notwithstanding that defendant's part in the crimes may have been only to stand guard. D.C. Code 1940, §§ 22-1801, 22-2202. *Fretz v. U.S.*, 140 F.2d 468, 1944 U.S. App. LEXIS 3967 (1944).

Person who has small part in violation of law in breaking and entering or in larceny is just as guilty in eyes of law as if he were the ring-leader. *Dawson v. Peyton*, 246 F. Supp. 444, 1965 U.S. Dist. LEXIS 7164 (1965), affirmed by 359 F.2d 149, 1966 U.S. App. LEXIS 6558 (4th Cir. Va. 1966).

Evidence that defendant aided and abetted in commission of burglary justified charging defendant as principal in burglary. D.C. Code §§ 22-105, 22-1801(b), 22-2201. *In re R.D.J.*, 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

Defendant's being with those who broke store window coupled with his flight with stolen goods would establish his responsibility for housebreaking. D.C. Code § 22-1801. *In re Ellis*, 253 A.2d 789, 1969 D.C. App. LEXIS 256 (App. 1969), remanded by 429 F.2d 214, 139 U.S. App. D.C. 30, 1970 U.S. App. LEXIS 8461 (1970).

Pleas.

Trial court did not abuse its discretion in denying motion to withdraw which was filed eight months after defendant entered plea of guilty to conspiracy, burglary and illegal interception of oral and wire communications. 18 U.S.C. §§ 371, 2511, 4208; D.C. Code § 22-1801(b). *United States v. Hunt*, 514 F.2d 270, 1975 U.S. App. LEXIS 15940 (C.A.D.C. 1975).

Where prosecution in its opening statement had outlined overwhelming case against defendants, charged with burglary of political party headquarters, pleas were accepted only after extraordinarily elaborate procedure, stretching

over four days, conducted largely in camera, and involving two competent attorneys, and neither counsel, prosecutor, nor judge exerted the slightest pressure on defendants to induce them to plead guilty, withdrawal of pleas would substantially prejudice legitimate prosecution interests, defendants were granted "use immunity" so that they might testify before grand jury and congressional committees and, at time of plea, defendants had denied employment by government intelligence agencies, defendants would not be entitled, eight months after pleading guilty, to withdraw their pleas because they honestly, though mistakenly, believed that "national security" considerations required their silence. 18 U.S.C. §§ 371, 2510, 2511; D.C. Code §§ 22-1801(b), 23-543(a); Fed. Rules Crim. Proc. rules 11, 32(d), 18 U.S.C. *United States v. Hunt*, 514 F.2d 270, 1975 U.S. App. LEXIS 15940 (C.A.D.C. 1975).

Record established that defendants' guilty pleas to charge of breaking into national political party headquarters were voluntary and knowing, that, on allocation, defendants deliberately and repeatedly deceived the court, that withdrawal of pleas eight months after they were entered would prejudice the government, and that defendants' supposed national security reasons for their guilty pleas were based on entirely subjective beliefs which were patently unreasonable. 18 U.S.C. §§ 371, 2510, 2511; D.C. Code §§ 22-1801(b), 23-543(a); Fed. Rules Crim. Proc. rules 11, 32(d), 18 U.S.C. *United States v. Hunt*, 514 F.2d 270, 1975 U.S. App. LEXIS 15940 (C.A.D.C. 1975).

Where defendant charged with first-degree burglary tendered plea of guilty to lesser-included offense of unlawful entry, and trial judge was presented with a factual basis for the plea, plea should not have been refused simply because defendant refused to accompany his plea with an admission of guilt. D.C. Code §§ 22-1801(a), 22-3102; Fed. Rules Crim. Proc. rule 11, 18 U.S.C. *United States v. Gaskins*, 485 F.2d 1046, 1973 U.S. App. LEXIS 8053 (C.A.D.C. 1973).

In prosecution for housebreaking, larceny and destruction of property, wherein one defendant was permitted to change his plea in open court and in presence of jury and was asked by trial judge whether he admitted committing offense and replied that he did admit being with "them," there was error which, in view of circumstantial and inconclusive nature of evidence, would require reversal of another defendant's conviction. D.C. Code 1951, §§ 22-403, 22-1801, 22-2201, 22-2202. *Gaynor v. U.S.*, 247 F.2d 583, 1957 U.S. App. LEXIS 3726 (C.A.D.C. 1957).

Where evidence in prosecution for housebreaking and grand larceny disclosed close association between defendant and codefendant in events leading to their arrests, receiving

codefendant's plea of guilty in presence of jury, and calling attention to such plea during taking of evidence and while instructing jury, was prejudicial to defendant's right to be tried solely on evidence against him. D.C. Code, §§ 22-1801, 22-2201. *Payton v. U.S.*, 222 F.2d 794, 1955 U.S. App. LEXIS 3878 (C.A.D.C. 1955).

Counts charging violations of burglary statute as regards entry of office of Internal Revenue Service in January 1976, theft of federal property from such office, burglary of and theft from the same office in March of 1976, burglary and theft of another office later in March, burglary of IRS identification room the same month, burglary of and theft from office of associate deputy general in April, burglary of and theft of another IRS office in April, entering into a conspiracy to obstruct investigation of burglaries and thefts and obstructing justice did not violate agreement, in exchange for felony plea to charge of using a falsely made identification card to enter United States courthouse in May and June that the Government would not charge defendant with any other possible violations arising out of such entries. 18 U.S.C. §§ 499, 641, 1017, 1503; D.C. Code § 22-1801(b). *United States v. Hubbard*, 474 F. Supp. 90, 1979 U.S. Dist. LEXIS 11995 (1979), affirmed by 668 F.2d 1238, 215 U.S. App. D.C. 206, 1981 U.S. App. LEXIS 17192 (1981).

Defendant's guilty pleas to second-degree burglary and aggravated assault were not coerced; trial court took steps to assure that defendant understood his rights, terms of agreement, factual basis for plea, and that plea was voluntarily entered. D.C. Code 1981, § 22-504.1, 22-1801(b), 23-110. *Southall v. United States*, 716 A.2d 183, 1998 D.C. App. LEXIS 127 (1998).

Defendant was not entitled to evidentiary hearing on postsentencing motion to withdraw guilty pleas to second-degree burglary and aggravated assault; defendant's claims of ineffective assistance of counsel were vague and conclusory, and failed to assert how trial counsel was ineffective and otherwise warranted no relief. U.S. Const. Amend. 6; D.C. Code § 22-504.1, 22-1801(b), 23-110(c); Criminal Rule 23(e). *Southall v. United States*, 716 A.2d 183, 1998 D.C. App. LEXIS 127 (1998).

Prosecutor's statement that Government had same concern as court that drug rehabilitation program for defendant would fail implied that, but for plea arrangement, Government would have recommended period of incarceration, and Government, by such conduct, broke its agreement not to oppose substantial suspended sentence and residential drug program for defendant, in exchange for his agreement to plead guilty to charges of second-degree burglary and forgery. D.C. Code §§ 22-1401, 22-1801(b). *White v. United States*, 425 A.2d 616, 1980 D.C. App. LEXIS 421 (1980).

Trial court did not abuse discretion in denying defendant's motion for withdrawal of guilty pleas to second-degree murder, attempted burglary and destruction of property where, inter alia, reasons given for defendant's change of heart did not amount to a claim of legal innocence, proffered evidence of guilt was overwhelmingly convincing and there was no claim of coercion or incapacity. D.C. Code §§ 22-403, 22-1801(b), 22-2403. *Taylor v. United States*, 366 A.2d 444, 1976 D.C. App. LEXIS 409 (1976).

Where defendant was fully informed about concept of aiding and abetting at guilty plea hearing, defendant specifically acknowledged that he was outside at scene of burglary knowing that others were going to commit crime and defendant admitted that he was assisting and advising the other perpetrators, defendant's plea of guilty to charge of first-degree burglary was made voluntarily, with understanding of nature of charge and consequences of plea and there was factual basis for plea; and trial court did not abuse its discretion in refusing to allow withdrawal of plea upon defendant's subsequent denial that he had known that perpetrators of crime were going to burglarize apartment in question. D.C. Code §§ 22-105, 22-1801(a); D.C. Code SCR, Criminal Rules 11, 32. *Austin v. United States*, 356 A.2d 648, 1976 D.C. App. LEXIS 528 (1976).

Presumptions and burden of proof.

Fact of unlawful entry, even in the nighttime, may not support inference that entry was made with intent to steal. D.C. Code § 22-1801. *United States v. Melton*, 491 F.2d 45, 1973 U.S. App. LEXIS 7763 (C.A.D.C. 1973).

No rational inference of criminal intent can be drawn from mere possession of tools which reasonably may be employed in crime. D.C. Code 1951, § 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

Corpus delicti under count charging homicide in perpetration of a housebreaking did not require independent proof that death occurred in perpetration of housebreaking. D.C. Code 1951, §§ 22-1801, 22-2401. *U.S. v. Naples*, 192 F.Supp. 23, 1961 U.S. Dist. LEXIS 3087 (D.D.C.1961).

To prove burglary, the government must establish that the defendant entered the premises having already formed an intent to commit a crime therein. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

To obtain burglary conviction, government must prove that defendant entered premises having already formed intent to commit crime therein. D.C. Code 1981, § 22-1801(a). *Williams v. United States*, 725 A.2d 455, 1999 D.C. App. LEXIS 14 (1999).

To prove burglary, government must establish that defendant entered the premises having already formed an intent to commit a crime therein; however, such intent is rarely capable of direct proof, and, unless it is admitted by accused, it typically must be shown by circumstantial evidence. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Unauthorized presence, by itself, is not sufficient to prove a burglary; government must also show other circumstances that might lead reasonable people, based upon their common experience, to conclude beyond a reasonable doubt that defendant intended to commit some crime upon the premises. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Unauthorized presence, by itself, is not sufficient to show burglary; government must also show other circumstances that might lead reasonable people, based upon their common experience, to conclude beyond reasonable doubt that defendant intended to commit some crime upon premises. D.C. Code 1981, § 22-1801(a). *Bowman v. United States*, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

To obtain conviction under burglary statute, government must prove that defendant entered premises having already formed intent to commit crime therein. D.C. Code 1981, § 22-1801(a). *Bowman v. United States*, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

To sustain conviction for burglary, Government must prove wrongful entry on premises with specific intent to steal. *North v. United States*, 530 A.2d 1161, 1987 D.C. App. LEXIS 421 (1987).

Unauthorized presence in another's premises does not alone support inference of criminal purpose at time of entry as required for conviction of burglary; however, when unauthorized presence is aided by other circumstances, such inference may be drawn. D.C. Code 1981, §§ 22-1801, 22-1801(a). *Warrick v. United States*, 528 A.2d 438, 1987 D.C. App. LEXIS 385 (1987).

In order to properly infer that unlawful entry was with specific criminal purpose, jury must have before it evidence of circumstances other than mere unauthorized presence on another's property which would indicate such purpose; these other circumstances are those which might lead reasonable people, based upon their common experience, to conclude beyond reasonable doubt that defendant intended to commit some crime upon premises. D.C. Code 1981, §§ 22-1801, 22-3102. *Shelton v. United States*, 505 A.2d 767, 1986 D.C. App. LEXIS 283 (1986).

Statutes prohibiting breaking and entering, and taking property without right prohibit acts committed by defendant only if done without right and, therefore, government must prove

beyond reasonable doubt that defendant lacked authority from rightful owner of the property. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

Proof of larceny does not, in itself, establish burglary. D.C. Code §§ 22-1801(b), 22-2201. *White v. United States*, 300 A.2d 716, 1973 D.C. App. LEXIS 233 (1973).

Questions of law and fact.

In prosecution for theft of government property and second-degree burglary, whether defendant had aided and abetted the larceny by assisting in continuing asportation of property he knew had been stolen was jury question. D.C. Code § 22-1801(b); 18 U.S.C. § 641. *United States v. Barlow*, 470 F.2d 1245, 1972 U.S. App. LEXIS 7354 (C.A.D.C. 1972).

Where key government witness, who was owner of apartment allegedly burglarized by defendant, did not see defendant's face, but did notice that his assailant wore a pair of very distinctive plaid pants, and defendant was subsequently seen and identified as having been in vicinity by two witnesses, both of whom indicated that he was wearing a distinctive pair of plaid pants similar to those described by first government witness, and defendant attempted to establish an alibi, although validity of alibi was seriously impeached by government, trial court did not abuse its discretion in leaving determination of guilt or innocence to jury. *United States v. Coombs*, 464 F.2d 842, 1972 U.S. App. LEXIS 8108 (C.A.D.C. 1972).

Evidence was sufficient to warrant submission to jury in burglary prosecution of issue of defendant's guilt of unlawful entry. D.C. Code § 22-1801(a). *United States v. Whitaker*, 447 F.2d 314, 1971 U.S. App. LEXIS 10023 (C.A.D.C. 1971).

Evidence was sufficient to warrant submission to jury in burglary prosecution of question of whether defendant's entry onto the premises was with intent to commit crime. D.C. Code § 22-1801(a). *United States v. Whitaker*, 447 F.2d 314, 1971 U.S. App. LEXIS 10023 (C.A.D.C. 1971).

In prosecution for housebreaking with intent to commit an assault evidence was sufficient for jury. D.C. Code 1961, § 22-1801. *Baber v. United States*, 324 F.2d 390, 1963 U.S. App. LEXIS 4816 (C.A.D.C. 1963), writ of certiorari denied by 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86, 1964 U.S. LEXIS 1524 (1964).

In prosecution for housebreaking and larceny, evidence regarding identification of defendant made a case for the jury. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202. *Williams v. U.S.*, 282 F.2d 867, 1960 U.S. App. LEXIS 4117 (C.A.D.C. 1960).

In prosecution for housebreaking with intent to steal, evidence was sufficient to permit jury

inference that defendant had entered the home of another with intent to steal, and intent was not required to be shown by any specific acts or conduct, where there was unexplained presence of defendant in darkened home of another about midnight after access had been obtained by force and stealth through a window. *Washington v. U.S.*, 263 F.2d 742, 1959 U.S. App. LEXIS 4386 (C.A.D.C. 1959).

Evidence which showed that defendant was on second floor landing in stairwell of complainant's apartment building, that a window screen in complainant's apartment had been cut, that the apartment had been unlocked from the inside, and that there were rayon fibers on tennis shoes of defendant which were similar to the rayon on complainant's bedroom rug was insufficient to permit burglary charge to go to jury. D.C. Code § 22-1801(a). *United States v. Preston*, 331 F. Supp. 457, 1971 U.S. Dist. LEXIS 11781 (1971).

Question of defendant's intent was question of fact to be determined by jury even though there was nothing reported stolen from building allegedly broken into nor was there any evidence defendant was aiding or abetting commission of offense or that defendant intended to commit felony after entry was gained. *United States v. Mullen*, 278 F. Supp. 410, 1967 U.S. Dist. LEXIS 7422 (1967), affirmed by 416 F.2d 456, 1969 U.S. App. LEXIS 10483 (4th Cir. Va. 1969).

Evidence that rooms entered were used solely for purposes of prostitution and were occupied essentially for periods of short duration supported contention that Government failed to establish character of bedrooms as sleeping apartments within purview of first-degree burglary statute; therefore, trial court erred in denying defendants' motions for judgment of acquittal on first-degree burglary charges. D.C. Code § 22-1801(a). *Jennings v. United States*, 431 A.2d 552, 1981 D.C. App. LEXIS 294 (1981), writ of certiorari denied by 457 U.S. 1135, 102 S. Ct. 2964, 73 L. Ed. 2d 1353, 1982 U.S. LEXIS 2703, 50 U.S.L.W. 3998 (1982).

Whether defendant was merely present at scene of burglary and robbery at time of offense, but did not participate in it, was jury question. D.C. Code §§ 22-1801(a), 22-2901, 22-3202. *Franey v. United States*, 382 A.2d 1019, 1978 D.C. App. LEXIS 419 (1978).

Evidence that defendant made early morning forcible entry into bar and grill, prepared to carry away items of value, and attempted to conceal his actions inside the premises was sufficient on element of entry with intent to steal to make submissible case of second-degree burglary. D.C. Code § 22-1801(a, b). *Massey v. United States*, 320 A.2d 296, 1974 D.C. App. LEXIS 225 (1974).

Evidence in prosecution for attempted burglary was sufficient to permit inference of intent to commit crime by defendant who was found in warehouse amongst scattered papers, opened desk drawers and office machinery which had been moved into hall. D.C. Code §§ 22-103, 22-1801. *Hebble v. United States*, 257 A.2d 483, 1969 D.C. App. LEXIS 332 (App. 1969).

In prosecution for unlawful attempt to enter a private building, evidence was sufficient to raise jury question as to defendant's guilt. D.C. Code 1951, § 22-3102. *McFarland v. U.S.*, 163 A.2d 627, 1960 D.C. App. LEXIS 246 (Cr.App. 1960).

Review.

— Determination and disposition, review.

In view of defendant's testimony at a subsequent trial that he not only participated in a burglary but also participated in a conspiracy to suppress evidence of that burglary involving perjury and destruction of records, alleged "outrageous conduct" by government officials in seizing and destroying his records and "perjuring themselves before the grand jury" did not require reversal of defendant's convictions of conspiracy, burglary and illegal interception of oral and wire communications, entered upon guilty plea. 18 U.S.C. §§ 371, 2511, 4208; D.C. Code § 22-1801(b). *United States v. Hunt*, 514 F.2d 270, 1975 U.S. App. LEXIS 15940 (C.A.D.C. 1975).

Where defendant's first-degree burglary conviction had to be set aside for lack of proof of intent to commit crime in premises entered but jury necessarily found facts required for conviction of lesser included offense of unlawful entry and the evidence was sufficient to support this determination, Court of Appeals would remand case with instructions to enter, if government consents, judgment of conviction of unlawful entry or, if court believes it in interest of justice, to grant new trial on lesser offense. D.C. Code §§ 22-1801, 22-3102. *United States v. Melton*, 491 F.2d 45, 1973 U.S. App. LEXIS 7763 (C.A.D.C. 1973).

Convictions of second defendant for burglary and grand larceny were mutually exclusive with conviction for receiving stolen property and bringing it into the District of Columbia, and vacating the burglary and larceny convictions which carried longer sentences cured any prejudice which resulted from the failure to properly instruct. D.C. Code §§ 22-108, 22-1801, 22-2201. *United States v. Lemonakis*, 485 F.2d 941, 1973 U.S. App. LEXIS 9078 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 989, 94 S. Ct. 1586, 94 S. Ct. 1587, 39 L. Ed. 2d 885, 1974 U.S. LEXIS 757 (1974).

Where defendant was entitled to instruction on unlawful entry as a lesser included offense

in burglary prosecution and trier of fact necessarily found every fact required for conviction of lesser included offense, the trial court would be entitled to set aside the verdict of first-degree burglary and enter judgment of conviction for unlawful entry. D.C. Code § 22-1801(a); Fed.Rules Crim.Proc. rule 31(c), 18 U.S.C. *United States v. Whitaker*, 447 F.2d 314, 1971 U.S. App. LEXIS 10023 (C.A.D.C. 1971).

Although conviction for second-degree burglary was vacated because of insufficiency of indictment, government could seek another grand jury indictment for such offense, but since indictment was sufficient to charge an unlawful entry and evidence was sufficient to support such a conviction, case was remanded for entry of judgment of conviction for unlawful entry if government did not object and trial court considered such action in the interests of justice; otherwise government could decide whether it wished to submit defendant's case again to grand jury. D.C. Code §§ 22-1801(b), 22-3102; Fed.Rules Crim.Proc. rule 12(b)(2), 18 U.S.C. *United States v. Seegers*, 445 F.2d 232, 1971 U.S. App. LEXIS 10574 (C.A.D.C. 1971).

Error, in not giving instruction on lesser offense of simple assault, in prosecution for rape, assault with intent to commit rape, unlawful entry, and second-degree burglary, did not require that conviction of second-degree burglary be set aside, in view of fact that jury returned verdict on burglary charge rather than on lesser-included offense of unlawful entry. D.C. Code §§ 22-1801(b), 22-2801. *United States v. Huff*, 442 F.2d 885, 1971 U.S. App. LEXIS 11498 (C.A.D.C. 1971).

Where there was a question as to adequacy of proof of grand larceny that property taken had a value of \$100 or more, principle that appellate court may reverse a judgment as to one of sentences, if its validity is beset by substantial doubt, where there is neither injustice done defendant nor a need of government overridden would be applied to reverse concurrent sentence for grand larceny, while remanding case to trial court for entry of concurrent sentence on petit larceny. D.C. Code §§ 22-1801(b), 22-2201. *United States v. Henderson*, 439 F.2d 531, 1970 U.S. App. LEXIS 6365 (C.A.D.C. 1970).

In absence of specific evidence as to value of items taken, defendant's conviction for grand larceny would be reversed, but where district judge gave lesser included offense charge as to petit larceny and there was sufficient evidence on which jury could find defendant guilty thereof, case would be remanded for resentencing. D.C. Code §§ 22-1801(b), 22-2201. *United States v. Thweatt*, 433 F.2d 1226, 1970 U.S. App. LEXIS 8425 (C.A.D.C. 1970).

Where record on appeal from convictions for housebreaking, arson, and malicious destruction of personal property failed to show that

defendant's absence during trial, after trial had commenced in his presence, constituted deliberate failure to appear without reason that might bear on court's latitude to have continued trial, case would be remanded for development of such issue including circumstances in which defendant was taken into custody after trial. D.C. Code §§ 22-401, 22-403, 22-1801; Fed.Rules Crim.Proc. rule 43, 18 U.S.C.; U.S. Const. Amend. 5. *Cureton v. U.S.*, 396 F.2d 671, 1968 U.S. App. LEXIS 7275 (C.A.D.C. 1968).

Where defendant was convicted under first count of unlawful entry and his conviction under second count of possession of implements of crime consisting of crowbars was under statute which is unconstitutional in its application to crowbars, case was remanded with directions either to modify judgment by setting aside verdict on second count and dismissing that count or in the alternative to vacate judgment entirely, set aside verdict on second count, dismiss that count and resentencing defendant for unlawful entry, notwithstanding that general sentence was for period less than maximum for unlawful entry. D.C. Code 1951, §§ 22-1801, 22-3601. *Washington v. U.S.*, 232 F.2d 357, 1956 U.S. App. LEXIS 3032 (C.A.D.C. 1956).

Where defendant's two burglary convictions merged for purposes of sentencing, trial court had erroneously imposed sentence of five to 15 years on each conviction, and trial court did not impose maximum sentence permitted by statute on burglary counts, remand for resentencing was appropriate as it would allow trial court to impose sentence knowing only one of burglary convictions was available for sentencing purposes. D.C. Code 1981, § 22-1801(a). *Thorne v. United States*, 471 A.2d 247, 1983 D.C. App. LEXIS 556 (1983).

Although defendant was convicted of first-degree burglary while armed, first-degree burglary, armed robbery, robbery and assault with dangerous weapon, convictions for three lesser offenses of first-degree burglary, robbery and assault with dangerous weapon must be vacated on basis that they were lesser included offenses of first-degree burglary while armed and armed robbery. D.C. Code §§ 22-502, 22-1801(a), 22-2901, 22-3202. *Franey v. United States*, 382 A.2d 1019, 1978 D.C. App. LEXIS 419 (1978).

Reversal of defendant's conviction for first-degree burglary necessitated reversal of his conviction for felony-murder based on that burglary. D.C. Code § 22-1801(a). *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Where at time of his trial for first-degree burglary and obstruction of justice defendant was aware that affiant was witness to incident

and knew affiant personally and was aware of his whereabouts, where defendant failed to subpoena affiant at trial, and where material contained in affidavit would in all likelihood not cause jury to acquit defendant, defendant was not entitled to new trial based on newly discovered evidence. D.C. Code §§ 22-703, 22-1801(a). *Poteat v. United States*, 363 A.2d 295, 1976 D.C. App. LEXIS 355 (1976).

Where defendant was sentenced to two concurrent ten-year terms of imprisonment for crimes exclusively applicable to District of Columbia, subsequent amendment by trial court of defendant's sentence to one of indeterminate term was error, and case would be remanded for resentencing. D.C. Code §§ 22-1801(b), 22-2201, 22-2202, 22-2204; 18 U.S.C. §§ 4208, 4208(a)(2). *Fredericks v. United States*, 306 A.2d 268, 1973 D.C. App. LEXIS 309 (1973).

— **In general.**

Where criminal trial was aborted under circumstances permitting retrial, double jeopardy principles did not preclude Government from appealing from subsequent dismissal of indictment. D.C. Code §§ 22-1801(a), 22-2202, 23-104(c); U.S. Const. Amends. 5, 6. *United States v. Harvey*, 377 A.2d 411, 1977 D.C. App. LEXIS 376 (1977).

— **Presentation and reservation of grounds for review.**

There was no plain error in instructions on specific intent required for first-degree burglary even though instructions could have been more expansive on "specific intent" where instructions were not objected to at trial. D.C. Code § 22-1801(a). *United States v. Thornton*, 498 F.2d 749, 1974 U.S. App. LEXIS 8356 (C.A.D.C. 1974).

Failure, in criminal prosecution, to give an accomplice instruction with regard to accomplices who testified for government was not plain error where nonaccomplice testimony corroborated accomplice testimony to significant extent against one accused and to lesser extent against another and where accomplices did not appear to have extraordinary disposition to prevaricate. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed. Rules Crim. Proc. rules 30, 52(b), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Absent waiver of instruction, failure, in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, to give immediate limiting instruction as to admissibility where testimony of arresting officer was admitted to impeach defendant's testimony that he had not stated that codefendant "lived across the street" was plain error requiring reversal, though general instruction on impeachment evidence was given in very

long charge. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Record disclosing that one of two boys apprehended at scene of housebreaking accompanied officers to apartment and identified defendant as person who had entered store across street from apartment disclosed so small a probability that probable cause for arrest was lacking that unraised issue of probable cause would not be considered as plain error. D.C. Code § 22-1801. *Washington v. United States*, 414 F.2d 1119, 1969 U.S. App. LEXIS 13473 (C.A.D.C. 1969).

Where defense counsel, in response to inquiry by federal District Court in prosecution for housebreaking, expressed satisfaction with instructions given, and defendant was convicted on strong evidence, defendant could not require Court of Appeals to exercise discretion available under provision of Federal Rule of Criminal Procedure that plain errors or defects affecting substantial rights may be noticed though they were not brought to attention of court. D.C. Code 1961, § 22-1801; Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. *Manning v. United States*, 371 F.2d 353, 1966 U.S. App. LEXIS 4552 (C.A.D.C. 1966).

Where, in prosecution for housebreaking, no trial objection was made to certain evidence, Court of Appeals was not required to decide question of its admissibility, and in view of character of the evidence, would not do so in its discretion. D.C. Code 1951, § 22-1801. *Lawson v. U.S.*, 248 F.2d 654, 1957 U.S. App. LEXIS 3849 (C.A.D.C. 1957).

Defendant's timely written submission to trial court questioning restitution component of sentence for second-degree burglary and aggravated assault could properly be considered challenge to correctness of restitution element of sentence, and denial of that motion was properly before Court of Appeals for review. D.C. Code 1981, §§ 16-711(a), 22-504.1, 22-1801(b); Criminal Rule 35(a). *Southall v. United States*, 716 A.2d 183, 1998 D.C. App. LEXIS 127 (1998).

Search and seizure.

Any conflict of interest that might have existed because two Assistant United States Attorneys involved in prosecution of church officials for conspiracy, burglary, and theft were made defendants in a civil action brought by church based upon their participation in an allegedly illegal search and seizure did not amount to a due process violation that would require vacation of defendants' sentences in absence of proof of actual prejudice on part of prosecuting attorneys. 18 U.S.C. §§ 371, 499, 641, 1071, 1503, 1510, 1623, 2511(1)(a); D.C. Code 1973, § 22-1801(b). *United States v. Heldt*, 668 F.2d 1238, 1981 U.S. App. LEXIS

17192 (C.A.D.C. 1981), writ of certiorari denied by 456 U.S. 926, 102 S. Ct. 1971, 72 L. Ed. 2d 440, 1982 U.S. LEXIS 1705, 50 U.S.L.W. 3838 (1982).

Examination of trunk of defendant's automobile did not constitute an illegal search by the police where it occurred contemporaneously with and at place of defendant's arrest under circumstances indicating convincingly defendant's participation in burglary. D.C. Code 1967, §§ 22-1801, 22-2201. *Wright v. U.S.*, 404 F.2d 1256, 1968 U.S. App. LEXIS 8232 (C.A.D.C. 1968).

Where police officer, who saw defendant walking along street about 2:00 in the morning, and who thought defendant had narcotics, without a warrant stopped defendant, who admitted that he had not worked for over a year, and had maintained himself by gambling, and officer then informed defendant that he was arresting him for vagrancy and required him to disrobe, search, which led to discovery of stolen money orders, was an unreasonable and unlawful violation of defendant's rights as a citizen, rendering stolen money orders inadmissible in prosecution for forgery, house-breaking, grand larceny, and interstate transportation of falsely made securities. D.C. Code 1951, §§ 22-1401, 22-1801, 22-2201, 22-2202; U.S. Const. Amend. 4; 18 U.S.C. § 2314; Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C. *White v. U.S.*, 271 F.2d 829, 1959 U.S. App. LEXIS 3238 (C.A.D.C. 1959).

Police officers, who suspected defendant of having broken into and robbed drugstore, were entitled to ring defendant's doorbell and inquire concerning his whereabouts, and their observation, while awaiting admittance to defendant's house, of bottles and cigarettes, which apparently had been stolen from drugstore and which were lying in vicinity of porch, did not constitute a "search". D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202. *Ellison v. U.S.*, 206 F.2d 476, 1953 U.S. App. LEXIS 2772 (C.A.D.C. 1953).

Defendant had reasonable expectation of privacy in plastic bag he was carrying at time he was stopped in connection with burglary and was therefore entitled to Fourth Amendment protections in connection with seizure and search of bag, even though bag was found to contain items allegedly taken during burglary. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

Collective knowledge of three law enforcement officers at the time that one of them stopped defendant and another pedestrian after hearing burglary report from radio dispatcher could be aggregated in determining whether stop was justifiable, even though the officers had not communicated with one another directly or through a dispatcher, where

officers had all observed the burglary suspects in small area of city within a few minutes preceding the stop. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

Police had reasonable suspicion to stop defendant and companion in connection with a burglary allegedly involving two black males, though radio dispatch had indicated one of the burglars was wearing red pants and neither defendant nor companion was wearing red pants at time of stop, where officer making stop had observed the individuals running in a way that suggested they were fleeing something, another officer had earlier observed them when one was reading red pants, and a third officer had seen them running toward parkway where stop occurred. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

Burglar has no legitimate expectation of privacy in building which he has unlawfully invaded, and thief has no legitimate expectation of privacy in stolen property, as such, when it is neither on his person nor on premises which give rise to legitimate expectation of privacy. D.C. Code §§ 22-1801(b), 22-2201; U.S. Const. Amend. 4. *Godfrey v. United States*, 408 A.2d 1244, 1979 D.C. App. LEXIS 510 (1979), amended by 414 A.2d 214, 1980 D.C. App. LEXIS 330 (D.C. 1980).

Where officers on the scene at 5 a. m. had received eyewitness report of the commission of a burglary, corroborated by missing pane of glass near apartment door, and had received positive identification of the perpetrator which included name and address, and where officers then received another eyewitness report from complainant that suspect was at that very moment in an apartment across the street, warrantless search of the latter apartment was justified by probable cause to believe that fleeing felon was within and by exigent circumstances which precluded obtaining an arrest warrant. D.C. Code § 22-1801(a). *Dunston v. United States*, 315 A.2d 563, 1974 D.C. App. LEXIS 362 (1974).

Sentence and punishment.

Where, in prosecution for first-degree burglary and for assault with a deadly weapon, evidence disclosed a single act on part of defendant directed simultaneously at two persons, so that only a single conviction for assault on two persons was supported by evidence, convictions of first-degree burglary and of one assault would be affirmed, but conviction of an additional assault would be set aside, and sentences would be vacated and case would be remanded

for resentencing. D.C. Code §§ 22-502, 22-1801(a). *United States v. Carmichael*, 469 F.2d 937, 1972 U.S. App. LEXIS 7118 (C.A.D.C. 1972).

Where course of action taken by defendant in taking part in burglary and attempted armed robbery during which a murder occurred violated two separate felony-murder statutes, which required proof of different elements for conviction, imposition of two concurrent sentences was permissible for one murder. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Statutory provision for two-year mandatory minimum sentence for burglary did not operate to prevent prosecution and sentencing for lesser misdemeanors of attempted burglary in second degree, destroying private property, and petit larceny, for which offenses defendant was actually sentenced for one-half year more than two-year felony minimum. D.C. Code §§ 22-103, 22-403, 22-1801(b), 22-2202; D.C. Code General Sessions Court Rules, Criminal Division rule 7(e). *King v. United States*, 271 A.2d 556, 1970 D.C. App. LEXIS 365 (App. 1970).

Validity.

Actual notice to particular individual that legislation has passed or is about to be passed or approved is not prerequisite to application of act, as against ex post facto condemnation. D.C. Code §§ 22-1801, 22-1801(a), 22-2901; 1 U.S.C. § 112; U.S. Const. art. 1, § 9, cl. 3. *United States v. Casson*, 434 F.2d 415, 1970 U.S. App. LEXIS 10177 (C.A.D.C. 1970).

Statute providing increased punishment for acts committed "prior to the date of enactment of this Act" was not on its face ex post facto. D.C. Code §§ 22-1801, 22-1801(a), 22-2901; U.S. Const. art. 1, § 9, cl. 3. *United States v. Casson*, 434 F.2d 415, 1970 U.S. App. LEXIS 10177 (C.A.D.C. 1970).

Validity of related laws.

The statute of prohibiting possession of implements of crime is unconstitutional in its application to crowbars. D.C. Code 1951, § 22-3601. *Washington v. U.S.*, 232 F.2d 357, 1956 U.S. App. LEXIS 3032 (C.A.D.C. 1956).

Verdict and findings of fact.

Jury was not entitled to find that there was unlawful entry without breaking if it found beyond reasonable doubt that after entering the premises lawfully, defendant formed the intent to steal and remained on the premises after closing time to carry out the purpose; it was necessary that the act of entering coincided, in point of time, with intent to commit any criminal offense. D.C. Code § 22-1801(b). *United States v. Cooper*, 473 F.2d 95, 1972 U.S. App. LEXIS 6815 (C.A.D.C. 1972).

Verdicts acquitting defendant of larceny while convicting him of burglary were not factually inconsistent in prosecution in which officer testified that he found defendant in looted store holding cigarettes. D.C. Code § 22-1801(b). *United States v. Fox*, 433 F.2d 1235, 1970 U.S. App. LEXIS 8426 (C.A.D.C. 1970).

Verdict was equivocal in case where defendant was charged with housebreaking and jury was instructed on elements of both housebreaking and on lesser included offense of unlawful entry and returned one word verdict of "guilty" without specifying to which offense this finding related, and conviction for housebreaking could not be founded upon it. D.C. Code §§ 22-1801, 22-3102; Fed.Rules Crim.Proc. rule 31(c), 18 U.S.C. Glenn v. *United States*, 420 F.2d 1323, 1969 U.S. App. LEXIS 11398 (C.A.D.C. 1969).

Fact that defendant was acquitted on charge of burglarizing a liquor store in a riot district did not establish that jury accepted defendant's testimony that he did not enter store, thereby making it error for trial court to interpret anti-riot statute as permitting jury to find defendant guilty of engaging in a riot, since, absent an instruction to effect that jury should acquit defendant of riot count if it accepted his testimony as true, it was impossible to make any assumption as to precisely how jury viewed facts. D.C. Code §§ 22-1122(a, c), 22-1801(b). *United States v. Matthews*, 419 F.2d 1177, 1969 U.S. App. LEXIS 10118 (C.A.D.C. 1969).

Conviction of second-degree burglary was permissible, even if inconsistent with verdict acquitting defendant on charge of destruction of property arising out of same incident. D.C. Code 1981, §§ 22-103, 22-403, 22-1801(b). *Freeman v. United States*, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

Where trial court made special findings of fact that defendant and accomplices entered victim's premises by forcing back window with intent to commit larceny, that they removed television, radio, tape recorders, and bedspread from premises, that such items had market value of \$560, and that such items were taken with intent to permanently deprive rightful owner thereof, trial court's special findings adequately covered each element of offenses of burglary and grand larceny, and trial court was not further required to make special findings as to witness' testimony. D.C. Code §§ 22-1801(b), 22-2201; D.C. Code SCR, Juvenile Rule 31(a). *In re R.D.J.*, 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

Where evidence in burglary prosecution is sufficient to justify a reasonable inference that the requisite intent to steal existed, reviewing court will not disturb verdict if it otherwise meets the required standards. D.C. Code § 22-1801. *Massey v. United States*, 320 A.2d 296, 1974 D.C. App. LEXIS 225 (1974).

Trier of fact could have found defendant, who left apartment building carrying stolen goods which he later abandoned when he attempted to flee, guilty of both attempted burglary and petit larceny charges on inference of guilt raised by defendant's unexplained possession of recently stolen property or could have had a reasonable doubt that defendant had necessary criminal intent upon entering apartment building to be convicted of attempted burglary, and thus verdicts of acquittal on attempted burglary charge and guilty on petit larceny charge were not necessarily irreconcilable. D.C. Code §§ 22-103, 22-1801(b), 22-2202. *Barnes v. United States*, 254 A.2d 724, 1969 D.C. App. LEXIS 258 (App. 1969).

Weight and sufficiency of evidence.

— Arson offenses, weight and sufficiency of evidence.

Evidence was not sufficient to support convictions for arson, second-degree burglary while armed with a Molotov cocktail and possession of a Molotov cocktail. D.C. Code §§ 22-401, 22-1801(b), 22-3202, 22-3215a. *United States v. Carter*, 522 F.2d 666, 1975 U.S. App. LEXIS 13956 (C.A.D.C. 1975).

— Assault and battery, weight and sufficiency of evidence.

Evidence was sufficient to support convictions of first-degree burglary and of assault with a deadly weapon despite claim that, absent corroborating evidence, testimony of complaining witness alone could not support findings of guilt. D.C. Code §§ 22-502, 22-1801(a). *United States v. Carmichael*, 469 F.2d 937, 1972 U.S. App. LEXIS 7118 (C.A.D.C. 1972).

Evidence sustained conviction on three-count indictment charging housebreaking, robbery and assault with intent to commit robbery. D.C. Code 1961, §§ 22-501, 22-1801, 22-2901. *Martin v. United States*, 314 F.2d 266, 1963 U.S. App. LEXIS 6332 (C.A.D.C. 1963).

Intent to commit assault is rarely capable of direct proof in a prosecution for burglary with intent to commit assault, and, unless it is admitted by the accused, it typically must be shown by circumstantial evidence. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Testimony of robbery victims was sufficient proof that defendant carried a pistol, and, as it was reasonable to assume that pistol directed at victims in a menacing manner was loaded and operable, there was sufficient evidence that pistol involved in armed burglary, robbery and assaults was in fact operable. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3204. *Morrison v. United States*, 417 A.2d 409, 1980 D.C. App. LEXIS 324 (1980).

Although primarily circumstantial, the evidence was sufficient to establish beyond a rea-

sonable doubt defendants' guilt of murder, assault, armed robbery, burglary and conspiracy. D.C. Code §§ 22-105a, 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

— Attempts, weight and sufficiency of evidence.

Evidence that defendant had been seen trying to break into a parking meter was insufficient to support conviction for attempted breaking and entering of a parking meter, absent evidence that defendant lacked authority to open the meter. D.C. Code 1981, §§ 22-103, 22-3427. *Bolan v. United States*, 587 A.2d 458, 1991 D.C. App. LEXIS 50 (1991).

In prosecution for attempted second-degree burglary, evidence that defendants for over an hour cased a store which carried valuable stereo components, attempted to loosen security grating, cut telephone cables behind building, broke window at front of store, and walked quickly away when alarm began to sound was sufficient to show both that defendants were not the owners of the store and did not have right to break and enter in the middle of the night, and to show intent to steal. D.C. Code 1981, §§ 22-103, 22-1801(b). *Douglas v. United States*, 570 A.2d 772, 1990 D.C. App. LEXIS 34 (1990).

Testimony of police officer and witness that they saw and heard defendant in the act of trying to break into house was sufficient to sustain conviction for attempted second-degree burglary. D.C. Code 1981, §§ 22-103, 22-1801(b). *Freeman v. United States*, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

In prosecution for attempted burglary in the second degree and attempted petit larceny, evidence, both direct and circumstantial, was sufficient to sustain convictions. D.C. Code 1981, §§ 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

If defendants had several motives for firing weapons into the door of the house and if one of those motives was to gain entry into the house, that would be sufficient evidence to prove attempted first-degree burglary while armed. D.C. Code §§ 22-1801(a), 22-3202. *Harris v. United States*, 373 A.2d 590, 1977 D.C. App. LEXIS 475 (1977).

Evidence was sufficient to support conviction for attempted burglary in the second degree of defendant who was found by police officers in building next to building which had been scene of prior attempted break-in and which had bricks contiguous to upstairs room on side of party wall having been removed and whose trousers had dust on them matching dust in

broken wall which had additional bricks removed after the prior break-in. *Valentino v. United States*, 296 A.2d 173, 1972 D.C. App. LEXIS 278 (1972).

Evidence that defendant was standing in front of a broken window of store that was being burglarized by two other men, one of whom had a casual acquaintance with defendant, while perhaps raising a possibility or even strong suspicion of participation in criminal activity, was not sufficient to find defendant guilty beyond a reasonable doubt of attempted burglary in the second degree and of attempted petit larceny. D.C. Code §§ 22-103, 22-1801(b), 22-2202. *Perry v. United States*, 276 A.2d 719, 1971 D.C. App. LEXIS 312 (1971).

Evidence that defendant and his companion were the only people in hall near apartment when witness alighted from elevator after hearing suspicious noises, that door to witness' apartment had large hole in it and that defendant's companion dropped screwdriver while being followed was sufficient to support conclusion of guilt beyond reasonable doubt of attempted burglary II and destruction of property. D.C. Code §§ 22-103, 22-403, 22-1801(b). *Hopkins v. United States*, 274 A.2d 418, 1971 D.C. App. LEXIS 281 (1971).

Evidence including testimony identifying defendant as one of two men attempting to pry open window with crowbar was sufficient to sustain convictions for attempted second-degree burglary, destroying property and attempted petit larceny. D.C. Code §§ 22-103, 22-403, 22-1801(b). *Manning v. United States*, 270 A.2d 504, 1970 D.C. App. LEXIS 357 (App. 1970).

Evidence that defendant's fingerprints were on top of paper bag which contained burglary tools and which was found beside broken skylight over store, that area was generally inaccessible to public, and that bag was dry although roof was damp warranted conviction for attempted store breaking. D.C. Code § 22-103. *Patten v. U.S.*, 248 A.2d 182, 1968 D.C. App. LEXIS 223 (App. 1968).

Evidence that tenant of apartment heard what sounded like someone attempting to enter vacant apartment and that defendant and companion were seen leaving building and fled when pursued by officer was sufficient to sustain conviction of attempted housebreaking. D.C. Code §§ 22-103, 22-1801. *Adams v. United States*, 245 A.2d 640, 1968 D.C. App. LEXIS 205 (App. 1968).

Evidence of defendants' physical and chronological proximity to scene of housebreaking, and their leaving at a trot, was insufficient to sustain conviction for attempted housebreaking and petit larceny. D.C. Code 1961, §§ 22-103, 22-2202. *Davis v. United States*, 230 A.2d 485, 1967 D.C. App. LEXIS 168 (App. 1967).

Evidence was sufficient to sustain conviction for attempted housebreaking. D.C. Code 1961, §§ 22-103, 22-1801. *Hart v. United States*, 187 A.2d 329, 1963 D.C. App. LEXIS 175 (App. 1963).

— Breaking and entry, weight and sufficiency of evidence.

Evidence, including evidence that defendant was discovered by occupant of home about halfway through window, sustained conviction for unlawful entry. D.C. Code § 22-3102. *United States v. Thomas*, 444 F.2d 919, 1971 U.S. App. LEXIS 10575 (C.A.D.C. 1971).

Evidence that the staple holding the lock on prosecuting witness' garage had been pulled, that defendants were in the garage about 7 o'clock in the morning, and when another witness questioned them as to what they were doing they got into a waiting automobile and drove away without making any response, held to support a conviction of feloniously entering with intent to commit larceny. *Cady v. U.S.*, 293 F. 829, 1923 U.S. App. LEXIS 1681 (1923).

Evidence sustained defendant's conviction of housebreaking and petit larceny. D.C. Code 1951, § 22-1801. *U.S. v. Naples*, 192 F.Supp. 23, 1961 U.S. Dist. LEXIS 3087 (D.D.C.1961).

Evidence was sufficient to show that defendant entered apartment when any person was in any part of apartment, as second element of first-degree burglary; victim testified that she entered her apartment from hallway and that defendant approached behind her and pushed his way inside, and thus victim was inside apartment when defendant entered. *Bodrick v. United States*, 892 A.2d 1116, 2006 D.C. App. LEXIS 80 (2006).

Evidence supported finding of "entry" within meaning of burglary statute; defendant reached through security gate to open wooden door, with her hand then penetrating the dwelling, defendant reached hand through open space in gate with antifreeze jug in it to pour fluid contained in it onto kitchen floor, and jury could permissibly infer that when defendant threw two other bottles into kitchen, defendant reached her hand through open space in security gate to do so. *Davis v. United States*, 712 A.2d 482, 1998 D.C. App. LEXIS 77 (1998).

Evidence that defendant had worked for victims as a repairman and had access to their house, that victims' stereo equipment was stolen after defendant left the job, and that defendant's fingerprint was found on turntable dust cover was insufficient to support convictions for burglary and grand larceny, absent evidence that the entry was not forced. *Rhyne v. United States*, 492 A.2d 596, 1985 D.C. App. LEXIS 395 (1985).

— Character and ownership of premises, weight and sufficiency of evidence.

In prosecution for housebreaking and larceny, evidence was sufficient to establish corpo-

rate character of occupant of property entered and owner of property stolen. D.C. Code 1940, §§ 22-1801, 22-2201, 22-2202. *Bord v. U.S.*, 133 F.2d 313, 1942 U.S. App. LEXIS 2501 (1942).

Evidence was sufficient to support finding that apartment, rather than being a mere base for prostitution, was "dwelling, or room used as a sleeping apartment" within meaning of burglary statute. D.C. Code 1981, § 22-1801(a). *Newman v. United States*, 705 A.2d 246, 1997 D.C. App. LEXIS 189 (1997).

— Drug offenses, weight and sufficiency of evidence.

Evidence sustained conviction for burglary and possession of illegally acquired narcotic drugs, but did not sustain conviction for possessing drugs in quantity greater than 25 grains, despite state chemist's testimony that, while bottle label indicated that content was 25 grains, analysis of sample tablets indicated that each tablet contained slightly more codeine than manufacturer represented. Code 1950, §§ 54-488, 54-516. *Fierst v. Commonwealth*, 210 Va. 757, 173 S.E.2d 807, 1970 Va. LEXIS 196 (1970).

— Grade or degree of offense, weight and sufficiency of evidence.

Testimony by store manager as to retail value of items stolen from store provided sufficient evidence of value to support defendant's conviction for grand larceny. D.C. Code 1981, § 22-2201 (repealed). *Ross v. United States*, 520 A.2d 1064, 1987 D.C. App. LEXIS 285 (1987).

Evidence was sufficient to establish value of stolen property so as to support a conviction for grand larceny and so as to make an instruction on petit larceny unnecessary. D.C. Code § 22-2201. *Roldan v. United States*, 353 A.2d 292, 1976 D.C. App. LEXIS 484 (1976).

Evidence that value of items stolen by defendant and accomplices was based on estimate of current market value and not original cost was sufficient to support defendant's conviction for grand larceny. D.C. Code §§ 22-1801(b), 22-2201. *In re R.D.J.*, 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

— Homicide, weight and sufficiency of evidence.

Evidence was sufficient to support defendant's convictions for first-degree murder while armed, assault with intent to kill while armed, armed robbery, conspiracy to commit armed robbery, and first-degree burglary while armed; according to driver of get-away vehicle, defendant struggled to open stolen safe in vehicle following murders and made statement about apparent contents of safe, and other witnesses testified that defendant ran to vehicle from victims' house with codefendant, that defendant helped count out money, drugs, and other items found in safe, and that defendant ultimately

took his own share, including a diamond ring which he was seen wearing shortly after the murders. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Evidence that defendant aided and abetted codefendant in crime of robbing decedent and burglarizing her home was sufficient to sustain conviction of felony-murder. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

In prosecution for first-degree premeditated murder, felony-murder, and first-degree burglary, evidence on issues of intent and premeditation and deliberation sustained defendant's conviction. D.C. Code §§ 22-1801(a), 22-2401. *Blango v. United States*, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

Testimony that decedent told police officer that he had attempted to close the door to his house "as the man pulled the gun out and started in the house" and evidence that defendants and their colleagues were out to "get" an alleged rapist and wanted to find and beat up the alleged rapist was sufficient to show an attempted burglary as the felony underlying charge of felony murder. D.C. Code §§ 22-1801(a), 22-2401, 22-3202. *Blango v. United States*, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

— Identification of persons or things, weight and sufficiency of evidence.

Evidence, including evidence that defendant's fingerprints were found on both sides of pane of glass removed from back door to apartment and that prints were found on surface of glass covered by molding strips which secured window in door, were sufficient to sustain determination that defendant was person who entered complainant's apartment. *United States v. Cary*, 470 F.2d 469, 1972 U.S. App. LEXIS 6887 (C.A.D.C. 1972).

Defendant's conviction for housebreaking could not be predicated on fingerprints removed from objects in home in absence of evidence indicating that such objects were generally inaccessible to defendant because of custody or location of objects prior to crime. *Borum v. U.S.*, 380 F.2d 595, 1967 U.S. App. LEXIS 6319 (C.A.D.C. 1967).

Evidence, including disclosures that defendants' known fingerprints matched prints removed from objects in home in which robbery took place and that defendants had no legitimate access to the home, supported convictions for housebreaking and robbery. 18 U.S.C. §§ 533, 534. *Borum v. U.S.*, 380 F.2d 595, 1967 U.S. App. LEXIS 6319 (C.A.D.C. 1967).

Where theater was entered and money and property stolen therefrom and on same night

adjoining flower shop was entered and money stolen therefrom, it could reasonably be inferred that the man who stole from the theater also stole from the flower shop. D.C. Code 1940, §§ 22-1801, 22-2201, 22-2202. *Bord v. U.S.*, 133 F.2d 313, 1942 U.S. App. LEXIS 2501 (1942).

In prosecution for housebreaking and larceny, evidence was sufficient to sustain determination that defendant was one of men who entered building and committed larceny. D.C. Code 1940, §§ 22-1801, 22-2201, 22-2202. *Bord v. U.S.*, 133 F.2d 313, 1942 U.S. App. LEXIS 2501 (1942).

Absence of reasonable explanation as to why defendant was on government property at two o'clock in the morning, wearing working gloves, and ran when accosted by police officer, together with evidence that he was acquainted with other person in automobile at scene and in which burglary tools were found, sustained finding that defendant was guilty of breaking and entering. *United States v. Mullen*, 278 F. Supp. 410, 1967 U.S. Dist. LEXIS 7422 (1967), affirmed by 416 F.2d 456, 1969 U.S. App. LEXIS 10483 (4th Cir. Va. 1969).

Evidence was sufficient to convict defendant of first-degree burglary; police officer identified defendant as the person he saw in the victims' apartment, other officer testified that he saw defendant on a fire escape and that defendant appeared nervous when stopped, and defendant's fingerprints were found on one victim's key chain. *Evans v. United States*, 883 A.2d 146, 2005 D.C. App. LEXIS 492 (2005), writ of certiorari denied by 549 U.S. 870, 127 S. Ct. 357, 166 L. Ed. 2d 121, 2006 U.S. LEXIS 6986, 75 U.S.L.W. 3168 (2006).

Defendants' convictions for second-degree burglary while armed, armed robbery, and possession of firearm during crime of violence were supported by witnesses' identifications and other evidence including kind of clothing worn by defendants and car they were driving when they were apprehended. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3202, 22-3204(b). *Gregg v. United States*, 754 A.2d 265, 2000 D.C. App. LEXIS 108 (2000), writ of certiorari denied by 531 U.S. 980, 121 S. Ct. 430, 148 L. Ed. 2d 438, 2000 U.S. LEXIS 7361, 69 U.S.L.W. 3316 (2000).

Lapse of 22 days between shooting and victim's identification of defendant as second gunman did not make identification so untrustworthy that evidence was insufficient to support convictions of first-degree burglary while armed and possession of firearm during crime of violence, where victim positively identified defendant at trial, victim testified that he saw faces of both intruders when they burst into his apartment and that daylight was coming in through window, crime took place in mid-morning, victim knew defendant for 10 years before shooting, victim was close to death

for several days, and victim first stated that there was second gunman day after shooting. D.C. Code 1981, §§ 22-1801(a), 22-3202, 22-3204(b). *Gethers v. United States*, 684 A.2d 1266, 1996 D.C. App. LEXIS 226 (1996), writ of certiorari denied by 520 U.S. 1180, 117 S. Ct. 1458, 137 L. Ed. 2d 562, 1997 U.S. LEXIS 2437, 65 U.S.L.W. 3693 (1997).

Burglary, destruction of property, and theft convictions were supported by evidence of defendant's unauthorized presence in building where crimes occurred shortly after police responded to burglary alarm, footprints, burglary tools, damage done, and evasive actions of defendant upon seeing police. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-3811, 22-3812(b). *Wright v. United States*, 637 A.2d 95, 1994 D.C. App. LEXIS 11 (1994).

Victim's statements that defendant "looks very familiar," "looks just like somebody I have seen in the neighborhood," and "looks just like" young man with whom she had once spoken in front of her house about a doctor's office were not probative of defendant's guilt of burglary and theft, where victim did not positively identify defendant as that young man, victim might have seen him in normal course of events because defendant lived in vicinity, encounter with someone who looked like defendant was not perceptively suspicious, and there was nothing else about encounter connected with burglary. In re J.C.M., 502 A.2d 472, 1985 D.C. App. LEXIS 570 (1985).

Evidence consisting of defendant's latent fingerprints recovered from can of air freshener found near point of unlawful entry into victim's residence was insufficient to support defendant's conviction for burglary and theft; government failed to negate most reasonable, innocent explanation for presence of defendant's fingerprints on can, that is, that before victim recently purchased can, and thus before date of burglary, defendant had touched it while shopping at store closest to neighborhood where both defendant and victim lived. In re J.C.M., 502 A.2d 472, 1985 D.C. App. LEXIS 570 (1985).

Evidence was sufficient to identify defendant in attempted second-degree burglary trial, where both police officer and witness positively identified defendant and where defendant was never out of officer's sight from the time defendant left site of attempted burglary until defendant was arrested moments later. *Freeman v. United States*, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

In prosecution for first-degree premeditated murder, felony-murder and first-degree burglary, identification evidence sustained defendant's conviction. D.C. Code §§ 22-1801(a), 22-2401. *Blango v. United States*, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

In proceeding in which accused was convicted of burglary and grand larceny and in which accused's fingerprint in burglarized house was assertedly the only evidence linking accused to the offenses, evidence satisfied government's burden of negating the most reasonable explanations under which such fingerprint evidence would be consistent with innocence and of showing that fingerprint was made during commission of the offenses. *In re M.M.J.*, 341 A.2d 421, 1975 D.C. App. LEXIS 410 (1975).

Evidence, in prosecution for burglary of jewelry store, was sufficient to support conviction of defendant who, at 4:00 a. m., was seen by officers hastily running from window in vacant building through which burglars had gained access to jewelry store and who was apprehended in the possession of several pieces of jewelry, all identified as having been taken from the store. D.C. Code § 22-1801(b). *Manago v. United States*, 331 A.2d 335, 1975 D.C. App. LEXIS 310 (1975).

Defendant's convictions of first-degree burglary, grand larceny, and malicious destruction of property were not supported by sufficient evidence, where, despite the complainant's testimony that he was able to identify defendant at showup because the image of defendant's face was implanted on his mind, the complainant was unable to identify defendant at trial, where his opportunity to observe the burglars was brief, where he saw them at night under artificial light, where his nearest observation of them was when they were running and 17 feet away, and where there was a significant discrepancy in almost all respects between the description given by complainant to the police and defendant's actual description, both physically and in respect to clothing. D.C. Code §§ 22-403, 22-1801, 22-2201. *Crawley v. United States*, 320 A.2d 309, 1974 D.C. App. LEXIS 224 (1974).

Evidence that fingerprints of defendant appeared on glass surface, which had once been outside surface of drugstore entrance was insufficient to sustain conviction of attempted housebreaking, destroying property, and petit larceny. D.C. Code §§ 22-103, 22-403, 22-2202. *Townsend v. United States*, 236 A.2d 63, 1967 D.C. App. LEXIS 212 (App. 1967).

— In general.

Evidence, including eyewitness testimony, was sufficient to sustain conviction of second-degree burglary and grand larceny. D.C. Code §§ 22-1801(b), 22-2201. *United States v. Rosebar*, 463 F.2d 1255, 1972 U.S. App. LEXIS 9684 (C.A.D.C. 1972).

Evidence, including evidence that, at time stores in neighborhood were being looted, defendant was found by officer in store with broken window and that defendant dropped cartons of cigarettes, sustained burglary con-

viction. D.C. Code § 22-1801(b). *United States v. Fox*, 433 F.2d 1235, 1970 U.S. App. LEXIS 8426 (C.A.D.C. 1970).

Evidence of eyewitness, corroborated by physical details otherwise in evidence, supported verdicts finding defendants guilty of first-degree murder and housebreaking. D.C. Code 1961, §§ 22-1801, 22-2401. *Brown v. United States*, 375 F.2d 310, 1966 U.S. App. LEXIS 3854 (C.A.D.C. 1966), writ of certiorari denied by 388 U.S. 915, 87 S. Ct. 2133, 18 L. Ed. 2d 1359, 1967 U.S. LEXIS 1180 (1967).

Evidence was sufficient to sustain conviction for housebreaking, larceny and destroying movable property. D.C. Code 1951, §§ 22-403, 22-1801, 22-2201, 22-2202. *Braddy v. U.S.*, 225 F.2d 551, 1955 U.S. App. LEXIS 4229 (C.A.D.C. 1955).

Charge of breaking into building may be founded on circumstantial evidence. *United States v. Mullen*, 278 F. Supp. 410, 1967 U.S. Dist. LEXIS 7422 (1967), affirmed by 416 F.2d 456, 1969 U.S. App. LEXIS 10483 (4th Cir. Va. 1969).

Actions of defendant and companion in hurriedly leaving area of burglary where victim had seen two men run from her house, together with recovery of stolen items from companion's possession, were sufficient to support defendant's conviction for burglary. *McFerguson v. United States*, 770 A.2d 66, 2001 D.C. App. LEXIS 59 (2001), remanded sub nomine *Worthington v. United States*, 805 A.2d 929, 2002 D.C. App. LEXIS 496 (D.C. 2002).

Evidence that defendants were at underground subway station at which farecard machine had been broken into, that defendants had tried to escape upon being discovered by police officer, that clothing found in pickup truck driven by one defendant matched clothing officer had identified as worn by man she had seen at top of escalator at station, that 27 empty coin wrappers were also found in the truck, together with evidence that disproved one defendant's alibi defense and other defendant's inconsistent statements which undermined his own alibi defense, was sufficient to sustain conviction for second-degree burglary of underground subway station. D.C. Code 1981, § 22-1801(b). *Swinson v. United States*, 483 A.2d 1160, 1984 D.C. App. LEXIS 529 (1984).

Testimony that witness observed defendants intermittently for approximately 30 minutes as they carried victim's belongings from her apartment, that he had known defendants for "a good little while," and that hallway in which he observed them had "very clear" lighting, was sufficient for a reasonable juror to conclude beyond a reasonable doubt that defendants committed burglary. *Swinson v. United States*, 483 A.2d 1160, 1984 D.C. App. LEXIS 529 (1984).

Evidence that victim saw defendant standing in neighbor's yard and shortly thereafter heard sound of breaking glass in her basement, and that police officers discovered defendant inside victim's house, though circumstantial, was sufficient to support conviction for first-degree burglary with intent to steal. *Wheeler v. United States*, 470 A.2d 761, 1983 D.C. App. LEXIS 547 (1983).

Evidence, including circumstantial evidence linking a defendant to the events occurring in jewelry business offices on date in question, was sufficient to sustain his conviction of second-degree burglary of such offices while armed. D.C. Code 1981, §§ 22-1801, 22-3202. *Lee v. United States*, 454 A.2d 770, 1982 D.C. App. LEXIS 511 (1982), writ of certiorari denied by 464 U.S. 972, 104 S. Ct. 409, 78 L. Ed. 2d 349, 1983 U.S. LEXIS 2324, 52 U.S.L.W. 3368 (1983).

Evidence was sufficient to support conviction of defendant, who was found shortly after burglary crouched in stairwell of adjoining house, of burglary in second degree. D.C. Code 1981, § 22-1801(b). *Dyson v. United States*, 450 A.2d 432, 1982 D.C. App. LEXIS 422 (1982).

Evidence consisting of defendant's confessions and corroborative evidence was sufficient to sustain convictions of second-degree burglary, attempted second-degree burglary, and two counts of petit larceny. D.C. Code 1973, §§ 22-103, 22-1801(b), 22-2202; U.S. Const. Amend. 4. *Wilkerson v. United States*, 432 A.2d 730, 1981 D.C. App. LEXIS 316 (1981), writ of certiorari denied by 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628, 1981 U.S. LEXIS 4758, 50 U.S.L.W. 3447 (1981).

Burglary conviction was sustained by evidence including testimony that defendant and codefendant were first seen about five feet from place of breaking and entry, in the middle of the night, that bags which appeared to have been hastily filled with merchandise were there, that officers saw defendant and codefendant running side by side and testimony that defendant gave two conflicting explanations for his presence at scene together with evidence that defendant as retail dealer had recently purchased goods from the burglarized wholesale firm which had then refused him more credit and that goods stolen would have had actual value only to one in retail business. D.C. Code § 22-1801(b). *Forsyth v. United States*, 318 A.2d 292, 1974 D.C. App. LEXIS 414 (1974).

Evidence, including testimony that burglar did not leave victim's porch until victim's house was cordoned off by police and that defendant was concealing himself at about 4:00 in the morning in basement entrance of the house and was equipped with gloves, screwdriver and flashlight, was sufficient to establish that defendant was in fact the intruder and was sufficient to support second-degree burglary conviction.

D.C. Code § 22-1801(b). *Johnson v. United States*, 293 A.2d 269, 1972 D.C. App. LEXIS 226 (1972).

— Intent, weight and sufficiency of evidence.

Proof that accused entered premises armed and disguised as woman and accompanied by another man who also carried concealed firearm, that they both obtained consent to their entry under pretext and, as soon as money appeared on game table, accused and his companion whipped out their guns, robbed occupants and fled sustained finding that, when accused entered apartment, he possessed criminal intent required by District of Columbia first-degree burglary statute. D.C. Code § 22-1801(a). *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Fact that defendant assaulted girl in her home after illegal entry of home by him was completed did not preclude a jury finding in prosecution for housebreaking with intent to steal that original intent of defendant had been to steal, where there was no showing that defendant, before entering the home, had been aware of the presence of the girl therein, and defendant offered no evidence tending to suggest that he lacked motive for theft. *Washington v. U.S.*, 263 F.2d 742, 1959 U.S. App. LEXIS 4386 (C.A.D.C. 1959).

Evidence was sufficient to show that defendant entered apartment with intent to assault victim, as third element of first-degree burglary; defendant committed an assault upon pushing his way into apartment, and reasonable jurors could infer that he did so with intent to assault victim. *Bodrick v. United States*, 892 A.2d 1116, 2006 D.C. App. LEXIS 80 (2006).

Evidence in prosecution for burglary with intent to commit assault supported finding that defendant possessed such intent when he entered victims' house; evidence showed that defendant told his companions that he planned to collect on debt from victim, that defendant suggested possibility of violence when he told companion that "no one would get hurt if [companion] just did [what] he asked [companion] to do," and it also showed that defendant went to victims' house brandishing gun. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Defendant's repeated threats toward people in house were sufficient to allow jury to infer that defendant intended to start a fire and injure the occupants, so as to permit conviction for first-degree burglary while armed. *Davis v. United States*, 712 A.2d 482, 1998 D.C. App. LEXIS 77 (1998).

Evidence was sufficient to support armed burglary conviction, despite defendant's contention that government failed to prove a burglary because it did not establish that he or any

of his three companions had the requisite intent to steal, or to commit an assault, at time they entered victims' apartment; fact that defendant actually committed an assault very soon after he was inside apartment was strong circumstantial evidence that he intended to commit an assault at the time he entered, and fact that the four men gained entrance to the apartment by a ruse, rather than by force, also supported finding of intent to assault. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Evidence that defendant in fact committed assault soon after entering estranged wife's home and that, when estranged wife banged on wall, defendant warned her to stop knocking because if anyone came out of the neighboring house, "they gonna get hurt too" supported finding that defendant entered home with intent to commit assault, and thus supported conviction of first-degree burglary. D.C. Code 1981, § 1801(a). *Bowman v. United States*, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

Intent to commit crime therein, as required for burglary conviction, is rarely capable of direct proof. D.C. Code 1981, § 22-1801(a). *Bowman v. United States*, 652 A.2d 64, 1994 D.C. App. LEXIS 250 (1994).

"Intent to assault" victim when entering her apartment, as needed to support first-degree burglary conviction, was established by evidence that defendant used ruse to lure victim back into apartment, locked door behind him after entering, carried large butcher knife hidden in clothing, and no prolonged discussion occurred prior to attack. D.C. Code 1981, § 22-1801(a). *McKinnon v. United States*, 644 A.2d 438, 1994 D.C. App. LEXIS 100 (1994), writ of certiorari denied by 513 U.S. 1005, 115 S. Ct. 523, 130 L. Ed. 2d 428, 1994 U.S. LEXIS 8113, 63 U.S.L.W. 3386 (1994).

Entering victim's occupied dwelling while carrying weapon for purpose of confronting victim established intent needed to convict for first-degree burglary while armed. D.C. Code 1981, § 22-1801(a). *McKinnon v. United States*, 644 A.2d 438, 1994 D.C. App. LEXIS 100 (1994), writ of certiorari denied by 513 U.S. 1005, 115 S. Ct. 523, 130 L. Ed. 2d 428, 1994 U.S. LEXIS 8113, 63 U.S.L.W. 3386 (1994).

Evidence sustained defendant's conviction for armed second-degree burglary; jury could conclude beyond reasonable doubt that defendant had requisite intent to commit offense when he entered premises. *McIntyre v. United States*, 634 A.2d 940, 1993 D.C. App. LEXIS 209 (1993).

Evidence that defendant and two others gained entrance to an apartment and that one of defendant's accomplices assaulted an occupant of the apartment was sufficient to support finding that defendant intended to commit crime inside apartment, for purposes of sup-

porting defendant's conviction for armed first-degree burglary; intent to assault had formed by time the three crossed threshold of apartment during initial entry. D.C. Code 1981, § 22-1801(a). *Marshall v. United States*, 623 A.2d 551, 1992 D.C. App. LEXIS 165 (1992).

Evidence that defendant had formed plan before going into house to take things therein and barter them for cocaine was sufficient to show that defendant entered apartment with intent to steal, for purposes of conviction for first-degree burglary. D.C. Code 1981, § 22-1801(a). *Byrd v. United States*, 618 A.2d 596, 1992 D.C. App. LEXIS 353 (1992).

"Other circumstances" supporting finding that defendant entered victim's home with aggressiveness and hostility needed to support burglary conviction existed where victim broke off personal relationship with defendant, defendant had prior assaultive conduct toward victim, defendant made aggressive and hostile display at victim's home in early morning hours before incident, defendant entered home without victim's permission, and initial assaults occurred very quickly after entering premises. D.C. Code 1981, § 22-1801(a). *Johnson v. United States*, 613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

Evidence that victim's former boyfriend smashed glass pane in door, unlocked door, and pursued victims through apartment while he held hatchet established intent to commit felony at moment of entry, and thus, supported conviction for first-degree burglary while armed. D.C. Code 1981, §§ 22-1801, 22-3202. *Kelly v. United States*, 590 A.2d 1031, 1991 D.C. App. LEXIS 110 (1991).

Specific intent in a burglary or attempted burglary case, unless admitted by defendant, must usually be proved by circumstantial evidence or by some statement that defendant makes at the time of the offense. D.C. Code 1981, § 22-1801(b). *Douglas v. United States*, 570 A.2d 772, 1990 D.C. App. LEXIS 34 (1990).

Evidence was sufficient to permit reasonable trier of fact to find that defendant had specific intent to steal when he entered dormitory room where evidence, including admission by defendant to police officer, indicated that defendant had stolen jewelry from another dormitory room on prior occasion, even though jury had acquitted defendant of earlier charge. *Williams v. United States*, 549 A.2d 328, 1988 D.C. App. LEXIS 191 (1988).

Evidence was insufficient to sustain burglary conviction; although evidence was sufficient to permit reasonable juror to find an unlawful entry, evidence was insufficient to support finding of specific intent to steal. *North v. United States*, 530 A.2d 1161, 1987 D.C. App. LEXIS 421 (1987).

Evidence was insufficient to sustain defendant's conviction for burglary while armed with

intent to commit assault, though he was armed with dangerous weapon at time he entered premises, committed assault while inside, and placed television set in bag while inside premises, where evidence could only support inference that defendant intended to use weapon if someone attempted to interfere with taking of property. *Warrick v. United States*, 528 A.2d 438, 1987 D.C. App. LEXIS 385 (1987).

Fact that defendant entered premises without permission to do so was not sufficient evidence of intention to steal, so as to sustain burglary conviction, in absence of other circumstances indicating such intent, but was sufficient to establish unlawful entry. D.C. Code 1981, §§ 22-1801, 22-3102. *Shelton v. United States*, 505 A.2d 767, 1986 D.C. App. LEXIS 283 (1986).

For purpose of first-degree burglary conviction, evidence that there was entry into victim's apartment, that victim was murdered in his apartment, that apartment was ransacked and many items of property were taken, combined with evidence of accused's possession of stolen property, was sufficient to establish requisite intent. D.C. Code 1981, § 22-1801(a). *Hawthorne v. United States*, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

In prosecution for burglary committed in hotel rooms, evidence supported conclusion that defendant intended to commit crime when he entered, despite fact that defendant was authorized to be in rooms to wash windows. (Per Ferren, J., with one Judge concurring in the result and one Judge dissenting.) D.C. Code 1973, §§ 22-1801, 22-1801(b). *Parker v. United States*, 449 A.2d 1076, 1982 D.C. App. LEXIS 414 (1982).

Evidence that defendants entered building and rooms with intent to commit criminal offense of robbery supported convictions of second-degree burglary. D.C. Code § 22-1801. *Jennings v. United States*, 431 A.2d 552, 1981 D.C. App. LEXIS 294 (1981), writ of certiorari denied by 457 U.S. 1135, 102 S. Ct. 2964, 73 L. Ed. 2d 1353, 1982 U.S. LEXIS 2703, 50 U.S.L.W. 3998 (1982).

Defendant's presence with murder victim in bank on morning of the murders, coupled with defendant's knowledge of victim's large collection of jewelry and coins, gave rise to inference that defendant and another party had entered apartment intending to steal; thus evidence was sufficient to establish intent requisite for conviction for burglary. *Byrd v. United States*, 388 A.2d 1225, 1978 D.C. App. LEXIS 483 (1978).

Circumstances which together with unauthorized presence in another's premises will support inference of entry with criminal purpose need not include the actual commission of a crime within the premises but are such as might lead reasonable people, based upon com-

mon experience, to conclude beyond a reasonable doubt that the accused possessed the requisite intent. D.C. Code§ 22-1801(a, b). *Massey v. United States*, 320 A.2d 296, 1974 D.C. App. LEXIS 225 (1974).

Under circumstances that defendant and co-defendants were observed in department store dressed in "stockroom jackets" of kind worn by store personnel, carrying shopping bags of kind commonly used by professional shoplifters and walking in areas of store where employees rather than customers would normally be, evidence concerning defendant's intent to commit crime at time of entry was sufficient to support conviction for second-degree burglary. D.C. Code § 22-1801(b). *Franklin v. United States*, 293 A.2d 278, 1972 D.C. App. LEXIS 400 (1972).

— Motor vehicle offenses, weight and sufficiency of evidence.

Evidence supported convictions for unauthorized use of murder victim's car, robbery of items from murder victim and burglary and theft of items from victim's apartment; defendant joined two others in victim's car, helped murder victim and took property from him and went to victim's home and removed two plastic bags of personal property belonging to victim. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b). *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

— Persons liable, weight and sufficiency of evidence.

Evidence was sufficient to establish defendant's guilty participation in crime of house-breaking and larceny. D.C. Code 1940, § 22-105. *Lanham v. U.S.*, 185 F.2d 435, 1950 U.S. App. LEXIS 3302 (C.A.D.C. 1950).

Evidence establishing defendant's proximity to scene of crime and stolen television set, his flight and attempt to hide from police, and when discovered, his statement to officer that he did not go in house but was with friend who did, supported conviction, as aider and abettor, of first-degree burglary, second-degree theft, and misdemeanor destruction of property. D.C. Code 1981, §§ 22-403, 22-1801(a), 22-3811, 22-3812. *Garrett v. United States*, 642 A.2d 1312, 1994 D.C. App. LEXIS 88 (1994).

Evidence in prosecution for attempted first-degree burglary while armed sustained defendant's conviction as aider and abettor. *Harris v. United States*, 377 A.2d 34, 1977 D.C. App. LEXIS 361 (1977).

— Possession of burglars' tools, weight and sufficiency of evidence.

Under statute providing that no person shall have in his possession any instrument, tool, or other implement for picking locks or pockets, or that is usually employed or reasonably may be

employed in commission of any crime, if he is unable satisfactorily to account for possession of implement, if order or demand was necessary, requirement was satisfied by evidence in prosecution thereunder. D.C. Code 1951, § 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

— **Possession of stolen property, weight and sufficiency of evidence.**

Jury was properly permitted to find guilty participation in burglary from defendant's exclusive possession of recently stolen property. D.C. Code § 22-1801(b). *United States v. Barlow*, 470 F.2d 1245, 1972 U.S. App. LEXIS 7354 (C.A.D.C. 1972).

Offer of defendant to sell goods, his leading prospective buyers to where they were stored, and his remaining with goods during an interval when others had departed, was sufficient evidence to allow jury to find that defendant was in possession of recently stolen property and to infer larceny and housebreaking. D.C. Code §§ 22-1801, 22-2201. *Garris v. United States*, 418 F.2d 467, 1969 U.S. App. LEXIS 12665 (C.A.D.C. 1969).

Testimony that defendant possessed stolen property near to time and place of theft authorized finding of guilt both of larceny and housebreaking. *Wood v. United States*, 344 F.2d 548, 1965 U.S. App. LEXIS 6266 (C.A.D.C. 1965).

The unexplained exclusive possession of stolen property, shortly after the commission of larceny, does not raise presumption of law that defendant committed larceny, but it may satisfy jury and warrant verdict of guilty. D.C. Code 1940, §§ 22-1801, 22-2201. *Wright v. U.S.*, 189 F.2d 699, 1951 U.S. App. LEXIS 3219 (C.A.D.C. 1951).

Where evidence showed that crimes of housebreaking and larceny were committed in store building by two men, defendant was found in unexplained association with another who later confessed participation in crimes and each was in possession of some of the stolen property, evidence was sufficient to justify conviction. *Edwards v. U.S.*, 139 F.2d 365, 1943 U.S. App. LEXIS 2287 (1943).

Convictions for second-degree burglary, first-degree theft, second-degree theft, and destruction of property valued at \$200 or more, on aiding and abetting theory, were supported by evidence that police officers had seen defendant standing in front of burglarized premises near time of burglary holding stolen bird bath. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-3811, 22-3812(a, b). *Wright v. United States*, 508 A.2d 915, 1986 D.C. App. LEXIS 321 (1986).

Unexplained or unsatisfactorily explained possession of stolen property cannot, by itself, give rise to inference that burglary was committed; by itself, such evidence gives rise only to inference that possessor stole property or

received stolen property. D.C. Code 1981, § 22-1801(a). *Hawthorne v. United States*, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

Before possession of stolen property can give rise to inference that possessor of such property entered with intent to steal property so as to commit burglary, there must also be some evidence of entry or other evidence calculated to place accused in premises in which theft occurred. D.C. Code 1981, § 22-1801(a). *Hawthorne v. United States*, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

Where there was no proof of burglary, possession of recently stolen property could not give rise to inference respecting commission by possessor of burglary. D.C. Code § 22-1801(b). *White v. United States*, 300 A.2d 716, 1973 D.C. App. LEXIS 233 (1973).

Where there was no evidence of a breaking or evidence placing defendant within building, fact that defendant was in possession of recently stolen goods belonging to business did not establish burglary II. D.C. Code § 22-1801(b). *White v. United States*, 300 A.2d 716, 1973 D.C. App. LEXIS 233 (1973).

Cigarettes found in defendants' possession, with same "wholesale numbers" as cigarettes left in store, but not otherwise identified as having come from store, had little, if any, probative value. D.C. Code 1961, § 22-103. *Davis v. United States*, 230 A.2d 485, 1967 D.C. App. LEXIS 168 (App. 1967).

Evidence, including evidence as to exclusive control or possession of television in defendant, sustained conviction for unlawful entry and petit larceny. D.C. Code 1961, §§ 22-2202, 22-3102. *Benbow v. United States*, 227 A.2d 772, 1967 D.C. App. LEXIS 145 (App. 1967).

— **Unauthorized entry, weight and sufficiency of evidence.**

In view of evidence that neither police officer nor anyone else had investigated to determine whether defendant was authorized to enter parking meters by District of Columbia government, officer's testimony "not to my knowledge," when asked whether defendant worked for District of Columbia government, was not sufficient to support a conviction for breaking and entering or taking property without right. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

— **Value of property, weight and sufficiency of evidence.**

Evidence that television set was purchased for \$160 and radio for approximately \$40 or \$50, and that both items were at least one to two years old and in good working condition, was insufficient to establish value in excess of \$100 at time of theft. D.C. Code § 22-2201. *Terrell v. United States*, 361 A.2d 207, 1976

D.C. App. LEXIS 348 (1976), writ of certiorari denied by 429 U.S. 984, 97 S. Ct. 501, 50 L. Ed. 2d 594, 1976 U.S. LEXIS 3743 (1976).

Expert testimony is not required to establish market value of items stolen. D.C. Code §§ 22-1801(b), 22-2201. *In re R.D.J.*, 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

— **Weapons, weight and sufficiency of evidence.**

Convictions for multiple charges arising out

of armed robbery of apartment building were supported by the identification of defendants by victims and police officers, and testimony that the defendants' weapons were operational. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(a, b), 22-3214(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

CHAPTER 8A. PROTECTION OF MINORS.

Sec.

22-811. Contributing to the delinquency of a minor.

§ 22-811. Contributing to the delinquency of a minor.

(a) It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to:

- (1) Be truant from school;
- (2) Possess or consume alcohol or, without a valid prescription, a controlled substance as that term is defined in § 48-901.02(4);
- (3) Run away for the purpose of criminal activity from the place of abode of his or her parent, guardian, or other custodian;
- (4) Violate a court order;
- (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience;
- (6) Join a criminal street gang as that term is defined in § 22-951(e)(1); or
- (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.

(b)(1) Except as provided in paragraphs (2), (4) and (5) of this subsection, a person convicted of violating subsection (a)(1)-(6) of this section shall be fined not more than \$1,000, or imprisoned for not more than 6 months, or both.

(2) A person convicted of violating subsection (a)(2)-(6) of this section, having previously been convicted of an offense under subsection (a)(2)-(6) of this section or a substantially similar offense in this or any other jurisdiction, shall be fined not more than \$3,000 or imprisoned for not more than 3 years, or both.

(3) Except as provided in paragraphs (4) and (5) of this subsection, a person convicted of violating subsection (a)(7) of this section shall be fined not more than \$5,000 or imprisoned for not more than 5 years, or both.

(4) A person convicted of violating subsection (a) of this section that results in serious bodily injury to the minor or any other person shall be fined not more than \$5,000 or imprisoned for not more than 5 years, or both.

(5) A person convicted of violating subsection (a) of this section that results in the death of the minor or any other person shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both.

(c) The penalties under this section are in addition to any other penalties permitted by law.

(d) It is not a defense to a prosecution under this section that the minor does not engage in, is not charged with, is not adjudicated delinquent for, or is not convicted as an adult, for any conduct set forth in subsection (a)(1)-(7) of this section.

(e) The Attorney General for the District of Columbia, or his or her assistants, shall prosecute a violation of subsection (a) of this section for which the penalty is set forth in subsection (c)(1) of this section.

(f) For the purposes of this section, the term:

(1) "Adult" means a person 18 years of age or older at the time of the offense.

(2) "Minor" means a person under 18 years of age at the time of the offense.

(Apr. 24, 2007, D.C. Law 16-306, § 103, 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) addition, see § 103 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

Legislative history of Law 16-306. — Law 16-306, the "Omnibus Public Safety Amendment Act of 2006", was introduced in Council and assigned Bill No. 16-247, which was re-

ferred to Committee on the Judiciary. The Bill was adopted on first and second readings on June 6, 2006, and October 3, 2006, respectively. Signed by the Mayor on October 17, 2006, it was assigned Act No. 16-482 and transmitted to both Houses of Congress for its review. D.C. Law 16-306 became effective on April 24, 2007.

CHAPTER 8B. PROTECTION OF DISTRICT PUBLIC OFFICIALS.

Sec.

22-851. Protection of District public officials.

§ 22-851. Protection of District public officials.

(a) For the purposes of this section, the term:

(1) “Family member” means an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.

(2) “Official or employee” means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.

(b) A person who corruptly or, by threat or force, or by any threatening letter or communication, intimidates, impedes, interferes with, or retaliates against, or attempts to intimidate, impede, interfere with, or retaliate against any official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both.

(c) A person who stalks, threatens, assaults, kidnaps, or injures any official or employee or vandalizes, damages, destroys, or takes the property of an official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than \$3,000 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.

(d) A person who stalks, threatens, assaults, kidnaps, or injures a family member or vandalizes, damages, destroys, or takes the property of a family member on account of the performance of the official or employee’s duties, shall be fined not more than \$3,000 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.

(Apr. 24, 2007, D.C. Law 16-306, § 106, 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) addition, see § 106 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 106 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 106 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 106 of Omnibus Public Safety Second Congressional

Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — Law 16-306, the “Omnibus Public Safety Amendment Act of 2006”, was introduced in Council and assigned Bill No. 16-247, which was referred to Committee on the Judiciary. The Bill was adopted on first and second readings on June 6, 2006, and October 3, 2006, respectively. Signed by the Mayor on October 17, 2006, it was assigned Act No. 16-482 and transmitted to both Houses of Congress for its review. D.C. Law 16-306 became effective on April 24, 2007.

CHAPTER 9. COMMERCIAL COUNTERFEITING.

Sec.
22-901. Definitions.

Sec.
22-902. Trademark counterfeiting.

§ 22-901. Definitions.

For the purposes of this chapter, the term:

(1) "Counterfeit mark" means:

(A) Any unauthorized reproduction or copy of intellectual property; or

(B) Intellectual property affixed to any item knowingly sold, offered for sale, manufactured, or distributed, or identifying services offered or rendered, without the authority of the owner of the intellectual property.

(2) "Intellectual property" means any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia.

(3) "Retail value" means the counterfeiter's regular selling price for the item or service bearing or identified by the counterfeit mark. In the case of items bearing a counterfeit mark which are components of a finished product, the retail value shall be the counterfeiter's regular selling price of the finished product on or in which the component would be utilized.

(June 3, 1997, D.C. Law 11-271, § 2, 43 DCR 4585.)

Prior Codifications. — 1981 Ed., § 22-751.

Legislative history of Law 11-271. — Law 11-271, the "Commercial Counterfeiting Criminalization Act of 1996," was introduced in Council and assigned Bill No. 11-660, which was referred to the Committee on the Judiciary.

The Bill was adopted on first and second readings on July 3, 1996, and July 17, 1996, respectively. Signed by the Mayor on July 26, 1996, it was assigned Act No. 11-362 and transmitted to both Houses of Congress for its review. D.C. Law 11-271 became effective on June 3, 1997.

§ 22-902. Trademark counterfeiting.

(a) A person commits the offense of counterfeiting if such person willfully manufactures, advertises, distributes, offers for sale, sells, or possesses with intent to sell or distribute any items, or services bearing or identified by a counterfeit mark. There shall be a rebuttable presumption that a person having possession, custody, or control of more than 15 items bearing a counterfeit mark possesses said items with the intent to sell or distribute.

(b) A person convicted of counterfeiting shall be subject to the following penalties:

(1) For the first conviction, except as provided in paragraphs (2) and (3) of this subsection, by a fine not exceeding \$1,000 or by imprisonment for not more than 180 days, or both;

(2) For the second conviction, or if convicted under this section of an offense involving more than 100 but fewer than 1,000 items, or involving items with a total retail value greater than \$1,000 but less than \$10,000, by a fine not exceeding \$3,000 or by imprisonment for not more than 3 years, or both; and

(3) For the third or subsequent conviction, or if convicted under this section of an offense involving the manufacture or production of items bearing counterfeit marks involving 1,000 or more items, or involving items with a total retail value of \$10,000 or greater, by a fine not exceeding \$10,000 or by imprisonment for not more than 10 years, or both.

(c) For the purposes of this chapter, the quantity or retail value of items or services shall include the aggregate quantity or retail value of all items bearing, or services identified by, every counterfeit mark the defendant manufactures, advertises, distributes, offers for sale, sells, or possesses.

(d) The fines provided in subsection (b) of this section shall be no less than 3 times the retail value of the items bearing, or services identified by, a counterfeit mark, unless extenuating circumstances are shown by the defendant.

(e) Any items bearing a counterfeit mark and all personal property, including, but not limited to, any items, objects, tools, machines, equipment, instrumentalities, or vehicles of any kind, employed or used in connection with a violation of this chapter shall be seized by any law enforcement officer, including any designated civilian employee of the Metropolitan Police Department, in accordance with the procedures established by § 48-905.02.

(1) All seized personal property shall be forfeited.

(2) Upon the request of the owner of the intellectual property, all seized items bearing a counterfeit mark shall be released to the intellectual property owner for destruction or disposition.

(3) If the owner of the intellectual property does not request release of seized items bearing a counterfeit mark, such items shall be destroyed unless the owner of the intellectual property consents to another disposition.

(f) Any state or federal certificate of registration of any intellectual property shall be prima facie evidence of the facts stated therein.

(g) The remedies provided for herein shall be cumulative to the other civil and criminal remedies provided by law.

(June 3, 1997, D.C. Law 11-271, § 3, 43 DCR 4585; June 12, 1999, D.C. Law 12-284, § 3, 46 DCR 1328.)

Prior Codifications. — 1981 Ed., § 22-752.

Temporary Amendment of Section. — Section 3 of D.C. Law 12-282 inserted “including any designated civilian employee of the Metropolitan Police Department” in the introductory language of (e).

Section 13(b) of D.C. Law 12-282 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 3 of the Metropolitan Police Department Civilianization and Street Solicitation for Prostitution Emergency Amendment Act of 1998 (D.C. Act 12-428, August 6, 1998, 45 DCR 5884).

For temporary amendment of section, see § 3 of the Metropolitan Police Department Civilianization Legislative Review Emergency Amendment Act of 1998 (D.C. Act 12-506, No-

vember 10, 1998, 45 DCR 45 8139), and § 3 of the Metropolitan Police Department Civilianization Congressional Review Emergency Amendment Act of 1999 (D.C. Act 13-13, February 8, 1999, 46 DCR 2333).

Legislative history of Law 11-271. — For legislative history of D.C. Law 11-271, see Historical and Statutory Notes following § 22-901.

Legislative history of Law 12-282. — Law 12-282, the “Metropolitan Police Department Civilianization Temporary Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-709. The Bill was adopted on first and second readings on July 7, 1998, and September 22, 1998, respectively. Signed by the Mayor, it was assigned Act No. 12-492 and transmitted to both Houses of Congress for its review. D.C. Law 12-282 became effective on May 28, 1999.

Legislative history of Law 12-284. — Law 12-284, the “Metropolitan Police Department Civilianization Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-710, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor, it was assigned Act No. 12-613 and transmitted to both Houses of Congress for its review. D.C. Law 12-284 became effective on June 12, 1999.

CHAPTER 9A. CRIMINAL ABUSE AND NEGLECT OF VULNERABLE ADULTS.

Sec.	Sec.
22-931. Short title.	22-934. Criminal negligence.
22-932. Definitions.	22-935. Exception.
22-933. Criminal abuse of a vulnerable adult.	22-936. Penalties.

§ 22-931. Short title.

This chapter may be cited as the “Criminal Abuse and Neglect of Vulnerable Adults Act of 2000”.

(June 8, 2001, D.C. Law 13-301, § 201, 47 DCR 7039.)

Legislative history of Law 13-301. — Law 13-301, the “Senior Protection Amendment Act of 2000”, was introduced in Council and assigned Bill No. 13-297, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 26, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 2, 2000, it was assigned Act No. 13-396 and transmitted to both Houses of Congress for its review. D.C. Law 13-301 became effective on June 8, 2001.

§ 22-932. Definitions.

For the purpose of this chapter “vulnerable adult” means a person 18 years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection.

(June 8, 2001, D.C. Law 13-301, § 202, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-931.

CASE NOTES

In general.

Evidence was sufficient to show that victim was a vulnerable adult, as required for conviction for criminal abuse of a vulnerable adult; victim was a 33-year old male who suffered

from a mental condition that prevented him from providing for his overall medical and personal care. *Poole v. United States*, 929 A.2d 413, 2007 D.C. App. LEXIS 470 (2007).

§ 22-933. Criminal abuse of a vulnerable adult.

A person is guilty of criminal abuse of a vulnerable adult if that person intentionally or knowingly:

- (1) Inflicts or threatens to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means;
- (2) Uses repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening; or
- (3) Imposes unreasonable confinement or involuntary seclusion, including but not limited to, the forced separation from other persons against his or her will or the directions of any legal representative.

(June 8, 2001, D.C. Law 13-301, § 203, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-931.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Weight and sufficiency of evidence.

Admissibility of evidence.

Trial court acted within its discretion at trial for criminal abuse of a vulnerable adult in finding that victim, who was a 33-year old male who suffered from a mental condition that prevented him from providing for his overall medical and personal care, understood his duty to tell the truth and had capacity to recall, albeit with difficulty, events surrounding charged incident, such that victim was competent to testify. *Poole v. United States*, 929 A.2d 413, 2007 D.C. App. LEXIS 470 (2007).

Trial court acted within its discretion at trial for criminal abuse of a vulnerable adult in refusing to allow defense counsel to recall victim for further cross examination, even though defense counsel sought to recall victim after a failed attempt to elicit from another witness a prior inconsistent statement that victim allegedly made about charged incident; defense counsel had a full opportunity to cross examine victim, in that defense counsel conducted a extensive cross examination of victim and inquired into events surrounding date of incident,

particularly about victim's alleged prior inconsistent statement. *Poole v. United States*, 929 A.2d 413, 2007 D.C. App. LEXIS 470 (2007).

Weight and sufficiency of evidence.

Evidence was sufficient to show that victim suffered physical pain and injury, as required for conviction for criminal abuse of a vulnerable adult; victim testified that defendant put his knee into victim's back in an attempt to restrain him, that defendant threatened to have him sent to a hospital if he reported defendant's use of force, and that he was hurt as a result of incident, and two employees of private group home where victim was living corroborated victim's testimony and testified that they each saw a contusion on victim's lip and an abrasion to his right knee. *Poole v. United States*, 929 A.2d 413, 2007 D.C. App. LEXIS 470 (2007).

Evidence was sufficient to show that infliction of physical pain and injury on victim was done by defendant knowingly and intentionally, as required for conviction for criminal abuse of a vulnerable adult; defendant forced victim to the ground, placed his knee into victim's back, and refused to let victim up despite his repeated requests. *Poole v. United States*, 929 A.2d 413, 2007 D.C. App. LEXIS 470 (2007).

§ 22-934. Criminal negligence.

A person who knowingly, willfully or through a wanton, reckless or willful indifference fails to discharge a duty to provide care and services necessary to maintain the physical and mental health of a vulnerable adult, including but not limited to providing adequate food, clothing, medicine, shelter, supervision and medical services, that a reasonable person would deem essential for the well-being of the vulnerable adult is guilty of criminal negligence.

(June 8, 2001, D.C. Law 13-301, § 204, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-931.

CASE NOTES

Weight and sufficiency of evidence.

Evidence was sufficient to support conviction for criminal neglect of a vulnerable adult; defendant, employed as caregiver at assisted living group home, engaged in a physical altercation with victim, an individual with severe retardation, and knew that altercation left victim with bruises and scratches, and victim's

visible injuries resulting from his encounter with defendant were noticeable to lay persons, and were of such severity that failure to report matter as administratively required constituted neglectful behavior of vulnerable adult. *Jackson v. United States*, 996 A.2d 796, 2010 D.C. App. LEXIS 273 (2010).

§ 22-935. Exception.

A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult.

(June 8, 2001, D.C. Law 13-301, § 205, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-931.

§ 22-936. Penalties.

(a) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable person shall be subject to a fine of up to \$1000, imprisoned for not more than 180 days, or both.

(b) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult which causes serious bodily injury or severe mental distress shall be subject to a fine of up to \$100,000, imprisoned up to 10 years, or both.

(c) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult which causes permanent bodily harm or death shall be subject to a fine of up to \$250,000, imprisoned up to 20 years, or both.

(June 8, 2001, D.C. Law 13-301, § 206, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-931.

CHAPTER 9B. GANGS.

Sec.

22-951. Criminal street gangs.

§ 22-951. Criminal street gangs.

(a)(1) It is unlawful for a person to solicit, invite, recruit, encourage, or otherwise cause, or attempt to cause, another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang.

(2) A person convicted of a violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than 6 months, or both.

(b)(1) It is unlawful for any person who is a member of or actively participates in a criminal street gang to knowingly and willfully participate in any felony or violent misdemeanor committed for the benefit of, at the direction of, or in association with any other member or participant of that criminal street gang.

(2) A person convicted of a violation of this subsection shall be fined not more than \$5,000 or imprisoned for not more than 5 years, or both.

(c)(1) It is unlawful for a person to use or threaten to use force, coercion, or intimidation against any person or property, in order to:

(A) Cause or attempt to cause an individual to:

(i) Join a criminal street gang;

(ii) Participate in activities of a criminal street gang;

(iii) Remain as a member of a criminal street gang; or

(iv) Submit to a demand made by a criminal street gang to commit a felony in violation of the laws of the District of Columbia, the United States, or any other state; or

(B) Retaliate against an individual for a refusal to:

(i) Join a criminal street gang;

(ii) Participate in activities of a criminal street gang;

(iii) Remain as a member of a criminal street gang; or

(iv) Submit to a demand made by a criminal street gang to commit a felony in violation of the laws of the District of Columbia, the United States, or any other state.

(2) A person convicted of a violation of this subsection shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both.

(d) The penalties under this section are in addition to any other penalties permitted by law.

(e) For the purposes of this section, the term:

(1) "Criminal street gang" means an association or group of 6 or more persons that:

(A) Has as a condition of membership or continued membership, the committing of or actively participating in committing a crime of violence, as defined by § 23-1331(4)); or

(B) Has as one of its purposes or frequent activities, the violation of the criminal laws of the District, or the United States, except for acts of civil disobedience.

(2) “Violent misdemeanor” shall mean:

- (A) Destruction of property (§ 22-303);
- (B) Simple assault (§ 22-404(a));
- (C) Stalking (§ 22-404(b) [see now § 22-3132]);
- (D) Threats to do bodily harm (§ 22-407);
- (E) Criminal abuse or criminal neglect of a vulnerable adult (§ 22-936(a));
- (F) Cruelty to animals (§ 22-1001(a)); and
- (G) Possession of prohibited weapon (§ 22-4514).

(Apr. 24, 2007, D.C. Law 16-306, § 101, 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) addition, see § 101 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 101 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 101 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 101 of Omnibus Public Safety Second Congressional

Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — Law 16-306, the “Omnibus Public Safety Amendment Act of 2006”, was introduced in Council and assigned Bill No. 16-247, which was referred to Committee on the Judiciary. The Bill was adopted on first and second readings on June 6, 2006, and October 3, 2006, respectively. Signed by the Mayor on October 17, 2006, it was assigned Act No. 16-482 and transmitted to both Houses of Congress for its review. D.C. Law 16-306 became effective on April 24, 2007.

CHAPTER 10. CRUELTY TO ANIMALS.

Sec.

- 22-1001. Definitions and penalties.
- 22-1002. Other cruelties to animals.
- 22-1002.01. Reporting requirements.
- 22-1003. Rest, water and feeding for animals transported by railroad company.
- 22-1004. Arrests without warrant authorized; notice to owner.
- 22-1005. Issuance of search warrants.
- 22-1006. Prosecution of offenders; disposition of fines.
- 22-1006.01. Penalty for engaging in animal fighting.
- 22-1007. Impounded animals to be supplied with food and water.
- 22-1008. Relief of impounded animals.

Sec.

- 22-1009. Keeping or using place for fighting or baiting of fowls or animals; arrest without warrant.
- 22-1010. [Repealed].
- 22-1011. Neglect of sick or disabled animals.
- 22-1012. Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.
- 22-1013. Definitions.
- 22-1014. [Repealed].
- 22-1015. Penalty for engaging in animal fighting [Renumbered].

§ 22-1001. Definitions and penalties.

(a)(1) Whoever knowingly overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly chains, cruelly beats or mutilates, any animal, or knowingly causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly chained, cruelly beaten, or mutilated, and whoever, having the charge or custody of any animal, either as owner or otherwise, knowingly inflicts unnecessary cruelty upon the same, or unnecessarily fails to provide the same with proper food, drink, air, light, space, veterinary care, shelter, or protection from the weather, shall for every such offense be punished by imprisonment in jail not exceeding 180 days, or by fine not exceeding \$250, or by both.

(2) The court may order a person convicted of cruelty to animals:

(A) To obtain psychological counseling, psychiatric or psychological evaluation, or to participate in an animal cruelty prevention or education program, and may impose the costs of the program or counseling on the person convicted;

(B) To forfeit any rights in the animal or animals subjected to cruelty;

(C) To repay the reasonable costs incurred prior to judgment by any agency caring for the animal or animals subjected to cruelty; and

(D) Not to own or possess an animal for a specified period of time.

(3) The court may order a child adjudicated delinquent for cruelty to animals to undergo psychiatric or psychological evaluation, or to participate in appropriate treatment programs or counseling, and may impose the costs of the program or counseling on the person adjudicated delinquent.

(b) For the purposes of this section, "cruelly chains" means attaching an animal to a stationary object or a pulley by means of a chain, rope, tether, leash, cable, or similar restraint under circumstances that may endanger its health, safety, or well-being. Cruelly chains includes, but is not limited to, the use of a chain, rope, tether, leash, cable or similar restraint that:

(1) Exceeds $\frac{1}{8}$ the body weight of the animal;

(2) Causes the animal to choke;

(3) Is too short for the animal to move around or for the animal to urinate or defecate in a separate area from the area where it must eat, drink, or lie down;

(4) Is situated where it can become entangled;

(5) Does not permit the animal access to food, water, shade, dry ground, or shelter; or

(6) Does not permit the animal to escape harm.

(c) For the purposes of this section, “serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ. Serious bodily injury includes, but is not limited to, broken bones, burns, internal injuries, severe malnutrition, severe lacerations or abrasions, and injuries resulting from untreated medical conditions.

(d) Except where the animal is an undomesticated and dangerous animal such as rats, bats, and snakes, and there is a reasonable apprehension of an imminent attack by such animal on that person or another, whoever commits any of the acts or omissions set forth in subsection (a) of this section with the intent to commit serious bodily injury or death to an animal, or whoever, under circumstances manifesting extreme indifference to animal life, commits any of the acts or omissions set forth in subsection (a) of this section which results in serious bodily injury or death to the animal, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment not exceeding 5 years, or by a fine not exceeding \$25,000, or both.

(Aug. 23, 1871, Leg. Assem., p. 135, ch. 106, § 1; Aug. 20, 1994, D.C. Law 10-151, § 102(a), 41 DCR 2608; June 8, 2001, D.C. Law 13-303, § 2(a), 47 DCR 7307; Dec. 5, 2008, D.C. Law 17-281, § 108(a), 55 DCR 9186.)

Cross references. — Elderly or handicapped tenants, removal of dangerous pets, see § 8-2203.

Section references. — This section is referred to in §§ 8-2203, 22-1002, 22-1006, 22-1007, 22-1009.

Prior Codifications. — 1981 Ed., § 22-801. 1973 Ed., § 22-801.

Effect of amendments. — D.C. Law 13-303 rewrote the section which had read:

“Whoever overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates, or cruelly kills, or causes or procures to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated, or cruelly killed any animal, and whoever, having the charge or custody of any animal, either as owner or otherwise, inflicts unnecessary cruelty upon the same, or unnecessarily fails to provide the same with proper food, drink, shelter, or protection from the weather, shall for every such offense be punished by imprisonment in jail not exceeding

180 days, or by fine not exceeding \$250, or by both such fine and imprisonment.”

D.C. Law 17-281, in subsec. (a), designated par. (1) and added pars. (2) and (3).

Emergency legislation. — For temporary amendment of section, see § 102(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 13-303. — Law 13-303, the “Freedom From Cruelty to Animals Protection Amendment Act of 2000,” was introduced in Council and assigned Bill No. 13-473,

which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 4, 2000, it was assigned Act No. 13-418 and transmitted to both Houses of Congress for its review. D.C. Law 13-303 became effective on June 8, 2001.

Legislative history of Law 17-281. — Law 17-281, the “Animal Protection Amendment Act

of 2008”, was introduced in Council and assigned Bill No. 17-89 which was referred to the Committees on Health and Public Safety and Judiciary. The Bill was adopted on first and second readings on July 1, 2008, and July 15, 2008, respectively. Signed by the Mayor on August 4, 2008, it was assigned Act No. 17-493 and transmitted to both Houses of Congress for its review. D.C. Law 17-281 became effective on December 5, 2008.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Nature and elements of crime.
Pleadings.
Searches and seizures.
Validity.
Weight and sufficiency of evidence.

Admissibility of evidence.

Even if search warrant had authorized seizure of evidence that defendant had been “unnecessarily cruel” to puppies in his pet store, in violation of section of statute declared unconstitutional by motions judge, evidence of 15 dehydrated, emaciated, and weakened puppies could be used against defendant in prosecution for “unnecessarily failing” to provide them with proper food, water and shelter. D.C. Code 1981, § 22-801. *Tuck v. United States*, 467 A.2d 727, 1983 D.C. App. LEXIS 514 (1983).

In prosecution for failing to provide dog with proper shelter or protection from weather, stipulation that physician who observed dog was qualified physician did not have effect of qualifying physician as expert on care and handling of dogs. D.C. Code § 22-801. *Jordan v. United States*, 269 A.2d 848, 1970 D.C. App. LEXIS 347 (App. 1970).

Nature and elements of crime.

Defendants’ convictions for cruelty to animals and engaging in animal fighting in connection with alley fight between their pit bull terriers did not merge, as each crime required proof of element which other did not. D.C. Code 1981, §§ 22-801, 22-810. *Silver v. United States*, 726 A.2d 191, 1999 D.C. App. LEXIS 66 (1999).

Statutes enacted for protection of animals from cruelty were not intended to place unreasonable restrictions on infliction of such pain as may be necessary for training or discipline of animal. D.C. Code 1981, § 22-801. *Regalado v. United States*, 572 A.2d 416, 1990 D.C. App. LEXIS 54 (1990).

A homo sapiens is entitled to own animals but is not entitled to torment or cruelly destroy them. D.C. Code 1981, § 22-801. *Tuck v. United*

States, 477 A.2d 1115, 1984 D.C. App. LEXIS 408 (1984).

A defendant can be convicted of unnecessarily failing to provide dog with proper food, drink, shelter, or protection from weather without a finding that he inflicted unnecessary cruelty upon dog. D.C. Code § 22-801. *Jordan v. United States*, 269 A.2d 848, 1970 D.C. App. LEXIS 347 (App. 1970).

Pleadings.

Defendant was not entitled to judgment of acquittal, based upon having been charged by information with depriving animal of necessary sustenance, and having been convicted under another portion of same statute applicable to persons having charge and custody of animal who failed to provide animal with proper food or drink; under circumstances it could not be said that defendant lacked notice of charge against her or could have faced further prosecution without violating double jeopardy clause. D.C. Code 1981, § 22-801; U.S. Const. Amend. 5. *Carr v. United States*, 585 A.2d 158, 1991 D.C. App. LEXIS 9 (1991).

Searches and seizures.

Where defendant was arrested late at night without a warrant and booked on an open charge for investigation, statements of defendant while in jail that he had nothing to hide and that the officers could go and see for themselves did not establish an agreement that the officers could search the defendant’s household without first procuring a warrant. D.C. Code 1940, §§ 22-801 and 22-2201; U.S. Const. Amend. 4. *Judd v. U.S.*, 190 F.2d 649, 1951 U.S. App. LEXIS 2471 (C.A.D.C. 1951).

Congressionally created humane society, for District of Columbia, was not subject to suit challenging seizure of pets under Freedom From Cruelty to Animals Act; Congress had not made express authorization necessary for suit against society. *Daskalea v. Wash. Humane Soc’y*, 480 F.Supp.2d 16, 2007 U.S. Dist. LEXIS 19612 (2007).

Public interest in the preservation of life in general and in the prevention of cruelty to animals in particular requires some flexibility in application of general rule that a valid war-

rant is a prerequisite to a search. U.S. Const.Amend. 4; D.C. Code 1981, §§ 22-801, 22-814. *Tuck v. United States*, 477 A.2d 1115, 1984 D.C. App. LEXIS 408 (1984).

Police officers who came to pet store in response to a cruelty to animals complaint on a day when temperature was at least 103 degrees Fahrenheit, and who observed various suffering animals in a closed unventilated display window, including a rabbit sprawled out on the bottom of its small cage in a semi-dazed condition, panting and covered with heavy salivation, were justified in entering the store window and impounding the rabbit without first obtaining a warrant for the search and seizure; under the circumstances, exigencies of the situation made needs of law enforcement so compelling that warrantless seizure of the rabbit was objectively reasonable under the Fourth Amendment. U.S. Const.Amend. 4; D.C. Code 1981, §§ 22-801, 22-814. *Tuck v. United States*, 477 A.2d 1115, 1984 D.C. App. LEXIS 408 (1984).

Motions judge's narrowing of statute proscribing cruelty to animals did not affect warrant that expressly permitted seizure of evidence for purposes of prosecution under provision of statute motions judge held constitutional. D.C. Code 1981, § 22-801. *Tuck v. United States*, 467 A.2d 727, 1983 D.C. App. LEXIS 514 (1983).

Validity.

Pet owners stated claim that Freedom From Cruelty to Animals Act violated due process rights of owners on its face; there was no provision for prompt notice to owners that their animals had been seized, due to alleged owner neglect or cruelty, beyond requirement that attempt be made to give notice, and more importantly there was no provision allowing owners to appear and be heard before any action was taken permanently severing owner's interest in animal. *Daskalea v. Wash. Humane Soc'y*, 480 F.Supp.2d 16, 2007 U.S. Dist. LEXIS 19612 (2007).

Freedom From Cruelty to Animals Act, penalizing pet owners' neglect, was not unconstitutionally vague; owners' obligations were adequately described, through provision requiring that pets be provided proper food, drink, shelter, and protection from the weather. *Daskalea v. Wash. Humane Soc'y*, 480 F.Supp.2d 16, 2007 U.S. Dist. LEXIS 19612 (2007).

Words "unnecessarily" and "proper" were not so indefinite as to render unconstitutionally vague provision of cruelty to animals statute calling for punishment of anyone who "unnecessarily fails to provide" animal in one's custody "with proper food, drink, shelter, or protection from the weather." D.C. Code 1981, § 22-801. *Tuck v. United States*, 467 A.2d 727, 1983 D.C. App. LEXIS 514 (1983).

Statute under which proprietor of pet store was convicted for cruelty to animals was not so vague as applied to him as to violate due process, given extensive testimony that puppies in defendant's custody were suffering from dehydration and malnutrition, that they were being kept in cages without water, that they were weakened to point where many were unable to stand up, and that they were desperate in their eagerness for food placed before them. D.C. Code 1981, § 22-801. *Tuck v. United States*, 467 A.2d 727, 1983 D.C. App. LEXIS 514 (1983).

Weight and sufficiency of evidence.

Sufficient evidence supported conviction for attempted cruelty to animals, as government witnesses testified that defendant, in a fit of anger, tried to kick their dog. *Shepherd v. United States*, 905 A.2d 260, 2006 D.C. App. LEXIS 477 (2006).

Evidence was sufficient to show that defendant had custody of dogs in question, so as to support convictions for cruelty to animals as charged; defendant responded affirmatively to officer's question of whether she owned dogs and later stated that she and her son owned dogs, stated that she thought dogs were fine, showed officer that she kept dog food in house, and had dog crate, where dogs were found, located in center of her living room. *Shepherd v. United States*, 905 A.2d 260, 2006 D.C. App. LEXIS 477 (2006).

Defendant's conviction for animal cruelty was supported by evidence that defendant's pit bull terrier and codefendant's pit bull terrier engaged in fight in stockade enclosure in alley while leashed and that defendant and codefendant encouraged dogs to fight by yelling, making noise, and telling dogs to "go get him," or words to that effect. D.C. Code 1981, § 22-801. *Silver v. United States*, 726 A.2d 191, 1999 D.C. App. LEXIS 66 (1999).

Conviction for cruelty to animals was sufficiently supported by evidence that defendant's beating of puppy constituted willful attempt to harm puppy. D.C. Code 1981, § 22-801. *Regalado v. United States*, 572 A.2d 416, 1990 D.C. App. LEXIS 54 (1990).

Evidence was insufficient to sustain conviction for failing to provide full grown German shepherd dog, which was tied by three-foot chain on open concrete back porch of defendant's home during temperatures ranging from 23 degrees to 27 degrees Fahrenheit, with proper shelter or protection from weather, in absence of testimony by someone experienced in care of dog of this type, not necessarily a veterinarian, that shelter or protection from weather supplied this dog on this occasion would tend to cause dog to suffer. D.C. Code § 22-801. *Jordan v. United States*, 269 A.2d 848, 1970 D.C. App. LEXIS 347 (App. 1970).

§ 22-1002. Other cruelties to animals.

Every owner, possessor, or person having the charge or custody of any animal, who cruelly drives or works the same when unfit for labor, or cruelly abandons the same, or who carries the same, or causes the same to be carried, in or upon any vehicle, or otherwise, in an unnecessarily cruel or inhuman manner, or knowingly and wilfully authorizes or permits the same to be subjected to unnecessary torture, suffering, or cruelty of any kind, shall be punished for every such offense in the manner provided in § 22-1001.

(Aug. 23, 1871, Leg. Assem., p. 135, ch. 106, § 2.)

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-802. 1973 Ed., § 22-802.

§ 22-1002.01. Reporting requirements.

(a)(1) Any law enforcement or child or protective services employee who knows of or has reasonable cause to suspect an animal has been the victim of cruelty, abandonment, or neglect, or observes an animal at the home of a person reasonably suspected of child, adult, or animal abuse, shall provide a report within 2 business days to the Mayor. If the health and welfare of the animal is in immediate danger, the report shall be made within 6 hours.

(2) The report shall include:

(A) The name, title, and contact information of the individual making the report;

(B) The name and contact information, if known, of the owner or custodian of the animal;

(C) The location, along with a description, of where the animal was observed; and

(D) The basis for any suspicion of animal cruelty, abandonment, or neglect, including the date, time, and a description of the observation or incident which led the individual to make the report.

(b) When 2 or more law enforcement or child or protective services employees jointly suspect an animal has been the victim of cruelty, abandonment, or neglect, or jointly observe an animal at the home of a person reasonably suspected of child, adult, or animal abuse, a report may be made by one person by mutual agreement.

(c) No individual who in good faith reports a reasonable suspicion of abuse shall be liable in any civil or criminal action.

(d) Upon receipt of a report, any agency charged with the enforcement of animal cruelty laws shall make reasonable attempts to verify the welfare of the animal.

(e) For the purposes of this section, the terms “reasonable cause to suspect”, “suspect”, “reasonably suspected”, and “reasonable suspicion” mean a basis for reporting facts leading a person of ordinary care and prudence to believe and entertain a reasonable suspicion that criminal activity is occurring or has occurred.

(June 25, 1892, 27 Stat. 61, ch. 135, § 2a, as added Dec. 5, 2008, D.C. Law 17-281, § 108(b), 55 DCR 9186.)

Legislative history of Law 17-281. — For Law 17-281, see notes following § 22-1001.

§ 22-1003. Rest, water and feeding for animals transported by railroad company.

No railroad company, in the carrying or transportation of animals, shall permit the same to be confined in cars for a longer period than 24 hours, without unloading the same, for rest, water, and feeding, for a period of at least 5 consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which such animals have been confined without such rest on connecting roads from which they are received shall be included; it being the intent of this section to prohibit their continuous confinement beyond the period of 24 hours, except upon contingencies hereinbefore stated. Animals so unloaded shall be properly fed, watered, and sheltered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company transporting the same, at the expense of said owner or persons in custody thereof. And said company shall, in such case, have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by this section. Any company, owner, or custodian of such animals who fails to comply with the provisions of this section shall, for each and every such offense, be liable for and forfeit and pay a penalty of not less than \$1 nor more than \$500; provided, however, that when animals shall be carried in cars in which they can and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply.

(Aug. 23, 1871, Leg. Assem., p. 135, ch. 106, § 3.)

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-803. 1973 Ed., § 22-803.

§ 22-1004. Arrests without warrant authorized; notice to owner.

(a) Any person found violating the laws in relation to cruelty to animals may be arrested and held without a warrant, in the manner provided by § 44-1505 and the person making an arrest, with or without a warrant, shall use reasonable diligence to give notice thereof to the owner of animals found in the charge or custody of the person arrested, and shall properly care and provide for such animals until the owner thereof shall take charge of the same; provided, the owner shall take charge of the same within 20 days from the date of said notice. The person making the arrest or the humane officer taking possession of an animal shall have a lien on said animals for the expense of such care and provisions.

(b)(1) A humane officer of the Washington Humane Society may take

possession of any animal to protect it from neglect or cruelty. The person taking possession of the animal or animals, shall use reasonable diligence to give notice thereof to the owner of animals found in the charge or custody of the person arrested, and shall properly care and provide for the animals until the owner shall take charge of the animals; provided that, the owner shall take charge of the animals within 20 days from the date of the notice.

(2) If the owner or custodian of the animal or animals fails to respond after 20 days, the animal or animals shall become the property of the Washington Humane Society and the Washington Humane Society shall have the authority to:

- (A) Place the animal or animals up for adoption in a suitable home;
- (B) Retain the animal or animals, or
- (C) Humanely destroy the animal or animals.

(c)(1) The Mayor shall establish by rulemaking a notice and hearing process for the owner of the animal to contest the seizure, detention, and terms of release and treatment of the animal, the allegation of cruelty, abandonment, or neglect, and the imposition of the lien and costs assessed for caring and providing for the animal.

(2) Within 30 days of December 5, 2008, the proposed rules shall be submitted to the Council for a 45-day period of review, excluding weekends, legal holidays, and days of Council recess. If the Council does not approve or disapprove of the proposed rules, by resolution, within the 45-day review period, the rules shall be deemed approved.

(Aug. 23, 1871, Leg. Assem., p. 136, ch. 106, § 4; June 8, 2001, D.C. Law 13-303, § 2(b), 47 DCR 7307; Dec. 5, 2008, D.C. Law 17-281, § 108(c), 55 DCR 9186.)

Cross references. — Arrest without warrant, see § 23-581.

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-804. 1973 Ed., § 22-804.

Effect of amendments. — D.C. Law 13-303 designated subsec. (a); in subsec. (a), substituted “the person making the arrest or the humane officer taking possession of an animal” for “and the person making the arrest”; and added subsec. (b).

D.C. Law 17-281 added subsec. (c).

Legislative history of Law 13-303. — For Law 13-303, see notes following § 22-1001.

Legislative history of Law 17-281. — For Law 17-281, see notes following § 22-1001.

Resolutions. — Resolution 18-43, the “Hearing Procedures for Washington Humane Society Approval Resolution of 2009”, was approved effective March 3, 2009.

CASE NOTES

Immunity.

Individually named employees of humane society failed to establish entitlement to qualified immunity from pet owners’ §§ 1983 claim that employees’ actions following seizure of their pets, including the forced sterilization of one owner’s dog, violated due process; District of Columbia Freedom from Cruelty Animal Protection Act was silent regarding post-seizure requirements, and employees failed to address whether post-seizure actions showed a viola-

tion of owners’ constitutional rights, and if so, whether such rights were clearly established. *Daskalea v. Wash. Humane Soc’y*, 577 F.Supp.2d 90, 2008 U.S. Dist. LEXIS 68012 (2008).

Individually named employees of humane society were entitled to qualified immunity from pet owners’ §§ 1983 claim that seizure of their pets without notice violated due process; employees enforced District of Columbia Freedom from Cruelty Animal Protection Act as

written, and owners failed to establish that a reasonable employee would understand the Act to be grossly and flagrantly unconstitutional.

Daskalea v. Wash. Humane Soc'y, 577 F.Supp.2d 90, 2008 U.S. Dist. LEXIS 68012 (2008).

§ 22-1005. Issuance of search warrants.

When complaint is made by any humane officer of the Washington Humane Society on oath or affirmation, to any magistrate authorized to issue warrants in criminal cases, that the complainant believes, and has reasonable cause to believe, that the laws in relation to cruelty to animals have been or are being violated in any particular building or place, such magistrate, if satisfied that there is reasonable cause for such belief, shall issue a search warrant, authorizing any marshal, deputy marshal, police officer, or any humane officer of the Washington Humane Society to search such building or place.

(Aug. 23, 1871, Leg. Assem., p. 136, ch. 106, § 5; Feb. 13, 1885, 23 Stat. 302, ch. 58, § 1; Mar. 3, 1901, 31 Stat. 1195, ch. 854, § 41; June 8, 2001, D.C. Law 13-303, § 2(c), 47 DCR 7307.)

Cross references. — Search warrants, see §§ 23-521 to 23-525.

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-805. 1973 Ed., § 22-805.

Effect of amendments. — D.C. Law 13-303 substituted “humane office” for “member” in two places.

Legislative history of Law 13-303. — For Law 13-303, see notes following § 22-1001.

CASE NOTES

Search under warrant.

Even if search warrant had authorized seizure of evidence that defendant had been “unnecessarily cruel” to puppies in his pet store, in violation of section of statute declared unconstitutional by motions judge, evidence of 15 dehydrated, emaciated, and weakened puppies could be used against defendant in prosecution for “unnecessarily failing” to provide them with proper food, water and shelter. D.C. Code 1981,

§ 22-801. *Tuck v. United States*, 467 A.2d 727, 1983 D.C. App. LEXIS 514 (1983).

Evidence obtained under warrant based on presumptively valid statute need not be suppressed in later proceeding, after statute has been declared unconstitutional, unless statute itself purported to authorize searches forbidden by Fourth Amendment. U.S. Const. Amend. 4. *Tuck v. United States*, 467 A.2d 727, 1983 D.C. App. LEXIS 514 (1983).

§ 22-1006. Prosecution of offenders; disposition of fines.

It shall be the duty of all marshals, deputy marshals, police officers, or any humane officer of the Washington Humane Society, to prosecute all violations of the provisions of §§ 22-1001 to 22-1009 and §§ 22-1011, 22-1013, and 22-1014, which shall come to their notice or knowledge, and fines and forfeitures collected upon or resulting from the complaint or information of any humane officer of the Washington Humane Society under §§ 22-1001 to 22-1009 and §§ 22-1011, 22-1013, and 22-1014 [repealed] shall inure and be paid over to said association, in aid of the benevolent objects for which it was incorporated.

(Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 6; Feb. 13, 1885, 23 Stat. 302, ch. 58, § 1; Mar. 3, 1901, 31 Stat. 1195, ch. 854, § 41; June 8, 2001, D.C. Law 13-303, § 2(d), 47 DCR 7307.)

Section references. — This section is referred to in §§ 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-806. 1973 Ed., § 22-806.

Effect of amendments. — D.C. Law 13-303

substituted “humane office” for “member” in two places.

Legislative history of Law 13-303. — For Law 13-303, see notes following § 22-1001.

§ 22-1006.01. Penalty for engaging in animal fighting.

(a) Any person who: (1) organizes, sponsors, conducts, stages, promotes, is employed at, collects an admission fee for, or bets or wagers any money or other valuable consideration on the outcome of an exhibition between two or more animals of fighting, baiting, or causing injury to each other; (2) any person who owns, trains, buys, sells, offers to buy or sell, steals, transports, or possesses any animal with the intent that it engage in any such exhibition; (3) any person who knowingly allows any animal used for such fighting or baiting to be kept, boarded, housed, or trained on, or transported in, any property owned or controlled by him; (4) any person who owns, manages, or operates any facility and knowingly allows that facility to be kept or used for the purpose of fighting or baiting any animal; (5) any person who knowingly or recklessly permits any act described in this subsection, to be done on any premises under his or her ownership or control, or who aids or abets that act; or (6) any person who is knowingly present as a spectator at any such exhibition, is guilty of a felony, punishable by a fine of not more than \$25,000, imprisonment not to exceed 5 years, or both. The court may also impose any penalties listed in § 22-1001(a).

(b) Repealed.

(c) For the purposes of this section, the term:

(1) “Animal” means a vertebrate other than a human, including, but not limited to, dogs and cocks.

(2) “Baiting” means to attack with violence, to provoke, or to harass an animal with one or more animals for the purpose of training an animal for, or to cause an animal to engage in, fights with or among other animals.

(3) “Fighting” means an organized event wherein there is a display of combat between 2 or more animals in which the fighting, killing, maiming, or injuring of an animal is a significant feature, or main purpose, of the event.

(June 25, 1892, 27 Stat. 61, ch. 135, § 6a, as added June 8, 2001, D.C. Law 13-303, § 3(a), 47 DCR 7307; Dec. 5, 2008, D.C. Law 17-281, § 109, 55 DCR 9186.)

Prior Codifications. — 2001 Ed., § 22-1015.

Effect of amendments. — D.C. Law 17-281, in subsec. (a), substituted “any animal; (5)” for “any animal; or (5)”, and substituted “that act; or (6) any person who is knowingly present as a spectator at any such exhibition, is guilty of a felony, punishable by a fine of not more than \$25,000, imprisonment not to exceed 5 years, or both. The court may also impose any penalties listed in § 22-1001(a).” for “that act, is guilty of a felony, punishable by a fine of not more than \$25,000 or by imprisonment not to exceed 5 years, or both”; and repealed subsec.

(b), which had read as follows: “(b) Any person who is knowingly present at any place or building where preparations are being made for an exhibition described in subsection (a) of this section, or who is knowingly present as a spectator at any such exhibition, or who knowingly or recklessly aids or abets another in such exhibition, is guilty of a misdemeanor, punishable by a fine of not more than \$1,000 or by imprisonment not to exceed 180 days, or both.”

Legislative history of Law 13-303. — For Law 13-303, see notes following § 22-1001.

Legislative history of Law 17-281. — For Law 17-281, see notes following § 22-1001.

CASE NOTES

ANALYSIS

Evidence.

Nature and elements of crime.

Evidence.

Defendant's conviction for engaging in animal fighting was supported by evidence that defendant's pit bull terrier and codefendant's pit bull terrier engaged in fight in stockade enclosure in alley while leashed and that defendant and codefendant encouraged dogs to fight by yelling, making noise, and telling dogs to "go get him," or words to that effect. D.C. Code 1981, § 22-810. *Silver v. United States*, 726 A.2d 191, 1999 D.C. App. LEXIS 66 (1999).

State could use circumstantial evidence to prove that defendant premeditated alley fight between pit bull terriers in violation of statute prohibiting engaging in animal fighting. D.C. Code 1981, § 22-810. *Silver v. United States*, 726 A.2d 191, 1999 D.C. App. LEXIS 66 (1999).

Nature and elements of crime.

Defendants' convictions for cruelty to animals and engaging in animal fighting in connection with alley fight between their pit bull terriers did not merge, as each crime required proof of element which other did not. D.C. Code 1981, §§ 22-801, 22-810. *Silver v. United States*, 726 A.2d 191, 1999 D.C. App. LEXIS 66 (1999).

§ 22-1007. Impounded animals to be supplied with food and water.

Any person who shall impound, or cause to be impounded in any pound, any creature, shall supply the same, during such confinement, with a sufficient quantity of good and wholesome food and water; and in default thereof shall, upon conviction, be punished for every such offense in the same manner provided in § 22-1001.

(Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 7.)

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-807. 1973 Ed., § 22-807.

§ 22-1008. Relief of impounded animals.

In case any creature shall be at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than 12 successive hours, it shall be lawful for any officer of the Washington Humane Society, from time to time, and as often as it shall be necessary, to enter into and upon any pound in which such creature shall be so confined, and supply it with necessary food and water so long as it shall remain so confined; such person shall not be liable to any action for such entry, and the reasonable cost for such food and water may be collected of the owner of such creature, and the said creature shall not be exempt from levy and sale upon execution issued upon a judgment thereof.

(Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 8; Feb. 13, 1885, 23 Stat. 302, ch. 58, § 1.)

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-808. 1973 Ed., § 22-808.

§ 22-1009. Keeping or using place for fighting or baiting of fowls or animals; arrest without warrant.

Any person or persons who shall keep or use, or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting of fowls or animals, may be arrested without a warrant, as provided in § 44-1505, and for every such offense be punished in the same manner provided in § 22-1001.

(Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 9.)

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-809. 1973 Ed., § 22-809.

§ 22-1010. Penalty for engaging in cockfighting or animal fighting. [Repealed].

Repealed.

(June 25, 1892, 27 Stat. 61, ch. 135, § 6; Oct. 18, 1988, D.C. Law 7-176, § 7(d), 35 DCR 4787; Aug. 20, 1994, D.C. Law 10-151, § 103, 41 DCR 2608; June 8, 2001, D.C. Law 13-303, § 3(a), 47 DCR 7307.)

Prior Codifications. — 1981 Ed., § 22-810. 1973 Ed., § 22-810.

Emergency legislation. — For temporary amendment of section, see § 103 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 7-176. — Law 7-176, the "Dangerous Dog Amendment Act of 1988," was introduced in Council and assigned Bill No. 7-276, which was referred to the Committee on Human Services. The Bill was ad-

opted on first and second readings on May 17, 1988 and May 31, 1988, respectively. Signed by the Mayor on June 9, 1988, it was assigned Act No. 7-190 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1001.

Legislative history of Law 13-303. — For Law 13-303, see notes following § 22-1001.

§ 22-1011. Neglect of sick or disabled animals.

If any maimed, sick, infirm, or disabled animal shall fail to receive proper food or shelter from said owner or person in charge of the same for more than 5 consecutive hours, such person shall, for every such offense, be punished in the same manner provided in § 22-1001.

(Aug. 23, 1871, Leg. Assem., p. 138, ch. 106, § 10; June 25, 1892, 27 Stat. 60, ch. 135, § 4.)

Section references. — This section is referred to in §§ 22-1006, 22-1012 and 22-1013.

Prior Codifications. — 1981 Ed., § 22-811. 1973 Ed., § 22-811.

§ 22-1012. Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.

(a) A person being the owner or possessor or having charge or custody of a maimed, diseased, disabled, or infirm animal who abandons such animal, or leaves it to lie in the street or road, or public place, more than 3 hours after he or she receives notice that it is left disabled, is guilty of a misdemeanor punishable by a fine of not less than \$10 nor more than \$250, or by imprisonment in jail not more than 180 days, or both. Any agent or officer of the Washington Humane Society may lawfully destroy, or cause to be destroyed, any animal found abandoned and not properly cared for, appearing, in the judgment of 2 reputable citizens called by such officer to view the same in such officer's presence, to be glandered, injured, or diseased past recovery for any useful purpose. When any person arrested is, at the time of such arrest, in charge of any animal, or of any vehicle drawn by any animal, or containing any animal, any agent of said society may take charge of such animal and such vehicle and its contents and deposit the same in a place of safe custody or deliver the same into the possession of the police authorities, who shall assume the custody thereof; and all necessary expenses incurred in taking charge of such property shall be a lien thereon.

(b) Nothing contained in §§ 22-1001 to 22-1009, inclusive, and §§ 22-1011 and 22-1309 shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college, university, or scientific society.

(Aug. 23, 1871, Leg. Assem., p. 138, ch. 106, § 11; June 25, 1892, 27 Stat. 60, ch. 135, § 4; May 21, 1994, D.C. Law 10-119, § 6, 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 102(b), 41 DCR 2608.)

Prior Codifications. — 1981 Ed., § 22-812. 1973 Ed., § 22-812.

Emergency legislation. — For temporary amendment of section, see § 102(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the

Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1001.

§ 22-1013. Definitions.

In §§ 22-1001 to 22-1009, inclusive, and § 22-1011, the word "animals" or "animal" shall be held to include all living and sentient creatures (human beings excepted), and the words "owner," "persons," and "whoever" shall be

held to include corporations and incorporated companies as well as individuals.

(Aug. 23, 1871, Leg. Assem., p. 138, ch. 106, § 12; June 25, 1892, 27 Stat. 60, ch. 135, § 3.)

Section references. — This section is referred to in § 22-1006.

Prior Codifications. — 1981 Ed., § 22-813. 1973 Ed., § 22-813.

§ 22-1014. Docking tails of horses. [Repealed].

Repealed.

(June 25, 1892, 27 Stat. 61, ch. 135, § 5; Mar. 2, 1911, 36 Stat. 1003, ch. 192; May 10, 1989, D.C. Law 7-231, § 29, 36 DCR 492; Apr. 29, 2004, D.C. Law 15-154, § 5, 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-814. 1973 Ed., § 22-814.

Legislative history of Law 7-231. — Law 7-231, the “Technical Amendments Act of 1988,” was introduced in Council and assigned Bill No. 7-586, which was referred to the Committee of the Whole. The Bill was adopted on first and

second readings on November 29, 1988 and December 13, 1988, respectively. Signed by the Mayor on January 6, 1989, it was assigned Act No. 7-285 and transmitted to both Houses of Congress for its review.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

§ 22-1015. Penalty for engaging in animal fighting [Renumbered].

Renumbered as § 22-1006.01.

(June 25, 1892, 27 Stat. 61, ch. 135, § 6a, as added June 8, 2001, D.C. Law 13-303, § 3(a), 47 DCR 7307; Dec. 5, 2008, D.C. Law 17-281, § 109, 55 DCR 9186.)

CHAPTER 11. CRUELTY TO CHILDREN.

Sec.
22-1101. Definition and penalty.
22-1102. Refusal or neglect of guardian to provide for child under 14 years of age.

Sec.
22-1103 to 22-1106. [Repealed].

§ 22-1101. Definition and penalty.

(a) A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby causes bodily injury.

(b) A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly:

(1) Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child; or

(2) Exposes a child, or aids and abets in exposing a child in any highway, street, field house, outhouse or other place, with intent to abandon the child.

(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than \$10,000 or be imprisoned not more than 15 years, or both.

(2) Any person convicted of cruelty to children in the second degree shall be fined not more than \$10,000 or be imprisoned not more than 10 years, or both.

(Feb. 13, 1885, 23 Stat. 303, ch. 58, § 3; Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 814; May 21, 1994, D.C. Law 10-119, § 7, 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 201, 41 DCR 2608.)

Cross references. — Corroboration of child witness testimony, necessity, see § 23-114.

Prior Codifications. — 1981 Ed., § 22-901. 1973 Ed., § 22-901.

Emergency legislation. — For temporary amendment of section, see § 201 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively.

Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Assault.
Competency of counsel.

Double jeopardy.
Indictment and information.
Infants k 1562.
Instructions.
Libel and slander.

Manslaughter.
 Merger of offenses.
 Nature and elements of offense.
 Parental discipline, defenses.
 Presumptions and burden of proof.
 Review.
 Weight and sufficiency of evidence.
 Witnesses.

Admissibility of evidence.

In prosecution for murder, deceased's prior conviction based on plea of guilty to an indictment that charged that deceased did "beat, abuse and otherwise willfully maltreat" his six-year-old son was admissible to prove deceased's violent character and court's barring of the evidence was improper. D.C. Code § 22-901. *U.S. v. Burks*, 470 F.2d 432, 1972 U.S. App. LEXIS 7117 (C.A.D.C. 1972).

The fact that statements by child assault victim were made in response to an inquiry by her mother was not decisive of the question of spontaneity, in determining admissibility of testimony with respect thereto, although that fact was entitled to consideration. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

Testimony of physician who had examined child at hospital, that child said that his mother's boyfriend struck him in the face and back with a closed fist because he told his mother that the boyfriend was sexually abusing his sister, was admissible under "medical diagnosis" exception to rule against hearsay, in prosecution for first-degree child sexual abuse and cruelty to children; child's statement was relevant to his diagnosis and treatment, and medical record containing statement, which record had been admitted into evidence, was accompanied by kind of testimony and cross-examination that tested statement's reliability. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Even assuming that defendant preserved objection, physician's testimony that defendant's son stated, in explaining the causes of his injury while he sought medical treatment, that defendant tied his arms behind his back with duct tape and hit him with a wire brush all over his body, stomach, buttocks, arms, and that defendant hit him in the past was admissible under the medical diagnosis and treatment exception to the hearsay rule in prosecution for cruelty to children. *Jones v. United States*, 813 A.2d 220, 2002 D.C. App. LEXIS 735 (2002).

Evidence of defendant's other acts of physical abuse against his biological children and stepchildren was admissible to prove motive and identity, in prosecution for various counts of cruelty to children and assault. *McCloud v. United States*, 781 A.2d 744, 2001 D.C. App. LEXIS 206 (2001).

Photographs of defendant's infant daughter undergoing hospital treatment two to three days after being placed in scalding bath, and of daughter's body taken in the medical examiner's office, were admissible to establish malice element of second degree murder and to establish elements of cruelty to children, despite defense offers to stipulate that victim was placed in sitting position in hot tub and as a result suffered burns resulting in her death. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Having elicited opinions that defendant's explanation for injuries suffered by child was medically implausible, it was reasonable and proper for the prosecutor to ask expert witness whether an alternative explanation would be more reconcilable with the facts. *Cohon v. United States*, 387 A.2d 1098, 1978 D.C. App. LEXIS 521 (1978).

In prosecution for cruelty to a child and assault with a dangerous weapon, it was not plain error for the trial judge to read to the jury evidence of defendant's prior guilty plea to a charge of assault involving the same child. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

In prosecution on charges of cruelty to a child and assault with a dangerous weapon, prior assault by defendant on the same child, which occurred some 17 months earlier, was not too remote to preclude its receipt in evidence on the question of intent. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

Evidence as to defendant's prior assault on the same child unquestionably was relevant as to whether he had the requisite intent to support verdicts finding him guilty of the charges of cruelty to a child and assault with a dangerous weapon, namely, a belt. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

In prosecution of defendant on charges of cruelty to a child and assault with a dangerous weapon, namely, a belt, the trial court did not abuse its discretion in permitting the government to introduce, during its direct case, evidence of defendant's prior conviction of having assaulted the same child, where intent was placed clearly in issue by the contention in defendant's opening statement that an assault episode, involving the child's head being struck by a pliers tossed by defendant, was accidental. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

Assault.

The application of force or threat of application thereof in an assault may be made indi-

rectly as well as directly. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

An assault may be committed upon a child irrespective of whether there is submission or resistance thereto. *Beausoliel v. U.S.*, 107 F.2d 292, 1939 U.S. App. LEXIS 2731 (1939).

Competency of counsel.

Defense counsel's withdrawal of his objection to double hearsay testimony of one of child's treating physicians, which consisted of physician reading medical record prepared by child's other treating physician that reported that child's grandmother had stated that child told grandmother that defendant had "put [a] pillow over my body and put his fingers in my privates[.]" constituted trial strategy, and, thus could not amount to ineffective assistance, in prosecution for first-degree child sexual abuse and cruelty to children; defense counsel finally decided, as matter of trial strategy, to permit admission of first and second level written hearsay in medical record, even for truth of statements made, in lieu of risking live testimony by a hostile witness, the grandmother, and the sympathetic alleged victim, the child. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Defendant failed to establish he was denied effective assistance of counsel, during prosecution for murder of his baby, based upon extent of counsel's investigation, given counsel's testimony regarding her efforts to obtain baby's medical records. *U.S.C. Const.Amend. 6. Johnson v. United States*, 616 A.2d 1216, 1992 D.C. App. LEXIS 281 (1992), writ of certiorari denied by 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172, 1993 U.S. LEXIS 2319, 61 U.S.L.W. 3652 (1993).

Double jeopardy.

Charge of cruelty to child did not merge into manslaughter conviction, in that count charging cruelty had societal purposes as well as essential elements differing from those in count which charged second-degree murder and under which defendant was convicted of manslaughter. *D.C. Code §§ 22-901, 22-2403, 22-2405. United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Blockburger "same elements" test, used to determine whether separate statutory provisions criminalize single act, did not govern double jeopardy challenge to indictment charging first-degree cruelty to a child, which was based on prior trial for same charge; critical question under such circumstances was whether same act was at issue in both prosecutions. *U.S.C. Const.Amend. 5; D.C. Code 1981, § 22-901(a). Young v. United States*, 745 A.2d 943, 2000 D.C. App. LEXIS 34 (2000).

Defendant was not tried for "continuing crime" of child abuse in prior trial in which she

was charged with first-degree cruelty to child for alleged failure to provide adequate food and nutrition to son, second-degree cruelty for daily beatings allegedly administered to son, and second-degree murder of son resulting from specific beating, and therefore double jeopardy did not bar trial for first-degree cruelty to child based on incident in which defendant allegedly scalded son's foot, even though incident occurred during same time frame as prior charges and incident was offered at first trial as uncharged act of abuse. *U.S. Const.Amend. 5; D.C. Code 1981, § 22-901(a, b). Young v. United States*, 745 A.2d 943, 2000 D.C. App. LEXIS 34 (2000).

Indictment and information.

Defendant was not entitled to severance of various counts of cruelty to children and assault; evidence of defendant's other acts of physical abuse towards his biological children and his stepchildren was admissible to prove motive and identity, selectivity in jury's verdict demonstrated that joinder of charges did not cloud jurors' minds such that they viewed evidence of one crime as propensity evidence for each of other crimes, and prejudicial impact caused by evidence of other misconduct due to joinder of offenses did not substantially outweigh probative nature of evidence brought about by joinder. *McCloud v. United States*, 781 A.2d 744, 2001 D.C. App. LEXIS 206 (2001).

Indictment charging defendant with killing baby "by beating her with a blunt object and with a belt" was not constructively amended when trial court permitted prosecutor to dismiss "while armed" portion of indictment and to proceed on theory that baby was killed during trip to bathroom when defendant did not have belt, where indictment did not specify at exactly what time, or on which of two trips to bathroom, defendant administered fatal beating. *U.S.C. Const.Amend. 5. Johnson v. United States*, 616 A.2d 1216, 1992 D.C. App. LEXIS 281 (1992), writ of certiorari denied by 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172, 1993 U.S. LEXIS 2319, 61 U.S.L.W. 3652 (1993).

Infants k 1562.

Instructions.

Even though, in prosecution for cruelty to children, "willfulness" was mentioned in indictment and in statute as read to jury, and was generally defined, failure to include instruction on "willfulness" in its evil mind connotation as an essential element of the offense was plain error. *D.C. Code § 22-901. United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Failure in prosecution charging act of cruelty to child as having occurred "on or about October 11, 1968" to instruct that all elements comprising cruelty offense must have occurred on Oc-

tober 11, 1968, as distinguished from those occurring on previous occasions was plain error. D.C. Code § 22-901. *United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Failure to instruct that jury was required to find beyond a reasonable doubt that defendant was under a legal duty to supply food and necessities to infant before they could find her guilty of manslaughter in failing to provide such items was plain error. D.C. Code 1961, § 22-901, Fed. Rules Crim. Proc., rule 52(b), 18 U.S.C. *Jones v. U.S.*, 308 F.2d 307, 1962 U.S. App. LEXIS 4315 (C.A.D.C. 1962).

In prosecution of mother, who left her children chained in her home while she was absent, under statute making it a crime to torture, cruelly beat, abuse, or otherwise willfully maltreat a child, instruction that jury should decide whether mother was acting reasonably under the circumstances or whether her action was unreasonable and dangerous was reversibly erroneous because of omission of requirement of an evil state of mind. D.C. Code 1951, § 22-901. *Mullen v. U.S.*, 263 F.2d 275, 1958 U.S. App. LEXIS 5139 (C.A.D.C. 1958).

Trial court's response to jury's inquiry during deliberations as to what they were to do if they knew of a prior statement only through lawyer's questions, which was to tell jury that facts were established by a witness's answer, not by a lawyer's question, was not abuse of discretion, in prosecution for first-degree child sexual abuse and cruelty to children, as trial court's response was direct, balanced, and neutral response to question, as law required. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Trial court did not err, let alone plainly err, in instructing the jury as to the mens rea element of charges of cruelty to children, where court instructed jury by defining intentional, knowing, and reckless conduct based on standard jury instructions. *Jones v. United States*, 813 A.2d 220, 2002 D.C. App. LEXIS 735 (2002).

Even if assault was a lesser included offense of cruelty to a child, trial court did not commit reversible error by failing to submit assault charges to jury because defendant suffered no harm due to jury acquitting her on cruelty to a child charges. *York v. United States*, 803 A.2d 1009, 2002 D.C. App. LEXIS 392 (2002).

Where only evidence as to defendant's alleged intoxication came from defendant who testified that although he "had been drinking" he was not "dead drunk," evidence failed to warrant giving of requested instruction on issue of intoxication as bearing upon specific intent to commit charged offense of cruelty to children. D.C. Code § 22-901. *Smith v. United States*, 309 A.2d 58, 1973 D.C. App. LEXIS 343 (1973).

Libel and slander.

Defendants' publication of letter reporting a

mother's alleged neglect of her 16-year-old pregnant daughter to District of Columbia Department of Human Services did not constitute libel per se under District of Columbia law; accusation did not impute commission of crime by the mother. D.C. Code 1981, §§ 16-2301 et seq., 22-901. *Raboya v. Shrybman & Assoc.*, 777 F. Supp. 58, 1991 U.S. Dist. LEXIS 16381 (1991).

Manslaughter.

Finding of legal duty was critical element of crime of involuntary manslaughter based on breach of legal obligation to provide food and necessities to an infant, with such failure resulting in his death. D.C. Code 1961, § 22-901. *Jones v. U.S.*, 308 F.2d 307, 1962 U.S. App. LEXIS 4315 (C.A.D.C. 1962).

Act in conscious disregard of extreme risk of death or serious bodily injury, such as would support conviction of voluntary manslaughter, exists only where defendant was subjectively aware that her conduct created such a risk. *Johnson v. United States*, 631 A.2d 871, 1993 D.C. App. LEXIS 225 (1993).

Merger of offenses.

Convictions for simple assault did not merge into convictions for attempted second-degree cruelty to children, as each offense required element of proof that other did not; statute criminalizing attempted second-degree cruelty to children prohibited attempts to inflict unnecessary or unreasonable mental pain and suffering or psychological harm, and, thus this statute could be violated without commission of an assault, an offense which, by definition, had to actually or potentially impair victim's bodily integrity. *Alfaro v. United States*, 859 A.2d 149, 2004 D.C. App. LEXIS 459 (2004).

Conviction for simple assault did not merge with conviction for attempted second-degree child cruelty; the child cruelty offense required proof that the act was committed upon a child while simple assault did not have the same requirement, and simple assault required an act involving "force or violence" while child cruelty could be committed by "maltreating a child." *Bradley v. United States*, 856 A.2d 1157, 2004 D.C. App. LEXIS 434 (2004), writ of certiorari denied by 545 U.S. 1121, 125 S. Ct. 2923, 162 L. Ed. 2d 307, 2005 U.S. LEXIS 4785, 73 U.S.L.W. 3719 (2005).

Nature and elements of offense.

Statute making it a crime to torture, cruelly beat, abuse, or otherwise willfully maltreat a child calls for something worse than good intentions coupled with bad judgment. D.C. Code 1951, § 22-901. *Mullen v. U.S.*, 263 F.2d 275, 1958 U.S. App. LEXIS 5139 (C.A.D.C. 1958).

Criminal proceeding based on cruelty or abuse of child is primarily concerned with allegedly abusive parent. D.C. Code 1981, § 22-

901. *Raboya v. Shrybman & Assoc.*, 777 F. Supp. 58, 1991 U.S. Dist. LEXIS 16381 (1991).

Criminal proceeding for cruelty or abuse to a child requires proof of guilt beyond reasonable doubt. U.S. Const. Amends. 5, 14; D.C. Code 1981, § 22-901. *Raboya v. Shrybman & Assoc.*, 777 F. Supp. 58, 1991 U.S. Dist. LEXIS 16381 (1991).

Offense of cruelty to children includes the infliction of mental or emotional pain or suffering upon a child, as well as physically assaultive conduct. *Speaks v. United States*, 959 A.2d 712, 2008 D.C. App. LEXIS 429 (2008).

To convict defendant of second-degree cruelty to children, government must establish that defendant is a person who intentionally, knowingly, or recklessly maltreated a child or engaged in conduct which caused a grave risk of bodily injury to a child. *Dorsey v. United States*, 902 A.2d 107, 2006 D.C. App. LEXIS 358 (2006).

The infliction of psychological harm can contravene the criminal statute prohibiting cruelty to children, but the harm must be serious and "unjustifiable," rather than mild or trivial. *Alfaro v. United States*, 859 A.2d 149, 2004 D.C. App. LEXIS 459 (2004).

Statute which prohibits cruelty to children requires that an individual create a grave risk of bodily injury, not a risk of grave bodily injury; thus the correct focus is on the likelihood of injury, rather than the degree of injury sustained. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Cruelty to children is a general intent crime. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Neither charges against defendant of first- nor second-degree cruelty to children required proof of malice; rather, to prove *mens rea* requirement under statute, prosecutor was required only show that defendant committed offenses intentionally, knowingly, or recklessly. *Jones v. United States*, 813 A.2d 220, 2002 D.C. App. LEXIS 735 (2002).

Malice is not an element of the amended version of the cruelty to children statute; rather, the government need only show that a defendant acted intentionally, knowingly, or recklessly. *Jones v. United States*, 813 A.2d 220, 2002 D.C. App. LEXIS 735 (2002).

Specific intent to injure the child was not element of attempted second-degree cruelty to child; the government needed to prove that the defendant intended to commit the acts which resulted in the injury or the grave risk of injury to the child. *Jones v. United States*, 813 A.2d 220, 2002 D.C. App. LEXIS 735 (2002).

Parent-child assaults may be prosecuted under misdemeanor simple-assault statute; there is no requirement that they be prosecuted exclusively under cruelty to children statute.

Newby v. United States, 797 A.2d 1233, 2002 D.C. App. LEXIS 105 (2002).

Parent acts with sufficient malice to warrant conviction under statute prohibiting cruelty to children, when parent acts out of desire to inflict pain rather than out of genuine effort to correct child, or when parent, in genuine effort to correct child, acts with a conscious disregard that serious harm will result. D.C. Code 1981, § 22-901. *Carson v. United States*, 556 A.2d 1076, 1989 D.C. App. LEXIS 57 (1989).

In prosecution on charges of cruelty to child and assault with a dangerous weapon, namely, a belt, intent was an essential element of the offenses and hence had to be proved by the Government beyond a reasonable doubt. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

Defendant who arranged performances in tumbling, body-supporting and pyramids and included two children under 14 years of age was not guilty of attempting to use children under 14 years of age in acrobatics, in absence of evidence that there were any acts of recklessness which might endanger life or limb. D.C. Code 1961, §§ 22-103, 22-901. *Nesbitt v. United States*, 205 A.2d 595, 1964 D.C. App. LEXIS 170 (App. 1964).

District of Columbia Code section prohibiting person having in his control child under age of 14 years employed as acrobat, or gymnast or in any exhibition of like dangerous character is limited to dangerous acrobatics, and, to support conviction thereunder, government must prove acts of recklessness which endanger life or limb. D.C. Code 1961, § 22-901. *Nesbitt v. United States*, 205 A.2d 595, 1964 D.C. App. LEXIS 170 (App. 1964).

Parental discipline, defenses.

When a defendant charged with assault raises the privilege of parental discipline, the defendant's anger is relevant both to whether the defendant had a disciplinary purpose and to whether the discipline imposed was reasonable. *Longus v. United States*, 935 A.2d 1108, 2007 D.C. App. LEXIS 663 (2007).

Evidence failed to prove that force used by defendant in slapping his teenage daughter on the back of her neck and grabbing her by the shirt was unreasonable for purpose of exercising parental discipline, and thus was insufficient to disprove defendant's parental discipline defense in prosecution for assault; defendant testified that when he slapped daughter on the back of the head, he did so to discipline her and to urge her to the car, defendant also testified that when he grabbed daughter by the shirt, he did so in response to correct her statement that defendant did not love her and to tell her that he did love her, and daughter testified that she did not suffer any physical

injuries from either incident. *Longus v. United States*, 935 A.2d 1108, 2007 D.C. App. LEXIS 663 (2007).

Once privilege of parental discipline is raised as defense to assault, government has the burden of refuting it by proving beyond a reasonable doubt that the parent's purpose in resorting to force against child was not disciplinary or that the force she used was unreasonable. *Dorsey v. United States*, 902 A.2d 107, 2006 D.C. App. LEXIS 358 (2006).

A parent charged with simple assault may claim the privilege of parental discipline, i.e. that the use of force was for the purpose of exercising parental discipline and was reasonable. *Dorsey v. United States*, 902 A.2d 107, 2006 D.C. App. LEXIS 358 (2006).

Presumptions and burden of proof.

Second-degree cruelty to children does not require the government to prove that the actor "intended" to cause a grave risk of injury; rather, the government must prove that the actor intended to do the act that constitutes the offense. *Coffin v. United States*, 917 A.2d 1089, 2007 D.C. App. LEXIS 92 (2007).

Once privilege of parental discipline is raised as defense to assault or cruelty to children, the government has the burden of refuting it by proving beyond a reasonable doubt that the parent's purpose in resorting to force against her child was not disciplinary or that the force she used was unreasonable. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Government in prosecution of parent for attempted cruelty to child was not required to prove that she intended to create a grave risk of bodily injury or intended any harm; the only intent the government had to prove was the intent to do the act that constituted the offense, namely, striking her daughter with a wooden dowel. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

The government was not required to prove malice to rebut defendant's assertion of parental discipline defense in prosecution for cruelty to children. *Jones v. United States*, 813 A.2d 220, 2002 D.C. App. LEXIS 735 (2002).

Review.

Trial court's response to jury's request during deliberations to see various written statements that witnesses and lawyers had referred to but that had not been admitted into evidence, which was to tell jury that they had heard all of the evidence and had been provided with all exhibits that had been admitted into evidence, was not plain error, in prosecution for first-degree child sexual abuse and cruelty to children; defense counsel had not requested that trial court place statements before jury, or even that court reporter read testimony containing

statements to jury, and thus trial court did not plainly err in declining to reopen trial to introduce statements in evidence. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Court of Appeals would review for plain error issue of whether trial court had erred in responding to jury's request during deliberations to see various written statements that had been referred to by witnesses and lawyers but had not been admitted into evidence, in prosecution for first-degree child sexual abuse and cruelty to children, as defense counsel failed to move for admission of written statements into evidence and did not object to trial court's responsive instruction. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Remand was required for further findings on issue of whether juror number three, who allegedly had not been polled, assented to guilty verdict, in prosecution for first-degree child sexual abuse and cruelty to children, in which trial transcript reflected that only 11 out of 12 jurors had been polled after jury had announced guilty verdict; infirmities in proof on this issue were not enough to demonstrate that trial court's finding that verdict had been unanimous were clearly erroneous, to point that convictions had to be reversed, but they were enough to require greater certainty before one could say with sufficient confidence that juror number three had joined verdict. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Court of Appeals would review for plain error defendant's challenge to jury instruction on intent element of offense of cruelty to children, which challenge was not raised in the trial court. *Jones v. United States*, 813 A.2d 220, 2002 D.C. App. LEXIS 735 (2002).

Weight and sufficiency of evidence.

Defendant's act of driving, causing a grave risk of bodily injury to three different children in the vehicle, supported conviction on three counts of second degree cruelty to children. *Speaks v. United States*, 959 A.2d 712, 2008 D.C. App. LEXIS 429 (2008).

Evidence supported finding that defendant's act of driving with two unrestrained children, while intoxicated, knowingly and recklessly posed a grave risk of bodily injury to the children, and, thus, subjected defendant to criminal liability under the second-degree cruelty to children statute; evidence showed that defendant swerved across the yellow centerline, drove in the wrong direction down the street, operated his car without headlights, and ran a stop sign. *Coffin v. United States*, 917 A.2d 1089, 2007 D.C. App. LEXIS 92 (2007).

Evidence was sufficient to support second degree cruelty to children conviction; evidence showed that defendant started a fire in an

apartment in which defendant knew his six-year old niece was present. *Phenis v. United States*, 909 A.2d 138, 2006 D.C. App. LEXIS 539 (2006).

Evidence supported conclusion that defendant, in hitting her 11-year-old child with a curling iron, used reasonable force for purpose of exercising parental discipline, such that defense of parental discipline applied to preclude convictions for assault and attempted second-degree cruelty to children; child, who had history of violent and disruptive behavior, was misbehaving when incident occurred, in that she would not obey defendant's orders to get ready for doctor's appointment that defendant considered to be "very important" because doctors were concerned about health of child, who was obese, nor would child obey instructions regarding food she was not allowed to eat, and child, who was much bigger than defendant, had not responded to lesser degrees of correction, including taps on hand. *Florence v. United States*, 906 A.2d 889, 2006 D.C. App. LEXIS 512 (2006).

Sufficient evidence supported conviction for attempted second-degree cruelty to children; father created a grave or substantial risk of bodily injury when he struck child in the face with a belt, and, in so doing, father disregarded risk of fractures of child's orbital eye socket. *Dorsey v. United States*, 902 A.2d 107, 2006 D.C. App. LEXIS 358 (2006).

Evidence supported finding that father's behavior in striking child with belt was excessive, i.e., unreasonable, such that privilege of parental discipline did not apply with respect to charge of assault against father; father hit child in his eye with belt, he then chased child upstairs and stood over him and hit him with a belt, and father stopped when child's mother pulled him off of child. *Dorsey v. United States*, 902 A.2d 107, 2006 D.C. App. LEXIS 358 (2006).

Unsworn letter from deputy director of Court Reporting and Recording Division (CRRD), in which director stated that he had reviewed court reporter's notes and concluded that transcript had failed to reflect that juror number three had been polled and assented to verdict, was not competent evidence, on motion in trial court to correct the trial record, to show with sufficient certainty that this juror had joined the others in guilty verdict, in prosecution for first-degree child sexual abuse and cruelty to children, in which trial transcript reflected that only 11 out of 12 jurors had been polled after jury had announced guilty verdict; letter was unverified, and it was inadmissible hearsay. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Evidence supported conclusions that force used by parent in striking sixteen-year-old daughter with a wooden dowel exceeded limits

of reasonableness as discipline for not attending child's day-care luncheon and that privilege of parental discipline was not satisfied as defense to simple assault or attempted cruelty to children; although the child had a history of poor behavior, the beating warranted trip to emergency room, and judge as fact-finder heard physician's testimony and viewed photographs of the injuries. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Physician's testimony and police photographs in prosecution of parent for attempted cruelty to child supported conclusion that act of beating with wooden dowel created a risk of bodily injury and that such injury actually occurred. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Proof of second-degree cruelty to children was sufficient to convict defendant of attempted second-degree cruelty to children. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

Evidence that defendant tossed young child in the air while he was both intoxicated and in a heated argument with the child's mother would have supported a conviction for second-degree cruelty to child and, therefore, supported conviction for attempted second-degree cruelty to child. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

That the jury might have thought the evidence insufficient to convict on the felony charge of second degree cruelty to a child, which requires "a grave risk of bodily injury to a child," did not make its verdict acquitting defendant inconsistent with the finding of misdemeanor assault by the trial judge, which was supported by sufficient evidence. *York v. United States*, 803 A.2d 1009, 2002 D.C. App. LEXIS 392 (2002).

Defendant's express acknowledgement that she shook infant victim, her implicit admission that she knew infant's head was hitting the wall as she shook it, and her acknowledgement that these actions caused infant's death were sufficient, in absence of any justification or excuse, to establish factual basis to support guilty plea to voluntary manslaughter, even if defendant lacked actual intent to kill or injure infant. *Johnson v. United States*, 631 A.2d 871, 1993 D.C. App. LEXIS 225 (1993).

Defendant's actions in holding child under shower in such a manner as to cause child to fight for air, and in repeatedly slapping and kicking the child after removing him from the shower, supported verdict of guilty on charge of cruelty to a child, irrespective of fact that child was also beaten with a belt and defendant was also convicted of assault with a dangerous weapon. D.C. Code §§ 22-502, 22-901. *Robinson v. United States*, 317 A.2d 508, 1974 D.C. App. LEXIS 397 (1974).

Witnesses.

Admission of defendant to Lutheran minister

that she had chained her children, after he had urged her to confess her sins, was a "privileged communication" and testimony thereof by minister was inadmissible in prosecution under statute making it a crime to torture, cruelly beat, abuse, or otherwise willfully maltreat a child. D.C. Code 1951, § 22-901. *Mullen v. U.S.*, 263 F.2d 275, 1958 U.S. App. LEXIS 5139 (C.A.D.C. 1958).

Evidence of investigation of government witness' sons for sexual abuse of two of defendant's children was relevant to witness' bias, in prosecution for cruelty to children; witness was only adult witness who could corroborate testimony of three children regarding defendant's abuse during period charged in indictment, and witness could have motive to favor prosecution's case in hope of receiving beneficial treatment for her sons with regard to investigation and

prosecution of allegations, and possibly for herself as an accessory, and as a de facto guardian of children during time of some of alleged incidents. *McCloud v. United States*, 781 A.2d 744, 2001 D.C. App. LEXIS 206 (2001).

Voluntary testimony of defendant's common-law spouse that defendant told her on way to hospital that he expected to be arrested for causing their baby's death, and that defendant asked her to give statement to defense counsel which would get charges against him dropped, came within necessity exception to marital communications privilege. D.C. Code 1981, § 14-306. *Johnson v. United States*, 616 A.2d 1216, 1992 D.C. App. LEXIS 281 (1992), writ of certiorari denied by 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172, 1993 U.S. LEXIS 2319, 61 U.S.L.W. 3652 (1993).

§ 22-1102. Refusal or neglect of guardian to provide for child under 14 years of age.

Any person within the District of Columbia, of sufficient financial ability, who shall refuse or neglect to provide for any child under the age of 14 years, of which he or she shall be the parent or guardian, such food, clothing, and shelter as will prevent the suffering and secure the safety of such child, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to punishment by a fine of not more than \$100, or by imprisonment in the Workhouse of the District of Columbia for not more than 3 months, or both such fine and imprisonment.

(Mar. 3, 1901, 31 Stat. 1095, ch. 847, § 4.)

Cross references. — Intrafamily offense proceedings, see § 16-1001 et seq.

Prior Codifications. — 1981 Ed., § 22-902. 1973 Ed., § 22-902.

CASE NOTES

Nutrition and medical care.

In prosecution wherein defendants were convicted of involuntary manslaughter of their infant son, evidence permitted jury to find beyond reasonable doubt that death was proximately caused by lack of food and medical care. D.C. Code §§ 22-902, 22-2405. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

Parents were under common-law duty to provide medical care for their infant son, and were also under statutory duty to provide such medical care. D.C. Code §§ 22-902, 49-301. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

§§ 22-1103 to 22-1106. Wilful neglect or refusal to support wife or minor child; punishment; order of allowance; recognizance; trial under original charge; evidence of marriage; competency of witnesses; proof of wilful desertion; weekly payments by Superintendent of Workhouse for each day's confinement; collections by Clerk of Court to be deposited with Collector of Taxes and covered into Treasury [Repealed].

Repealed.

(July 29, 1970, 84 Stat. 586, Pub. L. 91-358, title I, § 165(a), (b).)

Prior Codifications. — 1981 Ed., §§ 22-903 to 22-906.

CHAPTER 12. DEBT ADJUSTING.

Sec.

22-1201. [Repealed].

§ 22-1201. Debt adjusting; prohibitions; exceptions; penalties; prosecutions for violations. [Repealed].

Repealed.

(May 22, 1970, 84 Stat. 264, Pub. L. 91-266; May 21, 1994, D.C. Law 10-119, § 19, 41 DCR 1639; Apr. 29, 2004, D.C. Law 15-154, § 6, 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-3426.

1973 Ed., § 22-3426.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see His-

torical and Statutory Notes following § 22-2903.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

CASE NOTES

Attorney activities.

Conduct of attorney in actively promoting debt collection agency in District of Columbia constitutes unethical conduct in aiding unauthorized practice of law. ABA Code of Professional Responsibility, DR3-101; D.C. Code §§ 22-3426, 22-3426(a)(1), (c). In re Smith, 5

B.R. 92, 1980 Bankr. LEXIS 4968 (1980), affirmed in part and reversed in part by 507 F. Supp. 468, 12 B.R. 140, 1981 U.S. Dist. LEXIS 10645, 7 Bankr. Ct. Dec. (LRP) 277, Bankr. L. Rep. (CCH) P67861, 5 Collier Bankr. Cas. 2d (MB) 595 (D.D.C. 1981).

CHAPTER 12A. DETECTION DEVICES.

Sec.

22-1211. Tampering with a detection device.

§ 22-1211. Tampering with a detection device.

(a)(1) It is unlawful for a person who is required to wear a device as a condition of a protection order, pretrial, presentence, or predisposition release, probation, supervised release, parole, or commitment, or who is required to wear a device while incarcerated, to:

(A) Intentionally remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device; or

(B) Intentionally allow any unauthorized person to remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device.

(2) For the purposes of this subsection, the term “device” includes a bracelet, anklet, or other equipment with electronic monitoring capability or global positioning system or radio frequency identification technology.

(b) Whoever violates this section shall be fined not more than \$1,000, imprisoned for not more than 180 days, or both.

(Dec. 10, 2009, D.C. Law 18-88, § 103, 56 DCR 7413; June 3, 2011, D.C. Law 18-377, § 8, 58 DCR 1174.)

Effect of amendments. — D.C. Law 18-377, in subsec. (a)(1), substituted “or commitment, or who is required to wear a device while incarcerated” for “or commitment”; and, in subsec. (a)(2), substituted “global positioning system or radio frequency identification” for “global positioning system”.

Emergency legislation. — For temporary (90 day) addition, see § 103 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 103 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

For temporary (90 day) amendment of section, see § 508 of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 508 of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 18-88. — Law 18-88, the “Omnibus Public Safety and Justice Amendment Act of 2009”, as introduced in Council and assigned Bill No. 18-151, which was referred to the Committee on Public Safety and the Judiciary. The bill as adopted on first and second readings on June 30, 2009, and July 31, 2009, respectively. Signed by the Mayor on August 26, 2009, it was assigned Act No. 18-189 and transmitted to both Houses of Congress for its review. D.C. Law 18-88 became effective on December 10, 2009.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

CHAPTER 13. DISTURBANCES OF THE PUBLIC PEACE.

Sec.	Sec.
22-1301. Affrays.	22-1314.02. Prohibited acts.
22-1302 to 22-1306. [Repealed].	22-1315, 22-1316. [Repealed].
22-1307. Blocking passage.	22-1317. Flying fire balloons or parachutes.
22-1308. Playing games in streets.	22-1318. Driving or riding on footways in public grounds.
22-1309. Throwing stones or other missiles.	22-1319. False alarms and false reports; hoax weapons.
22-1310. Urging dogs to fight or create disorder.	22-1320. Sale of tobacco to minors under 18 years of age.
22-1311. Allowing dogs to go at large.	22-1321. Disorderly conduct.
22-1312. Lewd, indecent, or obscene acts; sexual proposal to a minor.	22-1322. Rioting or inciting to riot.
22-1313. Kindling bonfires.	22-1323. Obstructing bridges connecting D.C. and Virginia.
22-1314. [Repealed].	
22-1314.01. Definitions.	

§ 22-1301. Affrays.

Whoever is convicted of an affray in the District shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both.

(July 16, 1912, 37 Stat. 192, ch. 235, § 1; Dec. 23, 1963, 77 Stat. 617, Pub. L. 88-241, § 11(a); Aug. 20, 1994, D.C. Law 10-151, § 107, 41 DCR 2608.)

Cross references. — Assaults because of gaming losses, see § 22-408.

Prior Codifications. — 1981 Ed., § 22-1101.

1973 Ed., § 22-1101.

Emergency legislation. — For temporary amendment of section, see § 107 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law

10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

CASE NOTES

Legislative intent.

Intent of Congress in enacting statute could best be determined by looking to act of Congress which such statute was enacted to sup-

plement. D.C. Code §§ 22-109, 22-1101 to 22-1119, 22-1121, 22-1121(1). *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

§ 22-1302. Duelling challenges. [Repealed].

Repealed.

(Mar. 3, 1901, 31 Stat. 1328, ch. 854, § 852; May 21, 1994, D.C. Law 10-119, § 2(f), 41 DCR 1639; Apr. 29, 2004, D.C. Law 15-154, § 3(d), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1102.

1973 Ed., § 22-1102.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of

1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was

assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

CASE NOTES

Burden of proof.

Upon an indictment for unlawfully carrying a challenge to fight a duel, scienter must be

proved. *U.S. v. Shackelford*, 27 F.Cas. 1037, 1828 U.S. App. LEXIS 403 (1827).

§ 22-1303. Assault for refusal to accept challenge. [Repealed].

Repealed.

(Mar. 3, 1901, 31 Stat. 1328, ch. 854, § 853; May 21, 1994, D.C. Law 10-119, § 2(g), 41 DCR 1639; Apr. 29, 2004, D.C. Law 15-154, § 3(e), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1103.

1973 Ed., § 22-1103.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see His-

torical and Statutory Notes following § 22-1302.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

§ 22-1304. Leaving District to give or receive challenge. [Repealed].

Repealed.

(Mar. 3, 1901, 31 Stat. 1328, ch. 854, § 854; Apr. 29, 2004, D.C. Law 15-154, § 3(f), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1104.

1973 Ed., § 22-1104.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

§§ 22-1305, 22-1306. Prize fights and animal fights prohibited; “pugilistic encounter” defined [Repealed].

Repealed.

(June 25, 1948, 62 Stat. 862, ch. 645, § 21.)

Prior Codifications. — 1981 Ed., §§ 22-1105, 22-1106.

§ 22-1307. Blocking passage.

It is unlawful for a person, alone or in concert with others, to crowd, obstruct, or incommode the use of any street, avenue, alley, road, highway, or sidewalk, or the entrance of any public or private building or enclosure or the use of or passage through any public conveyance, and to continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforce-

ment officer to cease the crowding, obstructing, or incommoding. A person who violates any provision of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500, imprisoned for not more than 90 days, or both.

(July 29, 1892, 27 Stat. 323, ch. 320, § 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159, § 210; May 26, 2011, D.C. Law 18-375, § 2(a), 58 DCR 731.)

Cross references. — Burning of cross or other religious symbol, see § 22-3312.02.

Conduct of prosecutions under this section, see § 22-1809.

Defacement of public or private building or property, see § 22-3312.01.

Disorderly conduct in public buildings and grounds, see § 22-3311.

Wearing of masks for specified purposes, see § 22-3312.03.

Section references. — This section is referred to in § 23-101.

Prior Codifications. — 1981 Ed., § 22-1107.

1973 Ed., § 22-1107.

Effect of amendments. — D.C. Law 18-375 rewrote the section, which formerly read:

“It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane lan-

guage or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than \$250 or imprisonment for not more than 90 days, or both for each and every such offense.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 302(a) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 302(a) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 18-375. — Law 18-375, the “Disorderly Conduct Amendment Act of 2010”, was introduced in Council and assigned Bill No. 18-425, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on November 23, 2010, and December 7, 2010, respectively. Signed by the Mayor on January 19, 2011, it was assigned Act No. 18-699 and transmitted to both Houses of Congress for its review. D.C. Law 18-375 became effective on May 26, 2011.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Arrest.

Construction and application.

Defenses.

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Harmless or prejudicial error.

Indictment or information.

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Jurisdiction.

Juvenile defendants.

Nature and elements of offense.

—Disorderly conduct, nature and elements of offense.

—Nature of conduct and utterances, nature and elements of offense.

—Public place.

—Unlawful assembly or congregation, nature and elements of offense.

Obstruction of justice.

Picketing.

Pleadings and proof.

Private property.

Questions of law and fact.

Related civil actions.

Review.

Search and seizure.

Validity.

- Free speech and press, validity.
- In general.
- Weight and sufficiency of evidence.

Admissibility of evidence.

Admission, in prosecution for using profane, indecent and obscene language, disorderly conduct, and making rude and obscene gestures, of witnesses' conclusions that language was profane, obscene and indecent was reversible error, even though proof of actions may have been sufficient to sustain conviction. D.C. Code 1951, §§ 22-1107, 22-1121. *Heilman v. District of Columbia*, 172 A.2d 141, 1961 D.C. App. LEXIS 244 (Cr.App. 1961).

Arrest.

Simply talking back to a policeman does not justify an arrest for disorderly conduct. D.C. Code §§ 22-1107, 22-1121. *Von Sleichter v. United States*, 472 F.2d 1244, 1972 U.S. App. LEXIS 8996 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517, 1972 U.S. LEXIS 338 (1972).

Police officer who, while walking his beat in an area considered high in narcotic traffic, noticed defendant and two other young men standing in the shadows of a building, who observed that their hands were "passing and changing" among them, who crossed the street to investigate whereupon defendant began to walk away rapidly, who called out "I would like to talk with you a minute," in response to which defendant, within the earshot of pedestrians, shouted a four-letter expletive and ran, had probable cause to arrest defendant for disorderly conduct; thus, the ensuing search for weapons incident to the arrest, which search yielded a bag of heroin, was likewise lawful. D.C. Code § 22-1107. *Von Sleichter v. United States*, 472 F.2d 1244, 1972 U.S. App. LEXIS 8996 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517, 1972 U.S. LEXIS 338 (1972).

While disorderly conduct is a crime without physical evidence or fruits, a policeman apprehending the possibility of danger may conduct a search incident to a lawful arrest for disorderly conduct for the purpose of discovering and removing weapons, and may command the person arrested to place his hands where they can be seen. D.C. Code § 22-1107. *Von Sleichter v. United States*, 472 F.2d 1244, 1972 U.S. App. LEXIS 8996 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517, 1972 U.S. LEXIS 338 (1972).

Existence of disorderly conduct statute was factor properly to be considered by arresting police officer in determining whether probable cause existed to arrest defendant for conduct in officer's presence and defined in that statute as crime. D.C. Code 1961, § 22-1107. *Johnson v.*

United States, 370 F.2d 489, 1966 U.S. App. LEXIS 4290 (C.A.D.C. 1966).

Whether defendant's arrest for disorderly conduct was sham, employed by police as gamble for detecting larger crime, was one for inference to be drawn by fact-finder based upon credibility and demeanor. D.C. Code 1961, §§ 4-140, 22-1107. *Johnson v. United States*, 370 F.2d 489, 1966 U.S. App. LEXIS 4290 (C.A.D.C. 1966).

Arrest of defendant, who was observed by officers running across street from church doorway at midnight, and who, when stopped, used obscene language toward officers, on charges of disorderly conduct was lawful, and thus incriminating statement made by defendant and pistol found near scene of arrest were not inadmissible on the grounds asserted. D.C. Code 1961, §§ 4-140, 22-1107, 22-3204. *Johnson v. United States*, 370 F.2d 489, 1966 U.S. App. LEXIS 4290 (C.A.D.C. 1966).

To justify a disorderly conduct or similar arrest, the words uttered must be lewd, obscene, insulting, fighting words which tend by their very nature to incite a breach of the peace. D.C. Code § 22-1107. *Stewart v. United States*, 428 F. Supp. 321, 1976 U.S. Dist. LEXIS 11915 (1976).

Arrests, during mass demonstrations, of persons predicated solely on the profanity of the arrestee, without a showing of likelihood of inciting violence, were without probable cause and thus unlawful. D.C. Code § 22-1107. *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186, 1975 U.S. Dist. LEXIS 16420 (1975), reversed by 566 F.2d 107, 184 U.S. App. D.C. 215, 1977 U.S. App. LEXIS 11597, 1977 U.S. App. LEXIS 13879 (1977).

Police need not await outbreak of violence before attempting to control situation by making disorderly conduct arrest. D.C. Code 1981, § 22-1121(1). *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Officer did not have to await occurrence of actual breach of peace before arresting defendant who was kicking, poking, and shouting profanities at people on street. D.C. Code 1981, § 22-1121(1). *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Officer had probable cause to arrest for disorderly conduct person whom he had stopped for traffic violation where such person was openly flouting officer's request not to go back to his car, with inflammatory language and violent motions, and passersby were attracted by the commotion. D.C. Code § 22-1107.

Gueory v. District of Columbia, 408 A.2d 967, 1979 D.C. App. LEXIS 493 (1979).

Arrest of defendant for use toward officer of abusive, insulting, obscene language in protest against direction that he and a group of others on sidewalk move on was valid. D.C. Code 1961, § 22-1107. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

Where defendant, charged with disorderly conduct and simple assault, subsequent to order of police officer to clear street corner walked away reluctantly and when about five feet from officer spoke obscene words in fairly loud voice, defendant's arrest was legal. D.C. Code 1961, §§ 22-504, 22-1107. *Duncan v. United States*, 219 A.2d 110, 1966 D.C. App. LEXIS 166 (App. 1966), remanded by 379 F.2d 148, 126 U.S. App. D.C. 371, 1967 U.S. App. LEXIS 6334 (1967).

Construction and application.

Penal statutes are not to be broadened by intendment, and uncertainty respecting their ambit is to be resolved in favor of leniency. *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Thrust of this section is to bar loud and raucous behavior. *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

Defenses.

Defendant was not put in double jeopardy when, after having been convicted of disorderly conduct, he was prosecuted for assaulting a police officer, notwithstanding fact that both incidents occurred in relatively short span of time and at same place. D.C. Code §§ 22-505(a), 22-1107. *Harris v. United States*, 402 F.2d 205, 1968 U.S. App. LEXIS 5575 (C.A.D.C. 1968).

Fact that defendant and four other demonstrators who elected to stand trial faced enhanced charge, unlawful entry, while 153 other demonstrators who were arrested posted and forfeited collateral on lesser charge of unlawful assembly, did not require reversal of conviction on grounds of prosecutorial vindictiveness, where demonstrators were advised by assistant United States attorney that all who were arrested would be permitted to post and forfeit \$10 collateral on charge of unlawful assembly, but that if they did not do so, they would be charged with more serious misdemeanor of unlawful entry, police informed all of demonstrators of their exposure to prosecution under unlawful entry statute if they remained in Rotunda, and defendant was given opportunity to post and forfeit \$10 collateral for unlawful assembly, but failed to do so. D.C. Code 1981,

§§ 22-1107, 22-3102. *Shiel v. United States*, 515 A.2d 405, 1986 D.C. App. LEXIS 418 (1986), writ of certiorari denied by 485 U.S. 1010, 108 S. Ct. 1477, 99 L. Ed. 2d 706, 1988 U.S. LEXIS 1716, 56 U.S.L.W. 3718 (1988).

Defendants' intent to avert what they believed were international crimes specifically, that convention activities contravened charter of international military tribunal and that accordingly they were privileged or required under international law, and thus under local law, to violate unlawful assembly statute, in order to prevent greater wrong did not constitute "bona fide belief defense" to charges of unlawful assembly inasmuch as defendants' mistake was mistake of law and not of fact, and charter was penal law. D.C. Code 1981, § 22-1107. *Morgan v. District of Columbia*, 476 A.2d 1128, 1984 D.C. App. LEXIS 416 (1984).

Discovery.

Jencks rule of evidence applies in District of Columbia Court of General Sessions whether case is prosecuted by District of Columbia or by United States. D.C. Code 1961, §§ 22-504, 22-1107; 18 U.S.C. § 3500. *Duncan v. United States*, 379 F.2d 148, 1967 U.S. App. LEXIS 6334 (C.A.D.C. 1967).

If trial court, in determining issue of producibility of police report form under Jencks Act, found that statement should have been made available, error in failing to require production of statement would not be harmless and would require new trial on charges of disorderly conduct and simple assault. D.C. Code 1961, §§ 22-504, 22-1107; 18 U.S.C. § 3500. *Duncan v. United States*, 379 F.2d 148, 1967 U.S. App. LEXIS 6334 (C.A.D.C. 1967).

Harmless or prejudicial error.

Record on appeal from conviction for carrying concealed pistol without license failed to establish plain error warranting reversal, notwithstanding failure to raise issue below, on ground that defendant's arrest for disorderly conduct was sham employed by police as gamble for detecting larger crime. D.C. Code 1961, §§ 4-140, 22-1107, 22-3204. *Johnson v. United States*, 370 F.2d 489, 1966 U.S. App. LEXIS 4290 (C.A.D.C. 1966).

Where evidence had been admitted that telephone line identifier had been connected to defendant's telephone, testimony of security officer of telephone company that records of company showed that number from which harassing calls to complainant originated was private listing registered to defendant was merely cumulative and its admission, if error, was harmless, in proceeding on charge of disorderly conduct consisting of making harassing telephone calls to home of complainant. D.C. Code § 22-1107. *Coleman v. District of Colum-*

bia, 250 A.2d 555, 1969 D.C. App. LEXIS 203 (App. 1969).

Indictment or information.

Conviction under information charging obstruction of free use of public building could not be sustained on theory that defendant was really engaged in obstructing arrest, where defendant was not charged with the latter offense. D.C. Code § 22-1107. *Lange v. United States*, 443 F.2d 720, 1971 U.S. App. LEXIS 11245 (C.A.D.C. 1971).

Information charging that defendant used profane language and indecent and obscene words was defective for failure to allege that such conduct threatened breach of peace. D.C. Code § 22-1107; U.S. Const. Amend. 1; General Sessions Court Rules, Criminal Division rule 6(a). *Williams v. District of Columbia*, 419 F.2d 638, 1969 U.S. App. LEXIS 11844 (C.A.D.C. 1969).

Defendants, who were arrested after refusing to move out of corridor in House wing of Capitol building when ordered to do so by Capitol police, were entitled to know with certainty offense with which they were charged and possible penalty threatened and were entitled to definite reference to the law which they had allegedly violated, and thus where, notwithstanding request of defense, no one had given citation of statute under which prosecution was being had, other than statement of prosecutor that two sections were involved, convictions under section carrying lighter sentence, as requested by prosecutor, were required to be set aside. D.C. Code §§ 22-101 et seq., 22-109, 22-1107, 22-1121, 22-3102, 22-3111; 40 U.S.C. § 101. *Smith v. District of Columbia*, 387 F.2d 233, 1967 U.S. App. LEXIS 5491 (C.A.D.C. 1967).

Information charging defendant arrested during peace demonstration with disorderly conduct in that she did with intent to provoke breach of peace congregate with others on public street and on grounds of United States Capitol, and did refuse to move, which failed to specify which of several potentially applicable statutes was basis of prosecution, was insufficient. D.C. Code §§ 22-1101 et seq., 22-1107, 22-1121 and subd. (2), 22-3101 et seq., 22-3111. *Smith v. District of Columbia*, 387 F.2d 233, 1967 U.S. App. LEXIS 5491 (C.A.D.C. 1967).

An information charging defendants with congregating and assembling on a certain avenue, and there crowding, obstructing, and incommoding the free use of the sidewalk, contrary to and in violation of a specified act of Congress, is insufficient, though drawn in the language of the statute. *Hunter v. District of Columbia*, 47 App.D.C. 406, 1918 U.S. App. LEXIS 2430 (1918).

Information which stated in effect that defendant, under circumstances likely to cause

breach of peace, did congregate and assemble with others in designated public place and crowd, obstruct and incommode free use of street, in violation of certain statute pertaining to unlawful assembly, and which did not set forth any particulars as to acts by which offense was committed failed to allege essential facts constituting an offense. D.C. Code § 22-1107. *Horowitz v. District of Columbia*, 291 A.2d 202, 1972 D.C. App. LEXIS 394 (1972).

Where information charging violation of statute forbidding persons to congregate and assemble on public street and crowd, obstruct, or incommode free use of the street failed to charge that act was done under circumstances which threatened a breach of peace, information did not charge an offense and conviction on it could not stand. D.C. Code § 22-1107. *Adams v. United States*, 256 A.2d 563, 1969 D.C. App. LEXIS 300 (App. 1969).

Defendant could not have been convicted of engaging in loud and boisterous talking and other disorderly conduct where requisite element of congregating and assembling was neither charged nor proved. D.C. Code § 22-1107. *Franklin v. District of Columbia*, 248 A.2d 677, 1968 D.C. App. LEXIS 232 (App. 1968).

Injunctive relief.

Issuance of preliminary injunction restraining District of Columbia police officials from disseminating police records that pertained to arrestees was proper where the injunction preserved the status quo and prevented immediate injury to the arrestees until such time as their suit for expungement of arrest records could be determined on the merits. U.S. Const. Amends. 4-6; 18 U.S.C. § 1331; D.C. Code §§ 11-101 et seq., 11-923(b), 22-1107, 23-101(a, b). *Sullivan v. Murphy*, 478 F.2d 938, 1973 U.S. App. LEXIS 10515 (C.A.D.C. 1973).

Fact that all criminal proceedings in the District of Columbia Superior Court had come to an end did not moot arrestees' action for injunctive relief where there was live controversy as to whether District of Columbia police officials should be required to refund to the arrestees moneys that had been previously obtained through bail collateral forfeitures and there was live controversy as to whether arrest records should be expunged. U.S. Const. Amends. 4-6; 18 U.S.C. § 1331; D.C. Code §§ 11-101 et seq., 11-923(b), 22-1107, 23-101(a, b), 23-581(a)(1)(B). *Sullivan v. Murphy*, 478 F.2d 938, 1973 U.S. App. LEXIS 10515 (C.A.D.C. 1973).

Jurisdiction.

On record indicating that plaintiff in civil rights action had shouted obscenity and expletives at police officer at downtown intersection, that plaintiff failed to appear to contest charge of disorderly conduct or seek equitable relief in

superior court upon showing of lack of culpability and that plaintiff was apparently not distressed by handcuffs or interrogation, district court did not abuse discretion in certifying record to superior court of the District of Columbia, even without permitting further opportunity to reformulate complaint, for insufficiency of amount in controversy. D.C. Code §§ 11-922(b), 11-962, 22-1107; 18 U.S.C. §§ 1331, 1332, 1343(1, 3, 4); 42 U.S.C. §§ 1981, 1983. *James v. Lusby*, 499 F.2d 488, 1974 U.S. App. LEXIS 9022 (C.A.D.C. 1974).

In view of arrestees' claim that more complete remedy than is afforded by District of Columbia law was required to vindicate their federal constitutional rights which allegedly were violated during civil disorders, the exhaustion of local remedies doctrine did not preclude access to the federal court. U.S. Const. Amends. 4-6; 18 U.S.C. § 1331; D.C. Code §§ 11-101 et seq., 11-923(b), 22-1107, 23-101(a, b). *Sullivan v. Murphy*, 478 F.2d 938, 1973 U.S. App. LEXIS 10515 (C.A.D.C. 1973).

Arrestees were entitled to maintain in federal court their action against District of Columbia officials to set aside forfeiture of bail collateral security where there was serious doubt of the availability of relief in the District of Columbia courts and there was assertion that, because of misinformation circulated to the arrestees at the time they posted bond, large numbers of them were frustrated in their efforts to secure procedural due process with respect to the forfeitures of collateral. U.S. Const. Amends. 4-6; 18 U.S.C. § 1331; D.C. Code §§ 11-101 et seq., 11-923(b), 22-1107, 23-101(a, b). *Sullivan v. Murphy*, 478 F.2d 938, 1973 U.S. App. LEXIS 10515 (C.A.D.C. 1973).

Arrestees' action against District of Columbia police officials to compel expungement of records of arrest during civil disorders was ripe for determination where all prosecutions arising from the disorders had terminated, any danger of embarrassment or interference from judgments possibly inconsistent with those of the District of Columbia courts was obviated and a clearcut federal controversy existed. U.S. Const. Amends. 4-6; 18 U.S.C. § 1331; D.C. Code §§ 11-101 et seq., 11-923(b), 22-1107, 23-101(a, b). *Sullivan v. Murphy*, 478 F.2d 938, 1973 U.S. App. LEXIS 10515 (C.A.D.C. 1973).

Jurisdiction of the Court of General Sessions extended to prosecution under unlawful assembly statute, setting penalty of not more than \$250 or imprisonment for not more than 90 days, or both, notwithstanding contention that criminal jurisdiction of such court did not extend to case where maximum penalty may be both fine and imprisonment. D.C. Code §§ 11-963, 22-1107. *Lange v. United States*, 443 F.2d 720, 1971 U.S. App. LEXIS 11245 (C.A.D.C. 1971).

Under statute which restricts corporation counsel's authority to cases in which punishment is fine only or imprisonment not to exceed one year, corporation counsel lacked authority to initiate prosecution for disorderly conduct which was punishable by fine of not more than \$250 or imprisonment of not more than 90 days, or both. D.C. Code §§ 22-1107, 23-101, 23-102. *District of Columbia v. Grimes*, 404 F.2d 1337, 1968 U.S. App. LEXIS 7539 (C.A.D.C. 1968).

United States, through United States attorney, and not the District of Columbia, through the corporation counsel, is proper prosecutive authority for alleged violation of statute prescribing maximum fine of \$500, or imprisonment for not more than six months, or both, for disorderly and unlawful conduct in or about public buildings and public grounds belonging to the United States within the district. D.C. Code §§ 22-1107, 22-3111, 23-101(a, f). *District of Columbia v. Ackerman*, 283 A.2d 24, 1971 D.C. App. LEXIS 210 (1971).

Juvenile defendants.

Where adjudication of delinquency based on finding that minor used obscene and indecent language might have been premised on hearing judge's expressed view that "there is no obligation on the part of the Government in this case to show the likelihood of a breach of the peace" in prosecuting under statute prohibiting the use of obscene and indecent words and because such view was patently contrary to law, adjudication of delinquency based on incident wherein juvenile shouted obscenities after being suspended from school and told to leave school building was reversed for a new hearing to be conducted according to the prevailing legal standard. D.C. Code § 22-1107. *In re W.*, 383 A.2d 646, 1978 D.C. App. LEXIS 441 (1978).

Nature and elements of offense.

— Disorderly conduct, nature and elements of offense.

"Disorderly" conduct statute is not applicable for mere use of indecent or obscene words, but only if the language is, under contemporary community standards, so grossly offensive to members of the public who actually overhear it as to amount to a "nuisance". D.C. Code §§ 22-1107, 22-1121. *Von Sleichter v. United States*, 472 F.2d 1244, 1972 U.S. App. LEXIS 8996 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517, 1972 U.S. LEXIS 338 (1972).

The qualifying language of the general disorderly conduct statute—"under circumstances such that a breach of the peace may be occasioned thereby"—need not be read into statute making it unlawful to curse, swear, or make use of profane language or indecent or obscene

words in any public way. D.C. Code 1961, §§ 22-1107, 22-1121. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

Words "other disorderly conduct" within statute had to be read with preceding words "loud and boisterous talking" and was intended to mean other like disorderly actions while assembled in Capitol grounds, such as screaming, loud singing, clapping and similar noisy outbursts of sound, and merely "going limp" without active physical resistance and absent loud and boisterous vocal disturbance, could not be reasonably equated with "other disorderly conduct" within statute. D.C. Code 1961, § 22-1107. *Jalbert v. District of Columbia*, 221 A.2d 94, 1966 D.C. App. LEXIS 195 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 6085 (1967).

Generally, disorderly conduct embraces those actions or words which tend to corrupt public morals or outrage sense of public decency and is not limited to those acts which tend to breach peace or cause actual disturbance. D.C. Code 1961, § 22-1107. *Duncan v. United States*, 219 A.2d 110, 1966 D.C. App. LEXIS 166 (App. 1966), remanded by 379 F.2d 148, 126 U.S. App. D.C. 371, 1967 U.S. App. LEXIS 6334 (1967).

Even if disorderly conduct statute required as an element of proof circumstances which may tend to incite breach of peace, obscene words spoken by defendant in fairly loud voice, about five feet away from police officer, were meant for his ears even if not spoken directly to him and as such they were insulting, degrading, abusive and fighting words and an invitation to trouble and breach of peace. D.C. Code 1961, § 22-1107. *Duncan v. United States*, 219 A.2d 110, 1966 D.C. App. LEXIS 166 (App. 1966), remanded by 379 F.2d 148, 126 U.S. App. D.C. 371, 1967 U.S. App. LEXIS 6334 (1967).

Under disorderly conduct statute making it unlawful for any person to use indecent or obscene language in any public place, the presence of others than offender and person addressed is not necessary to complete the offense. D.C. Code 1940, § 22-1107. *Morris v. District of Columbia*, 31 A.2d 652, 1943 D.C. App. LEXIS 215 (Cr.App. 1943).

— Nature of conduct and utterances, nature and elements of offense.

Opinion in prior case suggested that it was not necessary to conviction for disorderly conduct that words used have tended to provoke breach of the peace, but even assuming that such requirement existed, it was satisfied by showing that defendant had stated to police officers "You m—r F—s keep out of this" since words uttered were indecent, obscene and patently offensive "fighting words" whose very use

not only inflicted injury but tended to provoke immediate breach of peace. D.C. Code § 22-1107. *Franklin v. District of Columbia*, 248 A.2d 677, 1968 D.C. App. LEXIS 232 (App. 1968).

Consequential or probable breach of the peace is not an element of offense under statute making it unlawful to curse, swear, or use profane language or indecent or obscene words in any public way. D.C. Code 1961, § 22-1107. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

Defendant's conduct and not crowd's reaction to it must be starting point for determining whether defendant's message was of such nature as to come within ambit of free speech guarantee of First Amendment, and audience reaction and immediacy of disorder become significant elements of proof of disorderly conduct only after speaker passes bounds of argument of persuasion and undertakes incitement to riot. U.S. Const. Amend. 1; D.C. Code 1961, §§ 22-1107, 22-1121. *Allen v. District of Columbia*, 187 A.2d 888, 1963 D.C. App. LEXIS 181 (App. 1963).

In determining whether defendant's remarks were within prohibition of disorderly conduct statute, the trial judge was entitled to consider all surrounding circumstances, time of occurrence and manner in which it occurred, repetition of the remarks, as well as lack of previous acquaintance. D.C. Code 1940, § 22-1107. *Morris v. District of Columbia*, 31 A.2d 652, 1943 D.C. App. LEXIS 215 (Cr.App. 1943).

— Public place.

A public vehicle, such as a taxicab, plying its business on a public street, is a "public place" within disorderly conduct statute making it unlawful for any person to use indecent or obscene words in any public place. D.C. Code 1940, § 22-1107. *Morris v. District of Columbia*, 31 A.2d 652, 1943 D.C. App. LEXIS 215 (Cr.App. 1943).

— Unlawful assembly or congregation, nature and elements of offense.

"Congregate and assemble" provision of District of Columbia disorderly conduct statute requires presence of three or more persons acting in concert for an unlawful purpose. D.C. Code § 22-1107. *Kilnoy v. District of Columbia*, 400 F.2d 761, 1968 U.S. App. LEXIS 5948 (C.A.D.C. 1968).

Attorney representing client who had been subpoenaed to appear before House Un-American Activities Committee could not be convicted of violation of District of Columbia unlawful assembly statute for conduct which led to his forceful removal from committee room by order of subcommittee chairman acting alone in violation of committee rules, where attorney could

not have been properly charged with assembling and congregating, an essential element of offense, and an attorney representing client could not come within definition of unlawful assembly. D.C. Code § 22-1107. *Kilnoy v. District of Columbia*, 400 F.2d 761, 1968 U.S. App. LEXIS 5948 (C.A.D.C. 1968).

Under District of Columbia unlawful assembly statute making it illegal for person or persons to congregate and assemble and to engage in loud and boisterous talking or disorderly conduct, a "congregation" requires at least three persons. D.C. Code § 22-1107. *Kilnoy v. District of Columbia*, 400 F.2d 761, 1968 U.S. App. LEXIS 5948 (C.A.D.C. 1968).

Under District of Columbia statute relating to disorderly conduct, there can be no "unlawful assembly" where only two persons at the most are assembled. D.C. Code § 22-1107. *Kilnoy v. District of Columbia*, 400 F.2d 761, 1968 U.S. App. LEXIS 5948 (C.A.D.C. 1968).

Conviction for unlawful assembly, based on war protester defendants' conduct in assembling in front of public building entrance with the intent to impede entry into the building, did not require proof that defendants were otherwise "disorderly" or that their actions threatened to cause a breach of the peace; purposely blocking or impeding entry into a public building enjoys no First Amendment protection, certainly none sufficient to require proof of an imminent breach of the peace before persons who refuse warnings to desist may be punished. *Tetaz v. District of Columbia*, 976 A.2d 907, 2009 D.C. App. LEXIS 333 (2009).

Conviction for unlawful assembly for purpose of incommoding free use of driveway required both proof of presence of three or more persons acting in concert for unlawful purpose and proof of commission of act of incommoding. D.C. Code 1981, § 22-1107. *Odum v. District of Columbia*, 565 A.2d 302, 1989 D.C. App. LEXIS 225 (1989).

Although proof of specific intent is not required under statute governing unlawful assembly, proof of general criminal intent is. D.C. Code 1981, § 22-1107. *Morgan v. District of Columbia*, 476 A.2d 1128, 1984 D.C. App. LEXIS 416 (1984).

Obstruction of justice.

Evidence that group of demonstrators of which defendant was part approached to within two or three feet of another group, which was being arrested, but did not intermingle physically with the arrested group would not support conviction for obstructing arrest, under disorderly conduct provision of unlawful assembly statute. D.C. Code § 22-1107. *Lange v. United States*, 443 F.2d 720, 1971 U.S. App. LEXIS 11245 (C.A.D.C. 1971).

Picketing.

Fact that group continued lawful picketing was not enough to impute to group defendant's

intent in committing wrongful action of blocking construction site driveway, and, therefore, evidence failed to establish concerted unlawful purpose necessary to obtain conviction of defendant for unlawful assembly for purpose of incommoding free use of driveway. D.C. Code 1981, § 22-1107. *Odum v. District of Columbia*, 565 A.2d 302, 1989 D.C. App. LEXIS 225 (1989).

Defendant's activities in counterpicketing another organization by carrying a sign demanding more police brutality for "Reds" and dragging what purported to be flag of a foreign government on ground in front of crowd, which gave no open displays of anger or threats of violence, was within protection of First Amendment and did not constitute disorderly conduct. U.S. Const. Amend. 1; D.C. Code 1961, §§ 22-1107, 22-1121. *Allen v. District of Columbia*, 187 A.2d 888, 1963 D.C. App. LEXIS 181 (App. 1963).

Pleadings and proof.

Proof of actual or impending breach of peace is not required for conviction of disorderly conduct; it is only required that alleged conduct occur under circumstances such that breach of peace may be occasioned thereby. D.C. Code 1981, § 22-1121(1). *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Dismissal of charge under general disorderly conduct statute removed need for finding that breach of the peace was threatened by offensive language of defendant, who was also charged with use of profane language or indecent or obscene words on public sidewalk. D.C. Code 1961, §§ 22-1107, 22-1121. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

Private property.

Requirement that those charged with unlawful assembly act under circumstances likely to be cause of breach of the peace is not applicable to actions on private property. D.C. Code 1981, § 22-1107. *Morgan v. District of Columbia*, 476 A.2d 1128, 1984 D.C. App. LEXIS 416 (1984).

Questions of law and fact.

Whether defendant, charged with assault, public intoxication and disorderly conduct in violation of District of Columbia Code, had mental disease which should have excused him from criminal responsibility was issue of ultimate fact for trier thereof. D.C. Code §§ 22-504, 22-1107, 25-128. *Dempsey v. United States*, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Weight to be given testimony of witnesses who related that conduct of defendant at time of alleged assault, public intoxication and disorderly conduct, in violation of District of Columbia Code, and shortly thereafter was bizarre and weight to be given testimony of government witness who related that defendant was intoxicated at time of alleged offenses and that assault was triggered by refusal to serve him beer was for trier of fact. D.C. Code §§ 22-504, 22-1107, 25-128. *Dempsey v. United States*, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Accuracy of telephone company's procedure in registering harassing telephone calls made to complainant's home was for trial court, in proceeding on charge of disorderly conduct consisting of making harassing telephone calls. D.C. Code § 22-1107. *Coleman v. District of Columbia*, 250 A.2d 555, 1969 D.C. App. LEXIS 203 (App. 1969).

Related civil actions.

Disorderly conduct arrest of plaintiff, who brought suit under the Federal Tort Claims Act for false arrest, was without probable cause, since the obscene expression addressed by plaintiff to police officer could not be deemed grossly offensive to those fellow workers and passers-by who may have heard it but, instead, is an everyday expression that punctuates everyday street language, and since plaintiff's loud protestations did not create a substantial risk of provoking violence. D.C. Code § 22-1107. *Stewart v. United States*, 428 F. Supp. 321, 1976 U.S. Dist. LEXIS 11915 (1976).

Review.

Where Court of General Sessions of the District of Columbia granted motion to dismiss disorderly conduct charge on several grounds but subsequently vacated dismissal with respect to jurisdictional ground only and question of prosecutorial authority was certified to Court of Appeals, any action Court of Appeals might take on certified question could not alter dismissal of charges and hence certificate was dismissed. D.C. Code §§ 22-1107, 23-102. *District of Columbia v. Barry*, 387 F.2d 860, 1967 U.S. App. LEXIS 4367 (C.A.D.C. 1967).

Court of Appeals, on appeal from conviction for disorderly conduct and simple assault, was reluctant to determine whether police department form containing information as to time, place and date of offense, name of complainant, names and addresses of witnesses, and description of details of offense was producible under Jencks Act but would give trial court opportunity in first instance to decide issue of produceability under established guidelines. D.C. Code 1961, §§ 22-504, 22-1107; 18 U.S.C. § 3500. *Duncan v. United States*, 379 F.2d 148, 1967 U.S. App. LEXIS 6334 (C.A.D.C. 1967).

Finding that defendant had, as charged in the information, engaged in loud and boisterous talking and other disorderly conduct was an independent basis of defendant's conviction, distinct from his alleged use of profane, indecent and obscene words, and court did not abuse its discretion in denying defendant's application for allowance of an appeal. D.C. Code 1961, § 22-1107. *Stone v. District of Columbia*, 359 F.2d 275, 1966 U.S. App. LEXIS 6565 (C.A.D.C. 1966).

Search and seizure.

Findings in support of order granting pretrial motion to suppress pistol seized from beneath seat of defendant's automobile near scene of his arrest for disorderly conduct were insufficient where there were no findings upon which Court of Appeals could base judgment as to whether pistol was product of search and seizure incident to lawful arrest, whether, if so, seizure was so far beyond the area within defendant's immediate control as to be constitutionally impermissible, and whether, if pistol was not product of search and seizure in Fourth Amendment sense (officer testified that he reached under seat in search of seat adjustment lever with intent of driving automobile to precinct station) the intrusion into the automobile was reasonable and warranted under the circumstances. D.C. Code §§ 22-1107, 22-3204; U.S. Const. Amend. 4. *United States v. Jones*, 275 A.2d 541, 1971 D.C. App. LEXIS 296 (1971).

Trial judge did not err in denying motion to suppress heroin properly seized from defendant, one judge being of the opinion that defendant was properly "seized" in rapidly moving on-street investigation and discarding of narcotics was not product of illegal police action and second judge being of opinion that officer had probable cause to arrest defendant for disorderly conduct and seizure of heroin was therefore lawful. D.C. Code §§ 22-1107, 33-402; U.S. Const. Amend. 4. *Von Sleichter v. United States*, 267 A.2d 336, 1970 D.C. App. LEXIS 311 (App. 1970), affirmed by 472 F.2d 1244, 153 U.S. App. D.C. 169, 1972 U.S. App. LEXIS 8996 (1972).

Validity.

— Free speech and press, validity.

Epithets and words of personal abuse are not communication of information safeguarded by First Amendment protections, and may, under certain circumstances, be subject to punishment as criminal act. U.S. Const. Amend. 1. *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Section making it a violation to use obscene and indecent words in public can pass constitutional muster only when interpreted to require that the language be spoken in circumstances which threaten a breach of the peace. D.C. Code § 22-1107. *In re W.*, 383 A.2d 646, 1978 D.C. App. LEXIS 441 (1978).

The prohibition of and, if required, prosecution for use of obscene and profane language in public may be upheld upon interest of state in preserving community moral standards. D.C. Code 1961, § 22-1107. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

— In general.

There is a state interest in protecting the sensibilities of passers-by against shock, and this does not depend on a showing of any tendency to result in violence. D.C. Code § 22-1107. *Von Sleichter v. United States*, 472 F.2d 1244, 1972 U.S. App. LEXIS 8996 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517, 1972 U.S. LEXIS 338 (1972).

Statute prohibiting use of profane or obscene language in public would be valid if interpreted to require that language be spoken in circumstances which threaten a breach of the peace. D.C. Code § 22-1107; U.S. Const. Amend. 1. *Williams v. District of Columbia*, 419 F.2d 638, 1969 U.S. App. LEXIS 11844 (C.A.D.C. 1969).

Fact that police officers sometimes seem to be unwilling to enforce District of Columbia's disorderly conduct statute in a proper manner did not necessitate finding that the law was so poorly drafted as to be incapable of constitutional application. D.C. Code §§ 22-1107, 22-1121. *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186, 1975 U.S. Dist. LEXIS 16420 (1975), reversed by 566 F.2d 107, 184 U.S. App. D.C. 215, 1977 U.S. App. LEXIS 11597, 1977 U.S. App. LEXIS 13879 (1977).

Weight and sufficiency of evidence.

Evidence that half of 50-foot-wide divided stairway leading to the Capitol was already closed to the public by the police in connection with arrest of another group at the time when group of demonstrators of which defendant was part assembled at the bottom thereof, and that the other half of such stairway was clear did not support conviction, under unlawful assembly statute, for obstructing free use of public building. D.C. Code § 22-1107. *Lange v. United States*, 443 F.2d 720, 1971 U.S. App. LEXIS 11245 (C.A.D.C. 1971).

Evidence supported finding that defendant war protesters assembled in front of public building entrance with the intent to impede entry into the building, thus supporting conviction

for unlawful assembly; officer testified that defendants were lying immediately in front of building entrance and had pulled sheets over themselves and lined up mock coffins, and defendants failed to move, though told three times that they would be arrested if they did not leave or unobstruct the entrance. *Tetaz v. District of Columbia*, 976 A.2d 907, 2009 D.C. App. LEXIS 333 (2009).

Evidence in prosecution of defendants for unlawful assembly, including testimony of hotel security chief that most participants at convention at hotel arrived by automobile and used driveway to reach hotel, supported trial court's finding that driveway was part of "entrance" to building within meaning of unlawful assembly statute prohibiting the congregation or assembly at entrance of any private building or enclosure. D.C. Code 1981, § 22-1107. *Morgan v. District of Columbia*, 476 A.2d 1128, 1984 D.C. App. LEXIS 416 (1984).

Evidence in defendants' prosecution for unlawful assembly, including evidence that police made several announcements asking defendants to leave driveway of hotel, but that defendants failed to do so, was sufficient to support finding that defendants intended to obstruct entrance to hotel within meaning of unlawful assembly statute. D.C. Code 1981, § 22-1107. *Morgan v. District of Columbia*, 476 A.2d 1128, 1984 D.C. App. LEXIS 416 (1984).

Evidence supported conviction of assault, public intoxication and disorderly conduct in violation of District of Columbia Code. D.C. Code §§ 22-504, 22-1107, 25-128. *Dempsey v. United States*, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Defendant could not have been convicted of fighting in street where proof was that incident occurred inside police station. D.C. Code § 22-1107. *Franklin v. District of Columbia*, 248 A.2d 677, 1968 D.C. App. LEXIS 232 (App. 1968).

Evidence supported conviction of defendant for using profane language, indecent and obscene words, on public sidewalk. D.C. Code 1961, § 22-1107. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

Evidence sustained defendant's conviction for disorderly conduct and simple assault. D.C. Code 1961, §§ 22-504, 22-1107. *Duncan v. United States*, 219 A.2d 110, 1966 D.C. App. LEXIS 166 (App. 1966), remanded by 379 F.2d 148, 126 U.S. App. D.C. 371, 1967 U.S. App. LEXIS 6334 (1967).

Evidence sustained convictions for disorderly conduct and drinking in public. D.C. Code 1961, §§ 22-1107, 25-128. *Heard v. District of Columbia*, 179 A.2d 723, 1962 D.C. App. LEXIS 350 (Cr.App. 1962).

Evidence that taxicab driver made certain suggestions to female passenger and repeated the suggestions both en route and on reaching their destination justified finding that such remarks were “indecent” and “obscene” within

disorderly conduct statute making it unlawful for any person to use indecent or obscene words in “public place”. D.C. Code 1940, § 22-1107. *Morris v. District of Columbia*, 31 A.2d 652, 1943 D.C. App. LEXIS 215 (Cr.App. 1943).

§ 22-1308. Playing games in streets.

It shall not be lawful for any person or persons to play the game of football, or any other game with a ball, in any of the streets, avenues, or alleys in the City of Washington; nor shall it be lawful for any person or persons to play the game of bandy, shindy, or any other game by which a ball, stone, or other substance is struck or propelled by any stick, cane, or other substance in any street, avenue, or alley in the City of Washington, under a penalty of not more than \$5 for each and every such offense.

(July 29, 1892, 27 Stat. 325, ch. 320, § 17; Feb. 11, 1895, 28 Stat. 650, ch. 79.)

Cross references. — Conduct of prosecutions under this section, see § 22-1809.

Prior Codifications. — 1981 Ed., § 22-1108.

1973 Ed., § 22-1108.

CASE NOTES

ANALYSIS

Admissions.
Torts of child.

Admissions.

Offer of parents of children, who injured aged woman while children were playing in street, to pay hospital expenses, was not a recognition of liability and evidence pertaining thereto was properly excluded. *Bateman v. Crim*, 34 A.2d 257, 1943 D.C. App. LEXIS 193 (Cr.App. 1943).

Torts of child.

In absence of evidence that either of two

minor boys had previously played with a football on sidewalk in violation of statute or that their conduct had been such that their parents, with closer supervision, would have been aware that boys were engaging in conduct which was unlawful or which might inflict injury upon others, parents of boys were not chargeable with liability for injuries sustained by pedestrian with whom one of the boys collided while attempting to catch football. D.C. Code 1940, § 22-108. *Bateman v. Crim*, 34 A.2d 257, 1943 D.C. App. LEXIS 193 (Cr.App. 1943).

§ 22-1309. Throwing stones or other missiles.

It shall not be lawful for any person or persons within the District of Columbia to throw any stone or other missile in any street, avenue, alley, road, or highway, or open space, or public square, or inclosure, or to throw any stone or other missile from any place into any street, avenue, road, or highway, alley, open space, public square, or inclosure, under a penalty of not more than \$500 for every such offense.

(July 29, 1892, 27 Stat. 322, ch. 320, § 3; July 23, 2008, D.C. Law 17-206, § 3, 55 DCR 5168.)

Cross references. — Conduct of prosecutions under this section, see § 22-1809.

Section references. — This section is referred to in § 22-1012.

Prior Codifications. — 1981 Ed., § 22-1109.

1973 Ed., § 22-1109.

Effect of amendments. — D.C. Law 17-206 substituted “\$500” for “five dollars”.

Legislative history of Law 17-206. — For Law 17-206, see notes following § 22-3751.

§ 22-1310. Urging dogs to fight or create disorder.

It shall not be lawful for any person or persons to entice, induce, urge, or cause any dogs to engage in a fight in any street, alley, road, or highway, open space, or public square in the District of Columbia, or to urge, entice, or cause such dogs to continue or prolong such fight, under a penalty of not more than \$1,000 for each and every offense; and any person or persons who shall induce or cause any animal of the dog kind to run after, bark at, frighten, or bite any person, horse, or horses, cows, cattle of any kind, or other animals lawfully passing along or standing in or on any street, avenue, road, or highway, or alley in the District of Columbia, shall forfeit and pay for such offense a sum not exceeding \$1,000.

(July 29, 1892, 27 Stat. 324, ch. 320, § 10; Oct. 18, 1988, D.C. Law 7-176, § 7, 35 DCR 4787; Aug. 20, 1994, D.C. Law 10-151, § 104, 41 DCR 2608.)

Cross references. — Conduct of prosecutions under this section, see § 22-1809.

Prior Codifications. — 1981 Ed., § 22-1110.

1973 Ed., § 22-1110.

Emergency legislation. — For temporary amendment of section, see § 104 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 7-176. — Law 7-176, the “Dangerous Dog Amendment Act of

1988,” was introduced in Council and assigned Bill No. 7-276, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on May 17, 1988 and May 31, 1988, respectively. Signed by the Mayor on June 9, 1988, it was assigned Act No. 7-190 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1301.

§ 22-1311. Allowing dogs to go at large.

(a) If any owner or possessor of a fierce or dangerous dog shall permit the same to go at large, knowing said dog to be fierce or dangerous, to the danger or annoyance of the inhabitants, he shall upon conviction thereof, be punished by a fine not exceeding \$5,000; and if such animal shall attack or bite any person, the owner or possessor thereof shall, on conviction, be punished by a fine not exceeding \$10,000, and in addition to such punishment the court shall adjudge and order that such animal be forthwith delivered to the poundmaster, and said poundmaster is hereby authorized and directed to kill such animal so delivered to him.

(b) If any owner or possessor of a female dog shall permit her to go at large in the District of Columbia while in heat, he shall, upon conviction thereof, be punished by a fine not exceeding \$20.

(June 19, 1878, 20 Stat. 174, ch. 323, § 9; June 30, 1902, 32 Stat. 547, ch. 1332; Oct. 18, 1988, D.C. Law 7-176, § 7(f), 35 DCR 4787.)

Prior Codifications. — 1981 Ed., § 22-1111.

1973 Ed., § 22-1111.

Legislative history of Law 7-176. — For

legislative history of D.C. Law 7-176, see Historical and Statutory Notes following § 22-1310.

CASE NOTES

Construction and application.

The fact that Act Cong. June 19, 1878, §§ 4, 5 (20 Stat. 173), were amended many years after they had been construed as not imposing on the owner of a dog liability for an injury caused by the dog, unless he knew or was charged with knowledge of its vicious propensities, by Act June 30, 1902 (D.C. Code 1929, T.

6, § 318 and T. 20, §§ 917, 918) without changing the particular provisions construed, indicates that Congress, which is presumed to know the judicial interpretation put on its legislation, approved the construction. *Bardwell v. Petty*, 286 F. 772, 1923 U.S. App. LEXIS 2754 (1923).

§ 22-1312. Lewd, indecent, or obscene acts; sexual proposal to a minor.

It is unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus, to engage in masturbation, or to engage in a sexual act as defined in § 22-3001(8). It is unlawful for a person to make an obscene or indecent sexual proposal to a minor. A person who violates any provision of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500, imprisoned for not more than 90 days, or both.

(July 29, 1892, 27 Stat. 324, ch. 320, § 9; July 8, 1898, 30 Stat. 724, ch. 638; Sept. 26, 1942, 56 Stat. 760, ch. 565; June 9, 1948, 62 Stat. 346, ch. 428, title I, § 101; June 29, 1953, 67 Stat. 92, ch. 159, § 202(a)(1); Apr. 24, 2007, D.C. Law 16-306, § 210, 53 DCR 8610; May 26, 2011, D.C. Law 18-375, § 2(b), 58 DCR 731.)

Cross references. — Conduct of prosecutions under this section, see § 22-1809.

Obscene conduct, see § 22-2201.

Sexual performances using minors, see § 22-3101 et seq.

Section references. — This section is referred to in §§ 22-109 and 23-101.

Prior Codifications. — 1981 Ed., § 22-1112.

1973 Ed., § 22-1112.

Effect of amendments. — D.C. Law 16-306 rewrote subsec. (a), which had read as follows: “(a) It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than \$300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense.”

D.C. Law 18-375 rewrote the section, which formerly read:

“(a) It shall not be lawful for any person or persons to make any obscene or indecent expo-

sure of his or her person, or to make any lewd, obscene, or indecent sexual proposal in the District of Columbia under penalty of not more than \$300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense.

“(b) Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed \$1,000, or both, for each and every such offense.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 210 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 210 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 210 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 210 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 302(b) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act

of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 302(b) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-375. — For history of Law 18-375, see notes under § 22-1307.

CASE NOTES

ANALYSIS

Admissibility of evidence.

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Admissibility of evidence.

Admission by defendant that he was present in washroom when officer entered eliminated necessity for corroboration of presence of officer and defendant at the time and place of alleged lewd, obscene, and indecent act in the washroom, in case wherein there was testimony of only one witness to the act, namely the officer. D.C. Code 1961, § 22-1112. *Reed v. District of Columbia*, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

Arrest.

Frisk of suspect was lawful where it occurred after officer received radio report of citizen's complaint of "man exposing himself and Peeping Tom," where officer sighted suspect, who generally matched description given, within one hour and only one block from location of reported offense, and where suspect reacted evasively upon seeing police cruiser. D.C. Code §§ 22-1112(a), 22-1121(1), 22-3204, 23-581; U.S. Const. Amend. 4. *Robinson v. United States*, 355 A.2d 567, 1976 D.C. App. LEXIS 514 (1976).

Construction and application.

Law extends to indecent exposure committed both in a public setting and a private one. *Parnigoni v. District of Columbia*, 933 A.2d 823,

2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Of the various forms of sexual conduct prohibited by statute, such as adultery, indecent exposure, incest, fornication, seduction, indecent liberties with children, and sodomy, only sodomy, indecent exposure, and indecent sexual acts with children can reasonably be deemed "lewd, obscene or indecent," within meaning of sexual proposal statute, with the result that statute's "sexual proposal" clause could be fairly construed to prohibit only proposals to commit sodomy, indecent exposure, or in the case of sexual proposals with children, to perform some sexual act. D.C. Code §§ 22-301, 22-1002, 22-1112, 22-1901, 22-3001, 22-3501, 22-3502. *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Under statute making it unlawful for any person to make any lewd, obscene, or indecent "sexual proposal," a "sexual proposal" would connote virtually the same conduct or speech-conduct as "sexual solicitation," and clearly implies a personal importunity addressed to a particular individual to do some sexual act. D.C. Code § 22-1112(a). *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Given the nature of common-law offense of solicitation, the "sexual proposal" clause of statute making it unlawful for any person to make any lewd, obscene, or indecent sexual proposal, should be limited to solicitations to commit lewd, obscene or indecent sexual acts which, if accomplished, would be punishable as a crime. D.C. Code § 22-1112(a). *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Words used in cases under "sexual proposal" statute may or may not be obscene in themselves; what matters is that sexual acts proposed are lewd, obscene or indecent and lawfully prohibited by statute, not the character of the particular words in which the proposal was framed. D.C. Code § 22-1112(a). *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Statute making it unlawful for any person to make any lewd, obscene, or indecent sexual proposal does not require an open or public act or proposal in the common-law sense, and was not designed or intended to apply to acts committed or proposals made in privacy in presence of a single and consenting person. D.C. Code § 22-1112(a). *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Under District of Columbia statute making it unlawful for any person to make any lewd, obscene or indecent sexual proposal, or to commit any other lewd, obscene or indecent act in the District of Columbia, an open or public act in common-law sense is no longer required, but statute is not designed or intended to apply to an act committed in privacy or presence of a single, consenting person. D.C. Code 1951, § 22-1112(a). *Rittenour v. District of Columbia*, 163 A.2d 558, 1960 D.C. App. LEXIS 239 (Cr.App. 1960).

Construction with other laws.

Whether habeas corpus petitioner who was committed under the District of Columbia Sexual Psychopath Act would be entitled to release on habeas corpus would be determined on likelihood that he would, if released, be dangerous to others because of sexual misconduct. D.C. Code § 22-1112(a). *Millard v. Harris*, 406 F.2d 964, 1968 U.S. App. LEXIS 4951 (C.A.D.C. 1968).

Habeas corpus petitioner who had been committed under the District of Columbia Sexual Psychopath Act had burden to show that his past behavior, viewed under the illumination provided by psychiatric evaluation of those actions, did not justify conclusion that he fell within statutory definition of one who was likely to inflict injury on others. D.C. Code § 22-1112(a). *Millard v. Harris*, 406 F.2d 964, 1968 U.S. App. LEXIS 4951 (C.A.D.C. 1968).

Petitioner who was confined in hospital pursuant to proceeding under District of Columbia Sexual Psychopath Act had burden to show by preponderance of the evidence that his continued confinement as sexual psychopath was not justified. D.C. Code § 22-1112(a). *Millard v.*

Harris, 406 F.2d 964, 1968 U.S. App. LEXIS 4951 (C.A.D.C. 1968).

Evidence adduced at habeas corpus proceeding did not support trial court's finding that petitioner, who had originally been committed under the District of Columbia Sexual Psychopath Act, would be likely to inflict injury, loss, pain or other evil on others by his sexual misconduct if he were released. D.C. Code § 22-1112(a). *Millard v. Harris*, 406 F.2d 964, 1968 U.S. App. LEXIS 4951 (C.A.D.C. 1968).

Evidence adduced at habeas corpus proceeding established that likelihood of serious injury to a child happening to see the petitioner expose himself in public was too remote to justify commitment under District of Columbia Sexual Psychopath Act. D.C. Code § 22-1112(a). *Millard v. Harris*, 406 F.2d 964, 1968 U.S. App. LEXIS 4951 (C.A.D.C. 1968).

As proceeding under District of Columbia Sexual Psychopath Act is closely related to behavior of person rather than to his mental condition considered apart from his behavior, constitutional guaranties implicit in due process of law must come into play. D.C. Code § 22-1112(a). *Millard v. Harris*, 406 F.2d 964, 1968 U.S. App. LEXIS 4951 (C.A.D.C. 1968).

Corroboration.

Testimony of a single witness to a verbal invitation to sodomy should be received and considered with great caution. D.C. Code 1961, § 22-1112. *Reed v. District of Columbia*, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

In cases wherein testimony of only one witness to verbal invitation to sodomy is introduced, the trial court should require corroboration of the circumstances surrounding the parties at the time, such as presence at the alleged time and place and similar provable circumstances. D.C. Code 1961, § 22-1112. *Reed v. District of Columbia*, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

Corroboration of arresting officer's testimony was not required to establish corpus delicti and to sustain conviction for indecent exposure. D.C. Code 1961, § 22-1112. *Nassif v. District of Columbia*, 219 A.2d 495, 1966 D.C. App. LEXIS 173 (App. 1966).

There must be corroboration in sex offenses, especially where offense is purely verbal and proof disappears as soon as words are spoken, but government is not required to produce witness who actually heard words spoken and corroboration may consist of circumstantial evidence supporting prosecutrix' story. D.C. Code 1961, § 22-1112(a). *Goodsaid v. District of Columbia*, 187 A.2d 486, 1963 D.C. App. LEXIS 176 (App. 1963).

Reluctance of woman, who contended that taxicab driver made indecent sexual proposals to her, to make complaint, driver's offer to

apologize for what he might have said, his failure to make immediate denial of charges, and fact that, after period of over two weeks, he recognized complainant as former passenger, recalled engaging in conversation with her, and remembered his remark to her as she left taxicab sufficiently corroborated complainant's story. D.C. Code 1961, § 22-1112(a). *Goodsaid v. District of Columbia*, 187 A.2d 486, 1963 D.C. App. LEXIS 176 (App. 1963).

Testimony of police officers who had observed commission of indecent act constituted valid corroboration of alleged act. D.C. Code 1961, § 22-1112(a). *Herland v. District of Columbia*, 182 A.2d 362, 1962 D.C. App. LEXIS 306 (Cr.App. 1962).

Testimony of complaining witness in prosecution for committing a lewd, obscene or indecent act, which was corroborated by her companion except for the actual identification of defendant, was sufficiently corroborated to secure conviction. D.C. Code 1951, § 22-1112. *McGhee v. District of Columbia*, 137 A.2d 721, 1958 D.C. App. LEXIS 210 (Cr.App. 1958).

Defenses.

That three individuals' alleged simulation of anal intercourse in common area of apartment building, which was allegedly observed by building's security officer on building's video surveillance system, may have violated District of Columbia laws prohibiting indecent or lewd conduct did not alter conclusion that individuals' alleged assault on three building guests later in evening was not foreseeable, and thus that landlords were not liable for assault. *G'Sell v. Carven*, 724 F.Supp.2d 101, 2010 U.S. Dist. LEXIS 73134 (2010).

The penalty structure of the indecent exposure statute refutes the idea that the consent of a child under the age of sixteen can provide a valid defense. *Parnigoni v. District of Columbia*, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Victim could not have consented to game of naked ping pong because he was under the age of sixteen when the events took place, and such consent was barred by the indecent exposure statute. *Parnigoni v. District of Columbia*, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Evidence did not support contention made for first time on appeal from conviction for committing lewd, obscene, and indecent act that defendant had been entrapped. D.C. Code 1961, § 22-1112. *Reed v. District of Columbia*, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

Unlocked washroom in hotel in which indecent act occurred was a public place, and fact that other participant willingly engaged did not relieve defendant from guilt in committing such act in public. D.C. Code 1961, § 22-1112(a). *Herland v. District of Columbia*, 182 A.2d 362, 1962 D.C. App. LEXIS 306 (Cr.App. 1962).

The acquittal of defendant of charge of committing an indecent act precluded the government, as a matter of law, from relying on the evidence relating to this alleged indecent act to support its charge of an alleged indecent exposure on the same night. D.C. Code 1961, § 22-1112. *Hearn v. District of Columbia*, 178 A.2d 434, 1962 D.C. App. LEXIS 263 (Cr.App. 1962).

Where police officer made phone call to defendant and went to defendant's house in order to investigate a suspected homosexual and in order to confirm the suspicion led suspect to believe officer would not resist homosexual advances and then arrested him, defendant was entrapped. D.C. Code 1951, § 22-1112(a). *Rittenour v. District of Columbia*, 163 A.2d 558, 1960 D.C. App. LEXIS 239 (Cr.App. 1960).

Indictment and information.

Where prosecution was under one subsection of statute, the wording of which was followed by the information, but upon conviction sentence was imposed under another subsection of statute which provided for stiffer penalties, and evidence sustained conviction, case would be remanded with instructions to vacate existing sentence and to resentence defendant in accordance with subsection of statute under which he was prosecuted. D.C. Code 1951, § 22-1112(a, b). *Howard v. District of Columbia*, 132 A.2d 150, 1957 D.C. App. LEXIS 237 (Cr.App. 1957).

Judicial actions.

Although trial court properly dismissed informations charging violations of statute making it unlawful to commit a lewd, obscene and indecent act on theory that statute was unconstitutionally vague, order purporting to enjoin police department from notifying employers of fact of arrest of an employee for other sex offenses until "formal charges" had been filed, when there was no person before the court who had sustained a direct injury as a result of the notification policy, was an abuse of discretion. D.C. Code § 22-1112(a). *District of Columbia v. Walters*, 319 A.2d 332, 1974 D.C. App. LEXIS 211 (1974), writ of certiorari denied by 419 U.S. 1065, 95 S. Ct. 650, 42 L. Ed. 2d 661, 1974 U.S. LEXIS 3693 (1974).

Nature and elements of offense.

Before use of assault statute to cover conduct that appears to fall within bounds of misdemeanor statutes can be countenanced court must be certain that elements of assault had been established. D.C. Code 1951, §§ 22-504,

22-1112, 22-2701. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

It is the indecent exposure of the comparable portions of the male and female anatomy that constitutes the crime of indecent exposure; in other words, the indecent exposure of human genitalia is the offense. *Parnigoni v. District of Columbia*, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Indecent exposure statute requires exposure at such a time and place where as a reasonable man he knows or should know his act will be open to the observation of others. *Parnigoni v. District of Columbia*, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

The law pertaining to indecent exposure does not require that an accused have a specific intent to expose himself to any particular person; it is sufficient that accused generally intended to expose himself so as to draw attention to his exposed condition. *Parnigoni v. District of Columbia*, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Public exposure of bare buttocks was not violation of statute prohibiting indecent exposure, which was limited in application to exposure of human genitalia. D.C. Code 1981, § 22-1112(a). *Duvallon v. District of Columbia*, 515 A.2d 724, 1986 D.C. App. LEXIS 437 (1986).

Ordinary acts involving exposure as result of carelessness or thoughtlessness, particularly when such acts take place within privacy of one's home, do not in themselves establish offense of indecent exposure. D.C. Code 1961, § 22-1112. *Selph v. District of Columbia*, 188 A.2d 344, 1963 D.C. App. LEXIS 195 (App. 1963).

An exposure becomes indecent when it occurs at such a time and place where reasonable man knows or should know his act will be open to observation of others; the required criminal intent is usually established by some action by which defendant draws attention to his exposed condition or by display in place so public that it must be presumed it was intended to be seen by others. D.C. Code 1961, § 22-1112. *Hearn v. District of Columbia*, 178 A.2d 434, 1962 D.C. App. LEXIS 263 (Cr.App. 1962).

Nudity is not per se "obscene", and it is not illegal for a man to be completely unclothed in his room; it becomes so only if he intentionally exposes himself to other persons. D.C. Code 1961, § 22-1112. *Hearn v. District of Columbia*,

178 A.2d 434, 1962 D.C. App. LEXIS 263 (Cr.App. 1962).

Homosexuality is not a crime. D.C. Code 1951, § 22-1112(a). *Rittenour v. District of Columbia*, 163 A.2d 558, 1960 D.C. App. LEXIS 239 (Cr.App. 1960).

A criminal intent must be shown in prosecution for indecent exposure before conviction can be upheld, and though exposure must be intentional and not accidental, the intent required is only a general one, and need not be directed toward any specific person or persons. D.C. Code 1951, § 22-1112. *Peyton v. District of Columbia*, 100 A.2d 36, 1953 D.C. App. LEXIS 181 (Cr.App. 1953).

An exposure becomes indecent when defendant exposes himself at such a time and place where as a reasonable man he knows or should know his act will be open to observation by others. D.C. Code 1951, § 22-1112. *Peyton v. District of Columbia*, 100 A.2d 36, 1953 D.C. App. LEXIS 181 (Cr.App. 1953).

The criminal intent in prosecution for indecent exposure is usually established by some action by which defendant draws attention to his exposed condition or by his display in a place so public that it must be presumed that it was intended to be seen by others, or the intent can be also inferred from recklessness of defendant's conduct in exposing himself. D.C. Code 1951, § 22-1112. *Peyton v. District of Columbia*, 100 A.2d 36, 1953 D.C. App. LEXIS 181 (Cr.App. 1953).

In prosecution for indecent exposure, where defendant exposed himself in a public area, and photographs showed that it was not unlikely that defendant saw group of walkers approaching him and was aware of their presence, defendant's conduct was sufficiently reckless to support court's finding that defendant had criminal intent to expose himself. D.C. Code 1951, § 22-1112. *Peyton v. District of Columbia*, 100 A.2d 36, 1953 D.C. App. LEXIS 181 (Cr.App. 1953).

Presumptions and burden of proof.

That an unidentified man left washroom immediately prior to arrest of defendant for committing lewd, indecent, and obscene act there and that arresting officer did not detain the man or obtain his name and address did not give rise to presumption that the unidentified man's testimony would not have supported officer's testimony, in absence of solid foundation indicating that unidentified man had witnessed the acts and conduct of defendant. D.C. Code 1961, §§ 22-1112. *Reed v. District of Columbia*, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

Before conviction for indecent exposure can be upheld, it must be shown that exposure was intentional, not accidental. D.C. Code 1961,

§ 22-1112. *Selph v. District of Columbia*, 188 A.2d 344, 1963 D.C. App. LEXIS 195 (App. 1963).

Review.

Failure of trial court in habeas corpus proceeding to distinguish between petitioner's sexual and nonsexual misconduct as justification for his commitment under District of Columbia Sexual Psychopath Act and trial court's failure to evaluate likelihood, as opposed to mere possibility, that petitioner would engage in sexual misconduct if released constituted reversible error. D.C. Code § 22-1112(a). *Millard v. Harris*, 406 F.2d 964, 1968 U.S. App. LEXIS 4951 (C.A.D.C. 1968).

In view of citation to court of general sessions of decision laying down rule that testimony of a single witness to verbal invitation to sodomy should be received and considered with great caution, in case wherein there was testimony of only one witness to the charged lewd, obscene, and indecent act, reviewing court was required to assume that court of general sessions was fully aware of the rules announced in that decision and that the testimony of the witness had been received and considered with great caution. D.C. Code 1961, § 22-1112. *Reed v. District of Columbia*, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

Where trial court, in prosecution for indecent exposure, held that evidence of defendant's prior conviction could only be introduced for purpose of affecting defendant's credibility, judge's subsequent remark that it was an unusual case to have same man previously convicted of same act at the very same place, did not indicate that judge improperly considered the prior conviction in arriving at finding. D.C. Code 1951, §§ 22-1112, 14-305. *Peyton v. District of Columbia*, 100 A.2d 36, 1953 D.C. App. LEXIS 181 (Cr.App. 1953).

Validity.

Indecent exposure statute was not unconstitutionally vague, given that cases had defined the contours of the statute's application beyond merely its wording. *Parnigoni v. District of Columbia*, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Where words "lewd," "obscene," and "indecent," as used in statute making it unlawful for any person "to make any lewd, obscene, or indecent sexual proposal. . .," were joined with the term "sexual proposal," a definite context was provided in which the words could be given meaning and statute was not void for vagueness. D.C. Code § 22-1112(a). *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by

423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Even though statute prohibiting any person from making any lewd, obscene, or indecent sexual proposal might be neither vague, overbroad or otherwise invalid as applied to conduct charged against defendants, they nevertheless would be permitted to question its unconstitutionality vagueness or overbreadth if it was susceptible of application to the protected expression of others. D.C. Code § 22-1112(a). *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Statute making it unlawful for any person to make any lewd, obscene, or indecent sexual proposal was not unconstitutional as applied to proposals to commit consensual sexual acts in private where, while sexual proposal made by defendant to officer was made in apparent privacy of parked automobile, it was clear from stipulated facts in the record that officer was not a "consenting person." D.C. Code § 22-1112(a). *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

"Sexual proposal" clause of statute providing that it shall be unlawful for any person to make any lewd, obscene, or indecent sexual proposal may be fairly construed to proscribe only proposals to commit sodomy, indecent exposure, or, in case of sexual proposals addressed to children, to perform some sexual act, and as so construed is not so vague as to amount to deprivation of due process of law. D.C. Code § 22-1112(a); U.S. Const. Amend. 5. *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Statute making it an offense to commit a lewd, obscene and indecent act is unconstitutionally vague in failing to give clear notice of what conduct is forbidden and in investing police with excessive discretion to decide, after the fact, who has violated the law, and statute could not be sustained on theory that police department practice supported construction of statute to mean the deliberate touching in public of one's own or another's genitals for purpose of sexual arousal or on theory that the indelicacy of the subject matter excused the failure to spell out precisely the acts covered. D.C. Code § 22-1112(a). *District of Columbia v. Walters*, 319 A.2d 332, 1974 D.C. App. LEXIS 211 (1974), writ of certiorari denied by 419 U.S. 1065, 95 S. Ct. 650, 42 L. Ed. 2d 661, 1974 U.S. LEXIS 3693 (1974).

District of Columbia statute making it unlawful to commit a lewd, obscene and indecent

act was unconstitutionally vague as applied to defendants who were arrested inside a commercial establishment “engaging in acts of mutual masturbation.” D.C. Code § 22-1112(a). District of Columbia v. Walters, 319 A.2d 332, 1974 D.C. App. LEXIS 211 (1974), writ of certiorari denied by 419 U.S. 1065, 95 S. Ct. 650, 42 L. Ed. 2d 661, 1974 U.S. LEXIS 3693 (1974).

Voir dire.

Trial court did not abuse its discretion in failing to ask jury panel specifically whether they would be influenced by fact that case involved sex crimes with little girls, since defendant himself covered question in substance by asking jury whether their impartiality would be affected by fact that crime, which they knew was sex crime, involved children. D.C. Code 1981, § 22-1112(b). Harlee v. District of Columbia, 558 A.2d 351, 1989 D.C. App. LEXIS 99 (1989).

Weight and sufficiency of evidence.

Great caution should be applied in considering testimony of arresting officer in cases where alleged assault is nonviolent sexual touching which by its nature left no traces and to which there were no other witnesses. D.C. Code 1951, §§ 22-504, 22-1112, 22-2701. Guarro v. U.S., 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Police officer’s testimony that defendant who was not wearing underwear lifted clothing so that her front vaginal area and breasts were fully exposed was sufficient for indecent exposure conviction, although officer did not testify that he saw her vagina, uterus, uterine tubes, and ovaries. Rolen-Love v. District of Columbia, 980 A.2d 1063, 2009 D.C. App. LEXIS 453 (2009).

Jury could have reasonably found that defendant exposed his genitalia to another individual, and thus, evidence was sufficient to support defendant’s conviction for indecent exposure; individual testified that defendant was facing him “completely naked,” and that defendant “covered his genitals” after he realized individual was in the basement of home. Parnigoni v. District of Columbia, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Defendant’s conduct was sufficiently public to come within the indecent exposure statute, and thus, he was not exempted from statute on ground that his actions were conducted within a private home; defendant was in basement of private home when he exposed himself and appeared surprised when he saw another individual walk into the basement, defendant was in an open part of home where people gathered to play games and door to basement was not

closed or locked, and reasonable man should have known his act would be open to the observation of others. Parnigoni v. District of Columbia, 933 A.2d 823, 2007 D.C. App. LEXIS 588 (2007), writ of certiorari denied by 555 U.S. 996, 129 S. Ct. 511, 172 L. Ed. 2d 360, 2008 U.S. LEXIS 8054, 77 U.S.L.W. 3265 (2008).

Evidence was sufficient to support conviction for attempted lewd acts; evidence showed that, upon discovering that his niece was sexually active, defendant asked her several times to have sex with him, and that defendant solicited sex from his niece. Pinckney v. United States, 906 A.2d 301, 2006 D.C. App. LEXIS 496 (2006).

Evidence disclosed that defendant, who appeared without clothes in early morning hours at second floor window of his hot and oppressive room at rear of hotel overlooking seemingly uninhabited alley area and who was observed by several police officers and room clerk, did not deliberately and intentionally expose himself, so that he was not guilty of obscene or indecent exposure. D.C. Code 1961, § 22-1112. Hearn v. District of Columbia, 178 A.2d 434, 1962 D.C. App. LEXIS 263 (Cr.App. 1962).

Evidence of government which presented two women complainants, who testified they saw defendant exposing himself, positively identifying him as maintenance man in their apartment development, was sufficient to sustain finding of his guilt of obscene and indecent exposure notwithstanding his production of five alibi witnesses. D.C. Code 1951, § 22-1112. Campbell v. District of Columbia, 172 A.2d 557, 1961 D.C. App. LEXIS 251 (Cr.App. 1961).

Evidence showed sufficient corroboration of the circumstances to sustain conviction for making an indecent sexual proposal. D.C. Code 1951, § 22-1112(a). Howard v. District of Columbia, 132 A.2d 150, 1957 D.C. App. LEXIS 237 (Cr.App. 1957).

Witnesses.

Prosecution was not entitled to attempt to impeach testimony of defendant indicted for second-degree murder by referring to thirteen prior convictions of petty offenses of vagrancy, disorderly conduct and soliciting prostitution, inasmuch as, although such offenses were District of Columbia Code offenses as distinguished from municipal ordinances, none of them was triable by jury. D.C. Code 1961, §§ 14-305, 16-705(b), 22-1107, 22-1112(a), 22-1121, 22-2701, 22-3302, 22-3304; U.S. Const. art. 3, § 2, cl. 3. Pinkney v. United States, 363 F.2d 696, 1966 U.S. App. LEXIS 5565 (C.A.D.C. 1966).

In cases wherein testimony of only one witness to verbal invitation to sodomy is introduced, evidence of good character is particularly applicable. D.C. Code 1961, § 22-1112.

Reed v. District of Columbia, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

Trial court, which expressly commented on evidence of good character of defendant convicted of committing lewd, obscene, and inde-

cent act in department store restroom, had given due consideration to the character evidence. D.C. Code 1961, § 22-1112. Reed v. District of Columbia, 226 A.2d 581, 1967 D.C. App. LEXIS 131 (App. 1967).

§ 22-1313. Kindling bonfires.

It shall not be lawful for any person or persons within the limits of the District of Columbia to kindle or set on fire, or be present, aiding, consenting, or causing it to be done, in any street, avenue, road, or highway, alley, open ground, or lot, any box, barrel, straw, shavings, or other combustible, between the setting and rising of the sun; and, any person offending against the provisions of this section shall on conviction thereof, forfeit and pay a sum not exceeding \$10 for each and every offense.

(July 29, 1892, 27 Stat. 325, ch. 320, § 14.)

Cross references. — Conduct of prosecutions under this section, see § 22-1809.

Prior Codifications. — 1981 Ed., § 22-1113.

1973 Ed., § 22-1113.

§ 22-1314. Disturbing religious congregation. [Repealed].

Repealed.

(July 29, 1892, 27 Stat. 324, ch. 320, § 11; May 26, 2011, D.C. Law 18-375, § 2(c), 58 DCR 731.)

Prior Codifications. — 1981 Ed., § 22-1114.

1973 Ed., § 22-1114.

Emergency legislation. — For temporary (90 day) repeal of section, see § 302(c) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) repeal of section, see § 302(c) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 18-375. — For history of Law 18-375, see notes under § 22-1307.

§ 22-1314.01. Definitions.

For the purpose of § 22-1314.02, the term:

(1) "Health professional" means a person licensed to practice a health occupation in the District pursuant to § 3-1201.01.

(2) "Medical facility" includes a hospital, clinic, physician's office, or other facility that provides health or surgical services.

(3) "Person" shall not include:

(A) The chief medical officer of the medical facility or his or her designee;

(B) The chief executive officer of the medical facility or his or her designee;

(C) An agent of the medical facility; or

(D) A law enforcement officer in the performance of his or her official duty.

(July 29, 1892, 27 Stat. 322, ch. 320, § 11a, as added Sept. 20, 1996, D.C. Law 11-157, § 2, 43 DCR 3699.)

Prior Codifications. — 1981 Ed., § 22-1114.1.

Emergency legislation. — For temporary addition of section, see § 2 of the Interference with Medical Facilities and Health Professionals Congressional Review Emergency Amendment Act of 1996 (D.C. Act 11-306, July 26, 1996, 43 DCR 4205).

Legislative history of Law 11-157. — Law 11-157, the “Interference with Medical Facili-

ties and Health Professionals Amendment Act of 1996,” was introduced in Council and assigned Bill No. 11-385, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on May 7, 1996, and June 19, 1996, respectively. Signed by the Mayor on June 19, 1996, it was assigned Act No. 11-286 and transmitted to both Houses of Congress for its review. D.C. Law 11-157 became effective on September 20, 1996.

§ 22-1314.02. Prohibited acts.

(a) It shall be unlawful for a person, except as otherwise authorized by District or federal law, alone or in concert with others, to willfully or recklessly interfere with access to or from a medical facility or to willfully or recklessly disrupt the normal functioning of such facility by:

(1) Physically obstructing, impeding, or hindering the free passage of an individual seeking to enter or depart the facility or from the common areas of the real property upon which the facility is located;

(2) Making noise that unreasonably disturbs the peace within the facility;

(3) Trespassing on the facility or the common areas of the real property upon which the facility is located;

(4) Telephoning the facility repeatedly to harass or threaten owners, agents, patients, and employees, or knowingly permitting any telephone under his or her control to be so used for the purpose of threatening owners, agents, patients, and employees; or

(5) Threatening to inflict injury on the owners, agents, patients, employees, or property of the medical facility or knowingly permitting any telephone under his or her control to be used for such purpose.

(b) A person shall not act alone or in concert with others with the intent to prevent a health professional or his or her family from entering or leaving the health professional’s home.

(c) Subsections (a) and (b) of this section shall not be construed to prohibit any otherwise lawful picketing or assembly.

(d) Any person who violates subsections (a) or (b) of this section, upon conviction, shall be fined not more than \$1,000, imprisoned for not more than 180 days, or both.

(July 29, 1892, 27 Stat. 322, ch. 320, § 11b, as added Sept. 20, 1996, D.C. Law 11-157, § 2, 43 DCR 3699.)

Section references. — This section is referred to in § 22-1314.01.

Prior Codifications. — 1981 Ed., § 22-1114.2.

Temporary Amendment of Section. — Temporary amendment of Reestablishment of Health Services Planning and Certificate of Need Program: Sections 201 through 221 of

D.C. Law 11-75 reestablished the Health Services Planning and Certificate of Need Program.

Section 301(b) of D.C. Law 11-75 provided that this act shall expire after 225 days of its having taken effect.

See §§ 2 and 3 of D.C. Law 11-133.

Section 5(b) of D.C. Law 11-133 provided that

the act shall expire on the 225th day of its having taken effect.

Emergency legislation. — Emergency Reestablishment of a Health Services Planning and Certificate of Need Regulatory Program: For temporary reestablishment of a Health Services Planning and Certificate of Need Regulatory Program in the District of Columbia, see § 201-221 of the Interference with Medical Facilities and Health Professionals and Reestablishment of Health Services Planning and Certificate of Need Program Emergency Act of 1995 (D.C. Act 11-117, July 25, 1995, 42 DCR 4044).

For temporary re-establishment of a health services planning and certificate of need regulatory program in the District of Columbia, see §§ 2 through 23 of the Health Services Planning and Certificate of Need Program Emergency Act of 1995 (D.C. Act 11-151, November 9, 1995, 42 DCR 6550).

For temporary addition of section, see § 2 of the Interference with Medical Facilities and Health Professionals Congressional Review Emergency Amendment Act of 1996 (D.C. Act 11-306, July 26, 1996, 43 DCR 4205).

For temporary establishment of a health services planning and certificate of need regulatory program in the District of Columbia, see § 2-22 of the Health Services Planning Program Legislative Review Emergency Act of 1996 (D.C. Act 11-345, August 8, 1996, 43 DCR 4517).

Legislative history of Law 11-75. — Law 11-75, the “Interference with Medical Facilities and Health Professionals and Reestablishment

of Health Services Planning and Certificate of Need Program Temporary Act of 1995,” was introduced in Council and assigned Bill No. 11-374. The Bill was adopted on first and second readings on July 11, 1995, and July 29, 1995, respectively. Signed by the Mayor on August 11, 1995, it was assigned Act No. 11-136 and transmitted to both Houses of Congress for its review. D.C. Law 11-75 became effective on December 15, 1995.

Legislative history of Law 11-133. — Law 11-133, the “Health Services Planning and Certificate of Need Program Temporary Amendment Act of 1996,” was introduced in Council and Assigned Bill No. 11-560. The Bill was adopted on first and second readings on February 6, 1996, and March 5, 1996, respectively. Signed by the Mayor on March 21, 1996, it was assigned Act No. 11-240 and transmitted to both Houses of Congress for its review. D.C. Law 11-133 became effective on May 29, 1996.

Legislative history of Law 11-157. — For legislative history of D.C. Law 11-157, see Historical and Statutory Notes following § 22-1314.01.

Delegation of Authority. — Delegation of authority pursuant to D.C. Law 11-117, the “Interference with Medical Facilities and Health Professionals and Reestablishment of Health Services Planning and Certificate of Need Program Emergency Act of 1995”: See Mayor’s Order 95-112, August 18, 1995.

Delegation of authority pursuant to the Health Services Planning and Certificate of Need Program Emergency Act of 1995, effective November 7, 1995 (D.C. Act 11-151), see Mayor’s Order 95-162, December 4, 1995.

§ 22-1315. Interference with foreign diplomatic and consular offices, officers, and property — Prohibited. [Repealed].

Repealed.

(May 7, 1988, D.C. Law 7-105, § 2, 35 DCR 728.)

Prior Codifications. — 1981 Ed., § 22-1115.

Legislative history of Law 7-105. — Law 7-105, the “Protection for Foreign Officials, Official Guests, and Internationally Protected Persons Amendment Act of 1987,” was introduced in Council and assigned Bill No. 7-59, which was referred to the Committee of the

Whole. The Bill was adopted on first and second readings on December 8, 1987 and January 5, 1988, respectively. The Bill was transmitted to the Mayor on January 12, 1988, and was deemed approved without signature upon expiration of the 10-day mayoral review period. The Bill was assigned Act No. 7-138 and transmitted to both Houses of Congress for its review.

§ 22-1316. Same — Penalties; exception. [Repealed].

Repealed.

(1981 Ed., § 22-1116; May 7, 1988, D.C. Law 7-105, § 2, 35 DCR 728.)

Legislative history of Law 7-105. — See note to § 22-1315.

§ 22-1317. Flying fire balloons or parachutes.

It shall not be lawful for any person or persons to set up or fly any fire balloon or parachute in or upon or over any street, avenue, alley, open space, public enclosure, or square within the limits of the City of Washington, under a penalty of not more than \$10 for each and every such offense.

(July 29, 1892, 27 Stat. 322, ch. 320, § 4; Feb. 11, 1895, 28 Stat. 650, ch. 79; July 29, 1970, 84 Stat. 667, Pub. L. 91-358, title VIII, § 802.)

Cross references. — Conduct of prosecutions under this section, see § 22-1809. 1973 Ed., § 22-1117.

Prior Codifications. — 1981 Ed., § 22-1117.

§ 22-1318. Driving or riding on footways in public grounds.

If any person shall drive or lead any horse, mule, or other animal, or any cart, wagon, or other carriage whatever on any of the paved or graveled footways in and on any of the public grounds belonging to the United States within the District of Columbia, or shall ride thereon, except at the intersection of streets, alleys, and avenues, each and every such offender shall forfeit and pay for each offense a sum not less than \$1 nor more than \$5.

(July 29, 1892, 27 Stat. 325, ch. 320, § 16.)

Cross references. — Conduct of prosecutions under this section, see § 22-1809. 1973 Ed., § 22-1118.

Prior Codifications. — 1981 Ed., § 22-1118.

§ 22-1319. False alarms and false reports; hoax weapons.

(a) It shall be unlawful for any person or persons to willfully or knowingly give a false alarm of fire within the District of Columbia, and any person or persons violating the provisions of this subsection shall, upon conviction, be deemed guilty of a misdemeanor and be punished by a fine not exceeding \$1,000 or by imprisonment for not more than 6 months, or by both such fine and imprisonment. Prosecutions for violation of the provisions of this subsection shall be on information filed in the Superior Court of the District of Columbia by the Office of the Attorney General for the District of Columbia.

(a-1) It shall be unlawful for any person or persons to willfully or knowingly use, or allow the use of, the 911 call system to make a false or fictitious report or complaint which initiates a response by District of Columbia emergency personnel or officials when, at the time of the call or transmission, the person knows the report or complaint is false. Any person or persons violating the provisions of this subsection shall, upon conviction, be deemed guilty of a misdemeanor and be punished by a fine not exceeding \$1,000 or by imprison-

ment for not more than 6 months. Prosecutions for violation of the provisions of this subsection shall be on information filed in the Superior Court of the District of Columbia by the Office of the Attorney General for the District of Columbia.

(b)(1) It shall be unlawful for any person to willfully or knowingly make, or cause to be made, a false or fictitious report to any individual which initiates a response by District of Columbia emergency personnel or officials, wherein such report involves, is alleged to involve, or may reasonably be deemed to involve, the delivery, presence, or use of a weapon of mass destruction, as defined by § 22-3152(12), within the District of Columbia.

(2) It shall be a violation of this subsection for any person to willfully and knowingly give, transport, mail, send, or cause to be sent any hoax weapon of mass destruction, as defined by § 22-3152(3), to another person or to place any such hoax weapon of mass destruction in or upon any real or personal property.

(3) Any person violating the provisions of this subsection shall, upon conviction, be guilty of a misdemeanor and be punished by imprisonment of not more than one year or fined in an amount not to exceed the greater of \$10,000 or the costs of responding to and consequential damages resulting from the offense, or both.

(c)(1) It shall be unlawful for anyone to willfully or knowingly, with the intent of intimidating or frightening people, causing panic or civil unrest, extorting profit, or causing economic damage, make, or cause to be made, a false or fictitious report to any individual, which initiates a response by District of Columbia emergency personnel or officials, wherein such report involves, is alleged to involve, or may reasonably be deemed to involve, the delivery, presence, or use of a weapon of mass destruction, as defined by § 22-3152(12), within the District of Columbia.

(2) It shall be a violation of this subsection for any person to willfully or knowingly, with the intent of intimidating or frightening people, causing panic or civil unrest, extorting profit, or causing economic damage, give, transport, mail, send, or cause to be sent any hoax weapon of mass destruction, as defined by § 22-3152(3), to another person or to place any such hoax weapon of mass destruction in or upon any real or personal property.

(3) Any person violating the provisions of this subsection shall, upon conviction, be guilty of a felony and may be punished by imprisonment of not more than 5 years or fined in an amount not to exceed the greater of \$50,000 or the costs of responding to and consequential damages resulting from the offense, or both.

(d)(1) It shall be unlawful for any person to willfully or knowingly, during a state of emergency, as declared by the Mayor pursuant to § 7-2304, with the intent of intimidating or frightening people, causing panic or civil unrest, extorting profit, or causing economic damage, make, or cause to be made, a false or fictitious report to any individual, which initiates a response by District of Columbia emergency personnel or officials, wherein such report involves, is alleged to involve, or may reasonably be deemed to involve, the delivery, presence, or use of a weapon of mass destruction, as defined by § 22-3152(12), within the District of Columbia.

(2) It shall be a violation of this subsection for any person to willfully or knowingly, during a state of emergency, as declared by the Mayor pursuant to § 7-2304, with the intent of intimidating or frightening people, causing panic or civil unrest, extorting profit, or causing economic damage, give, transport, mail, send, or cause to be sent any hoax weapon of mass destruction, as defined by § 22-3152(3), to another person or to place any such hoax weapon of mass destruction in or upon any real or personal property.

(3) Any person violating the provisions of this subsection shall, upon conviction, be guilty of a felony and may be punished by imprisonment of not more than 10 years or fined in an amount not to exceed \$100,000 or the cost of responding to and consequential damages resulting from the offense, or both.

(e) For the purposes of subsections (b), (c), and (d) of this section, the manner in which the false or fictitious report is communicated may include, but is not limited to:

(1) A writing;

(2) An electronic transmission producing a visual, audio, or written result;

(3) An oral statement; or

(4) A signing.

(f) There is jurisdiction to prosecute any person who participates in the commission of any offense described in this section if any act in furtherance of the offense occurs in the District of Columbia or where the effect of any act in furtherance of the offense occurs in the District of Columbia.

(June 8, 1906, 34 Stat. 220, ch. 3055, § 1; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); May 21, 1994, D.C. Law 10-119, § 8, 41 DCR 1639; Oct. 17, 2002, D.C. Law 14-194, § 153, 49 DCR 5306; Apr. 7, 2006, D.C. Law 16-91, § 142, 52 DCR 10637; May 26, 2011, D.C. Law 18-373, § 3.)

Prior Codifications. — 1981 Ed., § 22-1119.

1973 Ed., § 22-1119.

Effect of amendments. — D.C. Law 14-194 designated subsec. (a), and added subsecs. (b) to (f).

D.C. Law 16-91, in par. (c)(2), substituted “§ 22-3152(3)” for “§ 22-3152(12)”.

D.C. Law 18-373 rewrote subsec. (a); and added subsec. (a-1). Prior to amendment, subsec. (a) read as follows: “(a) It shall be unlawful for any person or persons to wilfully or knowingly give a false alarm of fire within the District of Columbia, and any person or persons violating the provisions of this section shall upon conviction, be deemed guilty of a misdemeanor and be punished by a fine not exceeding \$100 or by imprisonment for not more than 6 months, or by both such fine and imprisonment. Prosecutions for violation of the provisions of this section shall be on information filed in the Superior Court of the District of Columbia by the Corporation Counsel of the

District of Columbia or by any Assistant Corporation Counsel.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 103 of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 103 of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1302.

Legislative history of Law 14-194. — Law 14-194, the “Omnibus Anti-Terrorism Act of 2002”, was introduced in Council and assigned Bill No. 14-373, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 9, 2002, and May 7, 2002, respectively. Signed by

the Mayor on June 3, 2002, it was assigned Act No. 14-380 and transmitted to both Houses of Congress for its review. D.C. Law 14-194 became effective on October 17, 2002.

Legislative history of Law 16-91. — For Law 16-91, see notes following § 22-3152.

Legislative history of Law 18-373. — Law 18-373, the “Health and Safety 911 Abuse Prevention Amendment Act of 2010”, was intro-

duced in Council and assigned Bill No. 18-692, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on November 9, 2010, and December 7, 2010, respectively. Signed by the Mayor on January 12, 2011, it was assigned Act No. 18-682 and transmitted to both Houses of Congress for its review. D.C. Law 18-373 became effective on May 26, 2011.

§ 22-1320. Sale of tobacco to minors under 18 years of age.

Recodified as § 7-1721.02

(Feb. 7, 1891, 26 Stat. 736, ch. 117; May 2, 1991, D.C. Law 8-262, § 3, 37 DCR 8434.)

§ 22-1321. Disorderly conduct.

(a) In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:

(1) Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person’s immediate possession is likely to be harmed or taken;

(2) Incite or provoke violence where there is a likelihood that such violence will ensue; or

(3) Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person.

(b) It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct, with the intent and effect of impeding or disrupting the orderly conduct of a lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding.

(c) It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct, which unreasonably impedes, disrupts, or disturbs the lawful use of a public conveyance by one or more other persons.

(d) It is unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.

(e) It is unlawful for a person to urinate or defecate in public, other than in a urinal or toilet.

(f) It is unlawful for a person to stealthily look into a window or other opening of a dwelling, as defined in § 6-101.07, under circumstances in which an occupant would have a reasonable expectation of privacy. It is not necessary that the dwelling be occupied at the time the person looks into the window or other opening.

(g) It is unlawful, under circumstances whereby a breach of the peace may be occasioned, to interfere with any person in any public place by jostling

against the person, unnecessarily crowding the person, or placing a hand in the proximity of the person's handbag, pocketbook, or wallet.

(h) A person who violates any provision of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500, imprisoned not more than 90 days, or both.

(June 29, 1953, 67 Stat. 98, ch. 159, § 211(a); redesignated § 211, May 21, 1994, D.C. Law 10-119, § 9(a), 41 DCR 1639; May 26, 2011, D.C. Law 18-375, § 3(a), 58 DCR 731.)

Cross references. — Burning of cross or other religious symbol, see § 22-3312.02.

Defacement of public or private building or property, see § 22-3312.01.

Entities conducting prosecutions, failure to pay fines, see § 22-1809.

Wearing of masks for particular purposes, see § 22-3312.03.

Prior Codifications. — 1981 Ed., § 22-1121.

1973 Ed., § 22-1121.

Effect of amendments. — D.C. Law 18-375 rewrote the section, which formerly read:

"Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by the police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; (4) interferes with any person in any place by jostling against such person or unnecessarily crowding such

person or by placing a hand in the proximity of such person's pocketbook, or handbag; or (5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees, shall be fined not more than \$250 or imprisoned not more than 90 days, or both."

Emergency legislation. — For temporary (90 day) amendment of section, see § 303(a) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 303(a) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1302.

Legislative history of Law 18-375. — For history of Law 18-375, see notes under § 22-1307.

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Where prosecutions for disorderly conduct and for vagrancy were consolidated for trial, evidence of prior criminal convictions of defendants, though not relevant to charge of disorderly conduct, were required to establish vagrancy under statute. D.C. Code 1961, §§ 22-1121(4), 22-3302(1). *Riley v. District of Columbia*, 207 A.2d 121, 1965 D.C. App. LEXIS 159 (App. 1965).

Admission, in prosecution for using profane, indecent and obscene language, disorderly conduct, and making rude and obscene gestures, of witnesses' conclusions that language was profane, obscene and indecent was reversible er-

ror, even though proof of actions may have been sufficient to sustain conviction. D.C. Code 1951, §§ 22-1107, 22-1121. *Heilman v. District of Columbia*, 172 A.2d 141, 1961 D.C. App. LEXIS 244 (Cr.App. 1961).

Arrest.

Mass arrests of demonstrators by District of Columbia police officers were not invalid for failure to contemporaneously complete field arrest forms or other procedures for recording information necessary to establish probable cause; if all members of a group are arrested the prosecutor may be able to prove, by testimony of on-the-scene policemen, that there was probable cause to believe that the group as a whole was violating the law by violence or obstruction or by remaining on the scene after reasonable notice and opportunity to disperse. D.C. Code § 22-1121(2). *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

Where persons taken into custody during Vietnam war demonstrations were told by District of Columbia police that they were under arrest and, if they asked, were informed that they were charged with disorderly conduct there was no violation of due process, on ground that statement of the charges was not sufficiently specific, i.e., whether arrest was for violation of failure-to-move-on statute or violation of order issued under police line regulations. D.C. Code § 22-1121(2). *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

Simply talking back to a policeman does not justify an arrest for disorderly conduct. D.C. Code §§ 22-1107, 22-1121. *Von Sleichter v. United States*, 472 F.2d 1244, 1972 U.S. App. LEXIS 8996 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517, 1972 U.S. LEXIS 338 (1972).

Police officers observing physical confrontation unfolding between suspect and security guard tasked with safeguarding entrance to police department headquarters had probable cause to arrest suspect, since officers had every reason to believe that suspect was at very least committing disorderly conduct in violation of District of Columbia law. *Marcus v. District of Columbia*, 646 F.Supp.2d 58, 2009 U.S. Dist. LEXIS 73735 (2009).

Standard guiding an officer in deciding whether a breach of the peace has occurred or will occur is the presence of a substantial risk of violence. D.C. Code § 22-1121. *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186, 1975 U.S. Dist. LEXIS 16420 (1975), reversed by 566 F.2d 107, 184 U.S. App. D.C. 215, 1977 U.S. App. LEXIS 11597, 1977 U.S. App. LEXIS 13879 (1977).

Officer had probable cause to arrest defendant for committing misdemeanor offense in his presence, such that defendant's arrest was lawful and subsequent search of defendant's person was reasonable within the meaning of the Fourth Amendment; since officer saw defendant urinate on front bumper of van parked in gas station parking lot, officer had probable cause to arrest defendant for disorderly conduct and defacing of private property. U.S. Const. Amend. 4; D.C. Code §§ 23-581, 878 A.2d 486 (a).

Police need not await outbreak of violence before attempting to control situation by making disorderly conduct arrest. D.C. Code 1981, § 22-1121(1). *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Officer did not have to await occurrence of actual breach of peace before arresting defendant who was kicking, poking, and shouting profanities at people on street. D.C. Code 1981, § 22-1121(1). *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Claim that defendant's finger-pointing gesture from car and mouthing of word "pow" to undercover police officers in unmarked vehicle justified Terry stop as coming very close to being crime in itself did not establish officer's reasonable articulable suspicion for investigatory stop, where officer testified that he stopped car because he thought defendant may have gun, not because he thought gesture was itself a crime, and there was no evidence that defendants knew that individuals in vehicle were police officers. D.C. Code 1981, §§ 22-504, 22-507, 22-1121. *United States v. Bellamy*, 619 A.2d 515, 1993 D.C. App. LEXIS 18 (1993).

Officer had probable cause to arrest for disorderly conduct person whom he had stopped for traffic violation where such person was openly flouting officer's request not to go back to his car, with inflammatory language and violent motions, and passersby were attracted by the commotion. D.C. Code § 22-1107. *Gueory v. District of Columbia*, 408 A.2d 967, 1979 D.C. App. LEXIS 493 (1979).

Frisk of suspect was lawful where it occurred after officer received radio report of citizen's complaint of "man exposing himself and Peeping Tom," where officer sighted suspect, who generally matched description given, within one hour and only one block from location of reported offense, and where suspect reacted evasively upon seeing police cruiser. D.C. Code §§ 22-1112(a), 22-1121(1), 22-3204, 23-581; U.S. Const. Amend. 4. *Robinson v. United*

States, 355 A.2d 567, 1976 D.C. App. LEXIS 514 (1976).

Construction and application.

"Disorderly" conduct statute is not applicable for mere use of indecent or obscene words, but only if the language is, under contemporary community standards, so grossly offensive to members of the public who actually overhear it as to amount to a "nuisance". D.C. Code §§ 22-1107, 22-1121. *Von Sleichter v. United States*, 472 F.2d 1244, 1972 U.S. App. LEXIS 8996 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517, 1972 U.S. LEXIS 338 (1972).

"Jostling against" as used in disorderly conduct statute proscribing interfering with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook or handbag contemplates rough physical touching of one individual by another. D.C. Code § 22-1121(4). *In re B.*, 395 A.2d 59, 1978 D.C. App. LEXIS 576 (1978).

In disorderly conduct statute proscribing interfering with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook or handbag, prohibition against placing a hand in the proximity of person's pocketbook or handbag is conduct readily understood and comports with legislative intent to prevent pickpocketing by means of physically touching and then stealthily snatching purse or pocketbook from victim. D.C. Code § 22-1121(4). *In re B.*, 395 A.2d 59, 1978 D.C. App. LEXIS 576 (1978).

Term "unnecessarily crowding" in disorderly conduct statute proscribing interfering with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook or handbag is ambiguous in that its meaning depends on sensibility of some third person; the term "unnecessarily crowding" is therefore superfluous and is to be regarded as mere surplusage. D.C. Code § 22-1121(4). *In re B.*, 395 A.2d 59, 1978 D.C. App. LEXIS 576 (1978).

The qualifying language of the general disorderly conduct statute—"under circumstances such that a breach of the peace may be occasioned thereby"—need not be read into statute making it unlawful to curse, swear, or make use of profane language or indecent or obscene words in any public way. D.C. Code 1961, §§ 22-1107, 22-1121. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

The disorderly conduct statute and statute providing that all prosecutions for a violation of

disorderly conduct statute shall be conducted in name of and for benefit of District of Columbia and in same manner as provided by law for prosecution of offenses against laws and ordinances of the District must be read together. D.C. Code 1961, §§ 22-109, 22-1121. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

The statute penalizing acts intended to provoke or likely to occasion breach of peace is penal and must be strictly construed. Act. Cong. June 29, 1953, § 211(a), 67 Stat. 90. *Carey v. District of Columbia*, 102 A.2d 314, 1954 D.C. App. LEXIS 221 (Cr.App. 1954).

This section must be strictly construed. *Carey v. District of Columbia*, App. D.C., 102 A.2d 314 (1954); *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

Construction with federal law.

Where defendants were part of a congregation of people who paraded in streets in front of Austrian or German embassy with banners or placards pursuant to plan to bring German government into contempt, defendants, under provisions of local law making it an offense to aid and abet in violation of the law, were guilty of violation of joint resolution of Congress prohibiting such displays of banners or placards, regardless of whether each of defendants was then displaying one of placards. D.C. Code 1929, T. 6, § 5; 22 U.S.C. §§ 255a, 255b. *Frend v. U.S.*, 100 F.2d 691, 1938 U.S. App. LEXIS 2734 (1938).

Freedom of speech and of the press, generally.

In analyzing constitutional propriety of police reaction to seven demonstrations protesting United States participation in Vietnam war an important factor was that the police did not interfere with the demonstrators because of the content of the message they sought to present; furthermore, since either obstructive conduct or actual or imminent violence infected the demonstrations in substantial measure, the First Amendment did not insulate them from restraint by way of police lines and sweeps and application of District of Columbia failure-to-move-on statute. D.C. Code § 22-1121(2); U.S. Const. Amend. 1. *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

When government seeks to regulate activity which combines constitutionally protected speech with other forms of conduct the incidental restriction on First Amendment freedoms must be no greater than is essential to further a legitimate government interest; it is the tenor of a demonstration as a whole that determines whether the police may intervene and if it is

substantially infected with violence or destruction the police may act to control it as a unit; confronted with a mob, the police cannot be expected to single out individuals but may deal with the crowd as a unit. D.C. Code § 22-1121(2); U.S. Const. Amend. 1. *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

Although one who has violated no law is not to be arrested for the offenses of those who have been violent or obstructive, the police may validly order violent or obstructive demonstrators to disperse or clear the streets and if any demonstrator or bystander refuses to obey such an order after fair notice and opportunity to comply, his arrest does not violate the Constitution even though he has not previously been violent or obstructive; nonviolent demonstrators may be properly arrested for failure to obey a valid dispersal order. D.C. Code § 22-1121(2); U.S. Const. Amend. 1. *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

Defendant's conduct and not crowd's reaction to it must be starting point for determining whether defendant's message was of such nature as to come within ambit of free speech guarantee of First Amendment, and audience reaction and immediacy of disorder become significant elements of proof of disorderly conduct only after speaker passes bounds of argument of persuasion and undertakes incitement to riot. U.S. Const. Amend. 1; D.C. Code 1961, §§ 22-1107, 22-1121. *Allen v. District of Columbia*, 187 A.2d 888, 1963 D.C. App. LEXIS 181 (App. 1963).

Indictment and information.

Defendants, who were arrested after refusing to move out of corridor in House wing of Capitol building when ordered to do so by Capitol police, were entitled to know with certainty offense with which they were charged and possible penalty threatened and were entitled to definite reference to the law which they had allegedly violated, and thus where, notwithstanding request of defense, no one had given citation of statute under which prosecution was being had, other than statement of prosecutor that two sections were involved, convictions under section carrying lighter sentence, as requested by prosecutor, were required to be set aside. D.C. Code §§ 22-101 et seq., 22-109, 22-1107, 22-1121, 22-3102, 22-3111; 40 U.S.C. § 101. *Smith v. District of Columbia*, 387 F.2d 233, 1967 U.S. App. LEXIS 5491 (C.A.D.C. 1967).

Information charging defendant arrested during peace demonstration with disorderly conduct in that she did with intent to provoke breach of peace congregate with others on public street and on grounds of United States

Capitol, and did refuse to move, which failed to specify which of several potentially applicable statutes was basis of prosecution, was insufficient. D.C. Code §§ 22-1101 et seq., 22-1107, 22-1121 and subd. (2), 22-3101 et seq., 22-3111. *Smith v. District of Columbia*, 387 F.2d 233, 1967 U.S. App. LEXIS 5491 (C.A.D.C. 1967).

Where petition in proceeding in which juvenile was adjudicated to be guilty of disorderly conduct under statute proscribing interfering with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook or handbag alleged juvenile jostled against another and placed a hand in proximity of that other's handbag, such petition alleged all essential facts under such statute, and thus was sufficient basis for prosecution. D.C. Code § 22-1121(4). *In re B.*, 395 A.2d 59, 1978 D.C. App. LEXIS 576 (1978).

Failure of informations charging defendants with jostling to allege that jostling was with intent to provoke a breach of peace or under circumstances such that a breach of peace may be occasioned thereby did not require reversal where no objection to informations on this ground was made, and no showing of prejudice to either defendant was made. D.C. Code § 22-1121(4). *Sams v. District of Columbia*, 249 A.2d 230, 1969 D.C. App. LEXIS 196 (App. 1969).

Failure of informations charging defendants with jostling to set forth names of alleged victims was not a fatal omission. D.C. Code § 22-1121(4). *Sams v. District of Columbia*, 249 A.2d 230, 1969 D.C. App. LEXIS 196 (App. 1969).

Amendment of information charging that defendant did interfere with person by jostling against such person and by placing hand in proximity of such person's pocket book and handbag by addition of statutory language of intent to provoke breach of peace or under circumstances that breach of peace may be occasioned thereby was not prejudicial to defendant's defense and was properly allowed. D.C. Code § 22-1121; D.C. Code General Sessions Court Rules, Criminal Division, rules 6(c), 10(b) (2). *Sams v. District of Columbia*, 244 A.2d 479, 1968 D.C. App. LEXIS 183 (App. 1968).

Allegation of information charging that defendant was then and there a peeping Tom sufficiently charged that defendant's conduct was under circumstances such that a breach of the peace might be occasioned thereby, and information was not defective on grounds that it did not charge that defendant acted with an intent to provoke a breach of the peace or under circumstances such that a breach of the peace might be occasioned thereby. D.C. Code § 22-1121. *District of Columbia v. Jordan*, 232 A.2d 298, 1967 D.C. App. LEXIS 178 (App. 1967).

While one of the elements of offense of disorderly conduct under statute is that the conduct

must occur with intent to provoke a breach of the peace or occur under circumstances such that a breach of the peace may be occasioned thereby, it is not necessary in every case for the information to follow the precise language of the statute. D.C. Code § 22-1121. *District of Columbia v. Jordan*, 232 A.2d 298, 1967 D.C. App. LEXIS 178 (App. 1967).

Informations which charged that defendants "in a public place did engage in loud and boisterous talking and other disorderly conduct, to wit: under circumstances such that a breach of the peace may be occasioned thereby, acted in such manner as to annoy, disturb, and interfere with and obstruct and be offensive to others" disclosed only one substantive offense and were not fatally defective because of duplicity. D.C. Code 1961, § 22-1121. *Smith v. District of Columbia*, 219 A.2d 842, 1966 D.C. App. LEXIS 181 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 5491 (1967).

Actions of United States attorney in entering nolle prosequi of informations charging the more serious offense of unlawful entry and, thereafter, filing new informations regarding the less serious offense of disorderly conduct were not a violation of due process. D.C. Code 1961, §§ 22-1121, 22-3102. *Smith v. District of Columbia*, 219 A.2d 842, 1966 D.C. App. LEXIS 181 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 5491 (1967).

An information alleging that defendant "did then and there engage in disorderly conduct, to wit: was then and there a peeping Tom" was sufficient. Act Cong. June 29, 1953, § 211(a), 67 Stat. 90. *Carey v. District of Columbia*, 102 A.2d 314, 1954 D.C. App. LEXIS 221 (Cr.App. 1954).

Instructions.

Trial court did not err when, in prosecution for attempted robbery, it refused to instruct jury that disorderly conduct was lesser included offense of crime charged. D.C. Code §§ 22-1121(4), 22-2901, 22-2902. *Hawkins v. United States*, 399 A.2d 1306, 1979 D.C. App. LEXIS 326 (1979).

In disposition of issue in connection with trial court's refusal to give requested lesser-included offense instruction, Court of Appeals was controlled by state of the evidence in the record rather than abstract reading and comparison of statutes involved. D.C. Code §§ 22-1121, 22-2901. *Jones v. United States*, 374 A.2d 854, 1977 D.C. App. LEXIS 449 (1977).

In determining whether trial court's refusal to give requested lesser-included offense instruction on disorderly conduct was reversible error in prosecution for attempted robbery, question was whether disorderly conduct was necessarily established by proof of attempted robbery. D.C. Code §§ 22-1121, 22-2901. *Jones*

v. United States, 374 A.2d 854, 1977 D.C. App. LEXIS 449 (1977).

Testimony of defendant, who categorically denied that he bumped or jostled either complainant or her companion, who denied that his hand was ever inside or near complainant's purse or handbag and insisted that he was never closer than one foot to either woman, not only negated essential elements of disorderly conduct but was also completely exculpatory of either offense, and thus trial court did not err in refusing to give requested lesser-included offense instruction in prosecution for attempted robbery. D.C. Code §§ 22-1121, 22-2901. *Jones v. United States*, 374 A.2d 854, 1977 D.C. App. LEXIS 449 (1977).

Joint or separate trials.

Where prosecutions for disorderly conduct and vagrancy were consolidated for trial, and no pretrial objection was presented by defendant to consolidation and no request was made for severance during five months intervening between filing of informations and date of trial, and it was not until prior criminal records of defendants were offered into evidence in support of vagrancy charge that severance was requested on ground of prejudice to right of defendants to fair trial, request was not timely made and would be deemed waived. D.C. Code 1961, §§ 22-1121(4), 22-3302(1); General Sessions Court Rules, pt. 2, Criminal Division rule 7(e). *Riley v. District of Columbia*, 207 A.2d 121, 1965 D.C. App. LEXIS 159 (App. 1965).

Jurisdiction.

Criminal Division of District of Columbia Court of General Sessions had jurisdiction to try protest demonstrators for disorderly conduct under statute providing that whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby, congregates with others on a public street and refuses to move on when ordered by police shall be fined not more than \$250 or imprisoned not more than 90 days, or both. D.C. Code 1961, §§ 11-963(a)(1), 22-1121. *Jalbert v. District of Columbia*, 221 A.2d 94, 1966 D.C. App. LEXIS 195 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 6085 (1967).

District of Columbia Court of General Sessions has concurrent jurisdiction over all misdemeanors, and Corporation Counsel is proper official to conduct prosecution of offenses under statute providing that whoever with intent to provoke breach of peace, or under circumstances such that breach of peace may be occasioned thereby, congregates with others on public street and refuses to move on when ordered by police shall be fined not more than \$250 or imprisoned not more than 90 days, or both.

D.C. Code 1961, §§ 11-963(a)(1), 22-1121. *Jalbert v. District of Columbia*, 221 A.2d 94, 1966 D.C. App. LEXIS 195 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 6085 (1967).

Office of Corporation Counsel did not lack jurisdiction to prosecute for violations of disorderly conduct statute on ground that prosecution of offenses punishable by fine and imprisonment must be conducted by the United States Attorney, since the statute relating to prosecutions by United States Attorney specifically excepts prosecutions under disorderly conduct statute from operation of such rule. D.C. Code 1961, §§ 22-109, 22-1121. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

Informations charging disorderly conduct were properly prosecuted by the Corporation Counsel on behalf of the District of Columbia even though the informations charged an offense punishable by a fine or by imprisonment, or both. D.C. Code 1961, §§ 22-109, 22-1121, 23-101. *Smith v. District of Columbia*, 219 A.2d 842, 1966 D.C. App. LEXIS 181 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 5491 (1967).

Juvenile offenders.

Juvenile did not act with intent to provoke a breach of the peace by loudly protesting in the middle of the night and calling for his mother when police officer without right confiscated his money, as required in order to adjudicate juvenile delinquent for disorderly conduct for making a noise during the nighttime to the annoyance or disturbance of any considerable number of persons, though officer confiscated the money at a street corner known for drug dealing, as circumstances other than the neighborhood had to form the basis of a reasonable suspicion that criminal activity was afoot, officer misinformed juvenile that he would have to prove his legitimate entitlement to the cash in order to get it back, juvenile had good cause to protest the seizure and his protest was entirely foreseeable, and juvenile did not incite onlookers to violence or threaten to become violent himself. In re T.L., 996 A.2d 805, 2010 D.C. App. LEXIS 279 (2010).

Because police were trained to be more tolerant than average person in face of hostile words, juvenile, by riding his bicycle behind officers and voicing obscenities, was not engaged in conduct whereby breach of the peace might occur for purposes of determining whether he was guilty of disorderly conduct and should be adjudged delinquent; because juvenile rode his bicycle behind officers, his action did not disturb officers in performance of their duty, and juvenile was not placing himself

between officers and the suspects being questioned and patted down. D.C. Code 1981, § 22-1121. In re W.H.L., 743 A.2d 1226, 2000 D.C. App. LEXIS 10 (2000).

Juvenile's negative response when asked by police officer if his bicycle was registered did not constitute disorderly conduct for purposes of delinquency adjudication; juvenile answered officer's question, juvenile did not threaten to touch officer, and juvenile's verbal objection was voiced only when officer moved to grab bicycle. D.C. Code 1981, § 22-1121. In re W.H.L., 743 A.2d 1226, 2000 D.C. App. LEXIS 10 (2000).

Juvenile's yelling of obscenities at police officer after officer grabbed juvenile's bicycle to check its serial numbers did not constitute breach of the peace for purposes of determining whether juvenile was guilty of disorderly conduct and should be adjudged delinquent; juvenile's words were not aimed at crowd that had gathered, but, rather, at the officer herself, juvenile was not attempting to entice crowd to act against the officer, and reaction of crowd was to urge juvenile to allow officer to see bicycle. D.C. Code 1981, § 22-1121. In re W.H.L., 743 A.2d 1226, 2000 D.C. App. LEXIS 10 (2000).

Legislative intent.

Intent of Congress in enacting statute could best be determined by looking to act of Congress which such statute was enacted to supplement. D.C. Code §§ 22-109, 22-1101 to 22-1119, 22-1121, 22-1121(1). *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

Nature and elements of offense.

Neither an actual breach of the peace nor an intent to provoke a breach of peace is an essential element in the proof of disorderly conduct; it is sufficient that the alleged conduct be under circumstances such that a breach of the peace might be occasioned thereby. *Rodgers v. United States*, App. D.C., 290 A.2d 395 (1972); *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

Fixing one's pants over puddle of urine in hallway of partially occupied building at 7 p.m. is act sufficiently annoying and offensive to others that might occasion breach of the peace within meaning of District of Columbia disorderly conduct statute. D.C. Code 1981, §§ 22-1121(1), 23-581(a)(1)(B). *United States v. Williams*, 754 F.2d 1001, 1985 U.S. App. LEXIS 28026 (C.A.D.C. 1985).

Conduct creating a substantial risk of violence amounts to a breach of the peace under District of Columbia Code making it a misdemeanor for any one, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby, to congregate with others on a

public street and to refuse to move on when ordered by the police. D.C. Code § 22-1121(2). *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

Acts and conduct of demonstrators in obstructing streets and highways may amount to a nuisance and, therefore, constitute breach of the peace within meaning of District of Columbia failure-to-move-on statute; just as language may amount to a nuisance so may conduct of people blocking traffic at a critical intersection breach the peace as fully as those who hurl stones. D.C. Code § 22-1121(2). *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

The police have a duty to keep streets and sidewalks open for the movement of traffic; hence, failure-to-move-on provision of District of Columbia breach of the peace statute is a reasonable regulation empowering the police to fulfill such duty; statute does no more than that but in applying it the police must direct and control demonstrators only to the extent sufficient to protect legitimate state interests, such as free circulation of traffic and free access to public buildings; in ordering obstructive demonstrators to "move on" the initial police objective must be merely to clear passage, not to disperse demonstrators or suppress the free communication of their views. D.C. Code § 22-1121(2); U.S. Const. Amend. 1. *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 1977 U.S. App. LEXIS 13879 (C.A.D.C. 1977).

District of Columbia's breach of the peace statute, when construed to prohibit police from ordering persons in a demonstration to move on unless a breach of the peace is threatened or intended and so as to require an officer to consider the presence of a substantial risk of violence in determining whether a breach of the peace has occurred or will occur may be constitutionally enforced against persons arrested in demonstrations. D.C. Code § 22-1121. *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186, 1975 U.S. Dist. LEXIS 16420 (1975), reversed by 566 F.2d 107, 184 U.S. App. D.C. 215, 1977 U.S. App. LEXIS 11597, 1977 U.S. App. LEXIS 13879 (1977).

In order to convict a defendant for disorderly conduct, it is not enough to establish that the defendant made a racket in the nighttime that disturbed the neighbors; the prosecution in addition must establish that the defendant acted with intent to provoke a breach of the peace. In re T.L., 996 A.2d 805, 2010 D.C. App. LEXIS 279 (2010).

Bare possibility that words directed to a police officer may provoke violence by others does not suffice to show disorderly conduct; rather, the words must create a likelihood or

probability of such reaction. *Shepherd v. District of Columbia*, 929 A.2d 417, 2007 D.C. App. LEXIS 397 (2007).

One circumstance where a breach of peace may be occasioned by the circumstances of a defendant's conduct, so as to permit a conviction for disorderly conduct, is where the defendant uses words likely to produce violence on the part of others. *Shepherd v. District of Columbia*, 929 A.2d 417, 2007 D.C. App. LEXIS 397 (2007).

To permit a conviction for disorderly conduct, it is only required that the alleged conduct occur under circumstances such that a breach of peace may be occasioned thereby. *Shepherd v. District of Columbia*, 929 A.2d 417, 2007 D.C. App. LEXIS 397 (2007).

One circumstance where breach of the peace may be occasioned, for purposes of disorderly conduct statute, is where defendant uses words likely to produce violence on the part of others. D.C. Code 1981, § 22-1121. In re W.H.L., 743 A.2d 1226, 2000 D.C. App. LEXIS 10 (2000).

Neither actual breach of peace nor intent to provoke breach of peace is essential element in proof of disorderly conduct; it is sufficient that alleged conduct be under circumstances such that breach of peace might be occasioned thereby. D.C. Code §§ 22-1121, 22-1121(1). *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

Dismissal of charge under general disorderly conduct statute removed need for finding that breach of the peace was threatened by offensive language of defendant, who was also charged with use of profane language or indecent or obscene words on public sidewalk. D.C. Code 1961, §§ 22-1107, 22-1121. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

Disorderly conduct statute is violated when there is noisy, riotous, or inflammatory behavior provoking breach of peace, but there can be violation of such statute without such extreme conduct. D.C. Code 1961, § 22-1121(2). *Scott v. District of Columbia*, 184 A.2d 849, 1962 D.C. App. LEXIS 391 (Cr.App. 1962).

Defendant in ordering followers into hostile audience to stop heckling of speech and assault of one spectator as direct result of defendant's command to his followers, authorized conviction of disorderly conduct. U.S. Const. Amend. 1; D.C. Code 1951, § 22-1121. *Rockwell v. District of Columbia*, 172 A.2d 549, 1961 D.C. App. LEXIS 248 (Cr.App. 1961).

Under statute, one lacking intent to be disorderly may nevertheless be guilty if conduct is such that breach of peace may be occasioned thereby. D.C. Code 1951, § 22-1121. *Rockwell v. District of Columbia*, 172 A.2d 549, 1961 D.C. App. LEXIS 248 (Cr.App. 1961).

Peeping in window of occupied, lighted apartment at 1:30 in the morning constituted "disorderly conduct" within breach of peace statute penalizing action tending to "disturb" or be "offensive" to others. Act Cong. June 29, 1953, § 211(a), 67 Stat. 90. *Carey v. District of Columbia*, 102 A.2d 314, 1954 D.C. App. LEXIS 221 (Cr.App. 1954).

Urination in a secluded spot in a parking lot at five o'clock in the morning does not fall within the ambit of this section. *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

Parties.

Action asserting that plaintiff's arrest on charge of "failure to move on" when he attempted to gain access to White House sidewalk closed to public on Inauguration Day deprived him of his constitutional rights and seeking damages would not be dismissed as to "John Doe" defendants alleged to be United States park police officers in that plaintiff had not had opportunity to engage in discovery which could disclose exact identity of officers whom plaintiff was able to partially identify. D.C. Code § 22-1121(2); Fed.Rules Civ.Proc. rule 12(h)(3), 18 U.S.C.; U.S. Const. Amends. 1, 4, 5. *Saffron v. Wilson*, 70 F.R.D. 51, 1975 U.S. Dist. LEXIS 14539 (1975).

Assertion that plaintiff who brought action asserting that his arrest on charge of "failure to move on" when he attempted to gain access to White House sidewalk closed to public on Inauguration Day deprived him of his constitutional rights and seeking damages failed to state claim against "John Doe" defendants alleged to be United States park police officers could not be resolved until proper joinder was accomplished. D.C. Code § 22-1121(2); U.S. Const. Amends. 1, 4, 5. *Saffron v. Wilson*, 70 F.R.D. 51, 1975 U.S. Dist. LEXIS 14539 (1975).

Picketing.

Defendant's activities in counterpicketing another organization by carrying a sign demanding more police brutality for "Reds" and dragging what purported to be flag of a foreign government on ground in front of crowd, which gave no open displays of anger or threats of violence, was within protection of First Amendment and did not constitute disorderly conduct. U.S. Const. Amend. 1; D.C. Code 1961, §§ 22-1107, 22-1121. *Allen v. District of Columbia*, 187 A.2d 888, 1963 D.C. App. LEXIS 181 (App. 1963).

Police powers.

Police officers were not entitled to qualified immunity from arrestee's § 1983 wrongful arrest claim arising from his arrest for failure to obey a police officer, under District of Columbia law, due to his calling his mother's house on his cell phone and attempting to open door to get out of his car during traffic stop; no reasonable

officer could have believed that there was basis to arrest arrestee for failure to obey a police officer, and right to be free from arrest without probable cause was clearly established. *Dormu v. District of Columbia*, 795 F.Supp.2d 7, 2011 U.S. Dist. LEXIS 61798 (2011).

Police may not attempt to regulate the conduct of a demonstration by ordering persons to move on unless a breach of the peace is threatened or intended. D.C. Code § 22-1121. *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186, 1975 U.S. Dist. LEXIS 16420 (1975), reversed by 566 F.2d 107, 184 U.S. App. D.C. 215, 1977 U.S. App. LEXIS 11597, 1977 U.S. App. LEXIS 13879 (1977).

Police are not obliged to stand by and await occurrence of act of violence before stepping in to control situation and maintain peace and order. D.C. Code § 22-1121. *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

Presumptions and burden of proof.

Proof of actual or impending breach of peace is not required for conviction of disorderly conduct; it is only required that alleged conduct occur under circumstances such that breach of peace may be occasioned thereby. D.C. Code 1981, § 22-1121(1). *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Proof of breach of peace is not required for conviction of disorderly conduct. D.C. Code 1961, § 22-1121. *Stovall v. United States*, 202 A.2d 390, 1964 D.C. App. LEXIS 253 (App. 1964).

Government, which was prosecuting defendants who had stationed themselves just west of northwest gate of White House and wore arm bands reading "Bomb Tests Kill People" for disorderly conduct, was not required to prove actual or impending breach of peace. D.C. Code 1961, § 22-1121(2). *Scott v. District of Columbia*, 184 A.2d 849, 1962 D.C. App. LEXIS 391 (Cr.App. 1962).

Probable cause.

Police officers did not have probable cause to arrest occupants of house for District of Columbia offense of disorderly conduct; even if officers were told of reports of a loud party or loud music and some officers heard loud music upon arrival, there were no reports of noise that was so unreasonably loud or sustained for such a lengthy period of time as to constitute disorderly conduct, and when the officers arrived on the scene, they did not observe unreasonably loud, sustained noise that disturbed a considerable number of persons. *Wesby v. District of*

Columbia, 841 F.Supp.2d 20, 2012 U.S. Dist. LEXIS 5680 (2012).

Police officers were not entitled to qualified immunity from arrestee's § 1983 wrongful arrest claim arising from his arrest for disorderly conduct, under District of Columbia law; no reasonable officer could believe that probable cause existed with respect to disorderly conduct because arrestee did not behave in such a way that could have occasioned breach of peace, and right to be free from arrest without probable cause was clearly established. *Dormu v. District of Columbia*, 795 F.Supp.2d 7, 2011 U.S. Dist. LEXIS 61798 (2011).

Public transportation.

In prosecution of juvenile for smoking on bus, evidence that bus driver saw juvenile take cigarette out of her mouth and exhale smoke was sufficient to sustain conviction. D.C. Code 1978 Supp. § 44-216. *In re M.*, 432 A.2d 692, 1981 D.C. App. LEXIS 309 (1981).

Washington area transit regulation compact does not have authority to promulgate order regulating conduct of passengers. Compact between Maryland, Virginia and the District of Columbia, art. 12, §§ 6, 6(a)(4), 7, 15, D.C. Code § 1-1410 note; D.C. Code §§ 22-1121, 44-207; Code Md.1957, art. 27, § 122; Code Va.1950, § 18.1-253.1. *District of Columbia v. Jones*, 287 A.2d 816, 1972 D.C. App. LEXIS 346 (1972).

Review.

Where prosecutions for disorderly conduct and for vagrancy were consolidated for trial, and defendants waived right to severance, and trial was before judge sitting without jury, defendants were not prejudiced by introduction in evidence of prior criminal records in support of vagrancy charge. D.C. Code 1961, §§ 22-1121(4), 22-3302(1); General Sessions Court Rules, pt. 2, Criminal Division rule 7(e). *Riley v. District of Columbia*, 207 A.2d 121, 1965 D.C. App. LEXIS 159 (App. 1965).

Sentence and punishment.

Since prosecutions were brought under general disorderly conduct sections rather than the Capitol Grounds statute, defendants should have been sentenced under statute providing that any person guilty of disorderly conduct in or about public buildings and public grounds shall upon conviction thereof be fined not more than \$50 so that sentences of 90 days in jail were improper notwithstanding that government might have had a choice as to which statute it would proceed under. D.C. Code 1961, §§ 9-125, 22-1121, 22-3111. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

Tort liability.

United States Park Police officer would not

be entitled to qualified immunity from arrestee's constitutional tort action for arresting and detaining arrestee without probable cause, under facts as alleged by arrestee; no reasonable officer could have believed that individual who merely got out of his car had committed disorderly conduct or disobeyed police officer's order, even assuming that officer reasonably believed arrestee was attempting to evade citation for parking violation. D.C. Code 1981, § 22-1121(1, 4); U.S. Const.Amend. 4. *Martin v. Malhoyt*, 830 F.2d 237, 1987 U.S. App. LEXIS 13267 (C.A.D.C. 1987).

Arrestee's allegation concerning circumstances of arrest stated constitutional tort claim against United States Park Police officer for violating arrestee's Fourth Amendment rights on ground that there was no probable cause to arrest and detain arrestee for disorderly conduct and disobeying officer's orders. D.C. Code 1981, § 22-1121(1, 4); U.S. Const.Amend. 4. *Martin v. Malhoyt*, 830 F.2d 237, 1987 U.S. App. LEXIS 13267 (C.A.D.C. 1987).

Even though affidavits of federal officials sued in damage action based on arrest for violating regulation which was promulgated under Inaugural Ceremonies Act and which provided for temporary closing of certain streets alleged good faith in all their actions and their reliance upon inaugural legislation and regulations appeared reasonable, where there was nothing in record to support a finding of specific, good-faith belief necessary for invocation of qualified immunity, federal officials were not entitled to summary judgment on such theory. U.S. Const. Amends. 1, 4, 5; D.C. Code §§ 1-1201 et seq., 1-1202(a), 22-1121(2). *Saffron v. Wilson*, 70 F.R.D. 51, 1975 U.S. Dist. LEXIS 14539 (1975).

Validity.

Fact that police officers sometimes seem to be unwilling to enforce District of Columbia's disorderly conduct statute in a proper manner did not necessitate finding that the law was so poorly drafted as to be incapable of constitutional application. D.C. Code §§ 22-1107, 22-1121. *Washington Mobilization Committee v. Cullinane*, 400 F. Supp. 186, 1975 U.S. Dist. LEXIS 16420 (1975), reversed by 566 F.2d 107, 184 U.S. App. D.C. 215, 1977 U.S. App. LEXIS 11597, 1977 U.S. App. LEXIS 13879 (1977).

Where juvenile did not assert any abridgement of First Amendment rights nor attack disorderly conduct statute proscribing interfering with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in proximity of such person's pocketbook or handbag as applied to particular conduct for which he was adjudicated guilty, such statutory provision would only fall if no comprehensible course of conduct

is prohibited by its terms and it is thus unconstitutionally vague. D.C. Code § 22-1121(4); U.S. Const. Amendments. 1, 5. In re B., 395 A.2d 59, 1978 D.C. App. LEXIS 576 (1978).

Language and history of disorderly conduct statute proscribing interfering with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook or handbag provide potential defendants with sufficient notice and police and courts with adequate standard concerning what conduct is proscribed: touching a person with intent to take that person's pocketbook or handbag and contents; consequently, such statute does not prohibit a comprehensible course or conduct and prosecutions under it do not violate due process. D.C. Code § 22-1121(4); U.S. Const. Amend. 5. In re B., 395 A.2d 59, 1978 D.C. App. LEXIS 576 (1978).

Statute providing for punishment for any person who, with intent to provoke breach of peace, or under circumstances such that breach of peace might be occasioned thereby, acts in such manner as to annoy, disturb, interfere with, obstruct or be offensive to others was not constitutionally impermissible prohibition of activity protected by First Amendment. D.C. Code §§ 22-1121, 22-1121(1); U.S. Const. Amend. 1. *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

As constitutional attack on the face of disorderly conduct statute was not made in the trial court, the Court of Appeals was free to refuse review on that issue; however, even were defendant permitted to be heard on the point, Court would be bound by decision holding the portion of the statute in question to be constitutional. D.C. Code § 22-1121(1). *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

Enactments like statute prohibiting cursing, swearing, or using profane language or indecent or obscene words in public ways must contain qualifying language, and the qualifications must be applied within the framework of the clear and present danger test; otherwise they violate First Amendment. D.C. Code 1961, § 22-1121; U.S. Const. Amend. 1. *Williams v. District of Columbia*, 227 A.2d 60, 1967 D.C. App. LEXIS 133 (App. 1967), reversed by 419 F.2d 638, 136 U.S. App. D.C. 56, 1969 U.S. App. LEXIS 11844 (1969).

Statute providing punishment for whoever with intent to provoke breach of peace, or under circumstances such that breach of peace may be occasioned thereby, congregates with others on public street and refuses to move on when ordered by police is not unconstitutionally vague. D.C. Code 1961, § 22-1121. *Jalbert v. District of Columbia*, 221 A.2d 94, 1966 D.C. App. LEXIS 195 (App. 1966), vacated by 387

F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 6085 (1967).

Disorderly conduct statute as applied to defendants who exceeded the authorization of their parade permit, disregarded cautions of police and willfully violated Capitol Grounds statute by blocking a public walkway and refusing to move on when validly ordered to do so by the police is not unconstitutional. D.C. Code 1961, §§ 9-118 et seq., 22-1121; 40 U.S.C. § 193g. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

Disorderly conduct statute does not impinge upon exercise of free speech, free assembly, and right to petition the government for redress of grievances; the statute does no more than give police the right within reasonable limitations to keep public sidewalks free of unnecessary obstructions and prevent groups from congregating in way that breach of peace may result. D.C. Code 1961, § 22-1121. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

Disorderly conduct statute does not violate due process clause of Fifth Amendment although it does not require proof of breach of peace element; such statute does no more than give police the right within reasonable limitations to keep public sidewalks free of unnecessary obstructions and prevent groups from congregating in way that breach of peace might result. D.C. Code 1961, § 22-1121(2); U.S. Const. Amend. 5. *Scott v. District of Columbia*, 184 A.2d 849, 1962 D.C. App. LEXIS 391 (Cr.App. 1962).

Weight and sufficiency of evidence.

There was no evidence tending to prove beyond a reasonable doubt that defendant committed a breach of the peace warranting conviction of disorderly conduct; there was no evidence that defendant directed a verbal outburst toward anyone other than a police officer, and there was no evidence that defendant's outburst toward officer and his partner created the "likelihood or probability" that any of the onlookers would react with violence, and this was a pure case of words and not other actions. *Martinez v. District of Columbia*, 987 A.2d 1199, 2010 D.C. App. LEXIS 23 (2010).

Evidence was insufficient to show that defendant's actions were calculated to lead to a breach of the peace, as required for conviction for disorderly conduct, even though police officer testified that defendant, who he had stopped, cursed at him and accused him, in effect, of racial harassment and that, as defendant was doing so, a small group of bystanders gathered to see what the "commotion" was

about and “looked a little annoyed”; nothing suggested that group’s annoyance was directed toward officer and his partner rather than defendant, and nothing suggested that defendant was attempting to incite bystanders by, e.g., addressing his angry words to them. *Shepherd v. District of Columbia*, 929 A.2d 417, 2007 D.C. App. LEXIS 397 (2007).

Conviction for disorderly conduct was supported by evidence that defendant kicked and jabbed at individuals on street. D.C. Code 1981, § 22-1121(1). *Chemalali v. District of Columbia*, 655 A.2d 1226, 1995 D.C. App. LEXIS 53 (1995), writ of certiorari denied by 516 U.S. 818, 116 S. Ct. 76, 133 L. Ed. 2d 35, 1995 U.S. LEXIS 5457, 64 U.S.L.W. 3240 (1995).

Evidence in proceeding in which juvenile was adjudicated to be guilty of disorderly conduct under statute proscribing interfering with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person’s pocketbook or handbag was sufficient to support finding of juvenile’s guilt. D.C. Code § 22-1121(4). *In re B.*, 395 A.2d 59, 1978 D.C. App. LEXIS 576 (1978).

Where defendant’s actions, in course of his efforts to gain entry into auditorium without ticket, appeared to bring him within scope of statute providing penalty for incitement to riot, evidence supported finding of guilt of disorderly conduct. D.C. Code §§ 22-1121, 22-1121(1), 22-1122. *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

Evidence was sufficient to sustain conviction of disorderly conduct. D.C. Code § 22-1121. *Sams v. District of Columbia*, 244 A.2d 479, 1968 D.C. App. LEXIS 183 (App. 1968).

Evidence sustained convictions of disorderly conduct of protest demonstrators who allegedly had ignored numerous requests by police to disperse and warnings that they would be violating law if they went past certain point and assembled on Capitol grounds, thereby exceeding limits of parade permit, and instead entered Capitol grounds where police advised them that they were violating law and unsuccessfully urged them to leave. D.C. Code 1961,

§§ 9-124, 22-1121. *Jalbert v. District of Columbia*, 221 A.2d 94, 1966 D.C. App. LEXIS 195 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 6085 (1967).

Evidence including showing that a group of 250 demonstrators exceeded authorization of their parade permit, disregarded cautions of police, willfully violated Capitol Grounds statute, blocked a public walkway, refused to move on when validly ordered to do so by police, and engaged in loud and boisterous conduct sustained conviction of violating disorderly conduct statute. D.C. Code 1961, §§ 9-118 et seq., 22-1121. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

Evidence was sufficient to support defendants’ convictions of disorderly conduct. D.C. Code 1961, § 22-1121. *Smith v. District of Columbia*, 219 A.2d 842, 1966 D.C. App. LEXIS 181 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 5491 (1967).

Testimony of police officer that accused had hit, shoved and kicked his wife on a public street showed a series of assaults and justified conviction of disorderly conduct. D.C. Code 1961, § 22-1121. *Stovall v. United States*, 202 A.2d 390, 1964 D.C. App. LEXIS 253 (App. 1964).

Witnesses.

Prosecution was not entitled to attempt to impeach testimony of defendant indicted for second-degree murder by referring to thirteen prior convictions of petty offenses of vagrancy, disorderly conduct and soliciting prostitution, inasmuch as, although such offenses were District of Columbia Code offenses as distinguished from municipal ordinances, none of them was triable by jury. D.C. Code 1961, §§ 14-305, 16-705(b), 22-1107, 22-1112(a), 22-1121, 22-2701, 22-3302, 22-3304; U.S. Const. art. 3, § 2, cl. 3. *Pinkney v. United States*, 363 F.2d 696, 1966 U.S. App. LEXIS 5565 (C.A.D.C. 1966).

§ 22-1322. Rioting or inciting to riot.

(a) A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.

(b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than 180 days or a fine of not more than \$1,000, or both.

(c) Whoever willfully incites or urges other persons to engage in a riot shall

be punished by imprisonment for not more than 180 days or a fine of not more than \$1,000, or both.

(d) If in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of \$5,000, every person who willfully incited or urged others to engage in the riot shall be punished by imprisonment for not more than 10 years or a fine of not more than \$10,000, or both.

(Dec. 27, 1967, 81 Stat. 742, Pub. L. 90-226, title IX, § 901; Aug. 20, 1994, D.C. Law 10-151, § 111, 41 DCR 2608.)

Cross references. — Burning of cross or other religious symbol, see § 22-3312.02.

Defacement of public or private building or property, see § 22-3312.01.

Wearing of masks for particular purposes, see § 22-3312.03.

Prior Codifications. — 1981 Ed., § 22-1122.

1973 Ed., § 22-1122.

Temporary Addition of Section. — Temporary addition of sections: D.C. Law 11-75 added 2 new sections to read as follows: “§ 101. Definitions. For the purposes of this title, the term: (1) “Act” shall not include speech. (2) “Health professional” means a person licensed to practice a health occupation in the District pursuant to § 2-3301.1 1981 Ed.. (3) “Medical facility” means a facility, agency, or organizational entity, as defined in § 32-1301 1981 Ed., licensed or otherwise authorized to provide health care services in the District. (4) “Person” means: (A) The chief medical officer of a medical facility or the chief medical officer’s designee; (B) The chief executive officer of a medical facility or the chief executive officer’s designee; (C) An agent of a medical facility; or. (D) A law enforcement officer in the performance of the enforcement officer’s official duty.” “§ 102. Interference with entering and leaving a medical facility or home. (a) A person shall not act alone or in concert with others with the intent to prevent another person from entering or leaving a medical facility. A person shall not detain a person or obstruct, impede, or hinder a person’s free passage. (b) A person shall not act alone or in concert with others with the intent to prevent a medical provider or a member of the medical provider’s family from entering or leaving the medical provider’s home. (c) Subsections (a) and (b) of this section shall not be construed to prohibit any lawful picketing or assembly. (d) Any person who violates either subsection (a) or (b) of this section, upon con-

viction, shall be fined not more than \$1,000, imprisoned for not more than 6 months, or both.”

Section 301(b) of D.C. Law 11-75 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 111 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Interference with medical facilities and health professionals: For temporary prohibition of a person interfering with the free access to or egress from a medical facility or the home of a health professional in the District of Columbia, see §§ 101 and 102 of the Interference with Medical Facilities and Health Professionals and Reestablishment of Health Services Planning and Certificate of Need Program Emergency Act of 1995 (D.C. Act 11-117, July 25, 1995, 42 DCR 4044) and §§ 2 and 3 of the Interference with Medical Facilities and Health Professionals Congressional Review Emergency Act of 1995 (D.C. Act 11-152, November 9, 1995, 42 DCR 6565).

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1301.

Legislative history of Law 11-75. — Law 11-75, the “Interference with Medical Facilities and Health Professionals and Reestablishment of Health Services Planning and Certificate of Need Program Temporary Act of 1995,” was introduced in Council and assigned Bill No. 11-374. The Bill was adopted on first and second readings on July 11, 1995, and July 29, 1995, respectively. Signed by the Mayor on August 11, 1995, it was assigned Act No. 11-136 and transmitted to both Houses of Congress for its review. D.C. Law 11-75 became effective on December 15, 1995.

CASE NOTES

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Admissibility of evidence.

Since evidence that homosexual rapes were perpetrated by rioting inmates on hostages was indispensable in proving allegation of serious bodily harm for purpose of riot statute, testimony concerning sexual assaults on one of the hostages was properly admitted over objections that prejudicial effect outweighed its probative value; evidence was admissible even though government also alleged that the riot in question had resulted in property damage and even though statute referred to riot involving property damage or serious bodily harm in the alternative. D.C. Code § 22-1122. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

As evidence of a riot includes proof of assemblage, proof of acts of other two defendants would be admissible with respect to acts of any one defendant. D.C. Code § 22-1122. *United States v. Jeffries*, 45 F.R.D. 119, 1968 U.S. Dist. LEXIS 12787 (D.D.C.1968).

Upon the trial of an indictment for a riot, where defendant's witnesses have testified that they were of the party concerned in the riot, they will not be allowed to give evidence of their intention in meeting. *U.S. v. Dunn*, 25 F.Cas. 939, 1804 U.S. App. LEXIS 376 (1804).

Civil rights violations.

Riot which occurred in overcrowded jail was both foreseen and foreseeable so as to permit District of Columbia to be held liable for civil rights violations of inmates injured as result of riot. D.C. Code 1981, § 22-1122(a). *Marsh v. Barry*, 705 F. Supp. 12, 1988 U.S. Dist. LEXIS 14994 (1988).

Common law.

Offense of common-law riot required only three participants. *United States v. Bridgeman*,

523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

With the exception of requirement that five persons participate, District of Columbia prohibition against riot or inciting to riot was intended to subsume all aspects of the common-law crime. D.C. Code § 22-1122. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Where five or more persons are involved, District of Columbia statute prohibiting riots supplants the entirety of the common-law offense of riot and, although it includes street disorders, it is by no means limited to them. D.C. Code § 22-1122. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Riots are punishable at common law. *U.S. v. McFarlane*, 26 F.Cas. 1088, 1804 U.S. App. LEXIS 379 (1804).

Construction and application.

District of Columbia statute prohibiting riot or inciting to riot was sufficiently comprehensive to cover disturbance which occurred at District of Columbia jail when inmates attempted to escape and held certain persons hostage and attacked and beat them. D.C. Code § 22-1122. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

"Riot" is a breach of the peace which causes public terror and which is committed by an unlawful assembly of the stated number of persons, in the case of the District of Columbia, five. D.C. Code § 22-1122. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

District of Columbia riot statute proscribes any disorder which constitutes a breach of the peace and which affects the public. D.C. Code § 22-1122. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Public disturbance with which antiriot statute of District of Columbia deals is undoubtedly

compounded of unlawful conduct variously deriving from purposeful destructiveness and foolish greed, and fact that latter does not offer as ugly a face does not mean that the two do not interact upon each other and make a common, albeit perhaps unequal, contribution to the evil against which the statute is aimed. D.C. Code § 22-1122(a, c). *United States v. Matthews*, 419 F.2d 1177, 1969 U.S. App. LEXIS 10118 (C.A.D.C. 1969).

Defenses.

Where prosecutor reindicted 17 defendants under a 26-count indictment, after defendants, eight of whom were charged under a 15-count indictment, and nine of whom were charged under an 11-count indictment, made motion to join all 17 defendants to be tried together, such action resulted in the appearance of vindictiveness on the part of the government, and the burden was on the government to dispel that appearance. (Per Pratt, J., with one Judge concurring.) D.C. Code §§ 22-105, 22-505(a, b), 22-1122(b). *United States v. Schiller*, 424 A.2d 51, 1980 D.C. App. LEXIS 395 (1980), writ of certiorari denied by 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341, 1981 U.S. LEXIS 1897, 49 U.S.L.W. 3807 (1981).

Indictment and information.

In an indictment for a riot, it is sufficient to state that the defendants assembled to disturb the peace, and being so assembled, did such and such unlawful acts. *U.S. v. Fenwick*, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

It is an indictable offense at common law to incite others to insurrection, tumult, and riot; and the indictment need not aver that insurrection, tumult, and riot were thereby excited. *U.S. v. Fenwick*, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

Upon the count for inciting others to insurrection and riot, it is not necessary to prove an act of violence done in consequence of the incitement. *U.S. v. Fenwick*, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

Where indictments under riot statute uniformly accused defendants in other counts with burglary and often larceny as well, which took place at same time and same place, riot statute that was basically concerned with conduct rather than free expression did not unconstitutionally intrude on defendants' First Amendment rights. D.C. Code § 22-1122; U.S. Const. Amend. 1. *United States v. Jeffries*, 45 F.R.D. 110, 1968 U.S. Dist. LEXIS 12791 (D.D.C.1968).

Where no indictment for violation of riot statute had been returned charging engaging in riot alone but rather always that count was coupled with counts charging burglary and grand or petty larceny, the grand jury considered engaging in a riot in violation of statute in conjunction with separate but immediately re-

lated criminal conduct and there was no loose, unguided approach to indictments returned by grand jury under riot statute that would deprive defendants of their constitutional rights. D.C. Code § 22-1122. *United States v. Jeffries*, 45 F.R.D. 110, 1968 U.S. Dist. LEXIS 12791 (D.D.C.1968).

Ruling by trial court that action of prosecutor in reindicting 17 defendants under a single 26-count indictment, after defendants, who were charged under one of two indictments with 11 and 15 counts, respectively, made a motion to be tried together, was motivated by vindictiveness in seeking the new indictment was without support in the record. (Per Pratt, J., with one Judge concurring.) D.C. Code §§ 22-105, 22-505(a, b), 22-1122(b). *United States v. Schiller*, 424 A.2d 51, 1980 D.C. App. LEXIS 395 (1980), writ of certiorari denied by 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341, 1981 U.S. LEXIS 1897, 49 U.S.L.W. 3807 (1981).

If three or more persons assemble, with intent forcibly and violently to disturb the public peace in a tumultuous manner, and with intent mutually to assist each other against any who should oppose them in the execution of such purpose; and if, with force and violence, and in a tumultuous manner, they proceed to disturb the peace, either by a show of armor, threatening speeches, or turbulent gestures to the terror of the people, this constitutes a riot, whether or not they committed the particular act of violence charged in the indictment. *U.S. v. Fenwick*, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

Instructions.

Fact that defendant was acquitted on charge of burglarizing a liquor store in a riot district did not establish that jury accepted defendant's testimony that he did not enter store, thereby making it error for trial court to interpret anti-riot statute as permitting jury to find defendant guilty of engaging in a riot, since, absent an instruction to effect that jury should acquit defendant of riot count if it accepted his testimony as true, it was impossible to make any assumption as to precisely how jury viewed facts. D.C. Code §§ 22-1122(a, c), 22-1801(b). *United States v. Matthews*, 419 F.2d 1177, 1969 U.S. App. LEXIS 10118 (C.A.D.C. 1969).

Refusing to give defendant's requested instruction that jury must acquit him of riot if they believed his testimony that he was not within store being burglarized in riot district was not error, inasmuch as one who knowingly participates in looting phase of a riot can, without constitutional transgression, be comprehended by Congress within those identified by District of Columbia's antiriot statute as engaging in the proscribed "violent and tumultuous conduct." D.C. Code § 22-1122(a, c).

United States v. Matthews, 419 F.2d 1177, 1969 U.S. App. LEXIS 10118 (C.A.D.C. 1969).

Nature and elements of offense.

Three or more persons who act in concert, by prior arrangement, in a violent and turbulent manner, in opposing the mayor in keeping the polls open and preserving the peace on election day, are guilty of riot. U.S. v. Stewart, 27 F.Cas. 1339, 1857 U.S. App. LEXIS 681 (1857).

A riot statute can limit speech under certain circumstances. D.C. Code § 22-1122. United States v. Jeffries, 45 F.R.D. 110, 1968 U.S. Dist. LEXIS 12791 (D.D.C.1968).

Location of a disturbance is immaterial to the determination of whether it fits the statutory definition of riot; riot may take place in a penitentiary or in a military camp. D.C. Code § 22-1122. United States v. Bridgeman, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

An assemblage for the purpose of seizing a man without lawful authority, executed by tumultuously surrounding his house, and entering it, is a riot. U.S. v. Fenwick, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

An intent to seize a man by force, for uttering slanderous or offensive words, and to carry him by force, any where, even before a justice of the peace, without a legal warrant, is an unlawful intent. U.S. v. Fenwick, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

To constitute a riot, three or more persons must assemble with intent by force and violence to do some unlawful act, and mutually to assist each other against any one who should oppose them in doing such act; and the act must be done in a violent and turbulent manner, to the terror of the people. U.S. v. Peaco, 27 F.Cas. 477, 1835 U.S. App. LEXIS 322 (1835).

To constitute a riot, it is not necessary that the violence and tumult actually committed should have been premeditated by three or more persons assembled with intent to commit the same, nor that there should have been promises of mutual assistance, before or at the time of committing the actual violence. U.S. v. Peaco, 27 F.Cas. 477, 1835 U.S. App. LEXIS 322 (1835).

To constitute a riot it is not necessary that the unlawful intention should have existed at the time of meeting; but if, having met for a lawful purpose, the unlawful intent be afterwards formed and executed, it is sufficient; and the unlawful act is evidence of the unlawful intent. U.S. v. McFarland, 26 F.Cas. 1087, 1803 U.S. App. LEXIS 322 (1803).

Terror inflicted by rioting inmates on director of corrections department whom they held hostage and whom they continually beat and assaulted, to the point where he, at one time,

asked them to kill him rather than to continue to torture him, satisfied "public disturbance" requirements of District of Columbia riot statute. D.C. Code § 22-1122. United States v. Bridgeman, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Disturbance at District of Columbia jail in which several inmates attempted to escape and in which numerous persons were held hostage, in which many of the hostages were beaten and sexually assaulted, which resulted in media coverage with several hundred members of the public congregated outside, forcing the police to surround the jail and block the streets around it, involved sufficient "public terror" to constitute violation of District of Columbia riot statute. D.C. Code § 22-1122. United States v. Bridgeman, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Persons liable.

Testimony by prison guards that they were locked in a cell and held as hostages, that defendant frequently checked the cell where the guards were confined, that he told the guards that he "had nothing to lose by going out looking," that defendant separated himself from a group of inmates who did not want to escape immediately before rebellious inmates clustered for breakout attempt, and that defendant thereafter came by the cell many times armed with a short piece of steel with a sharp end and threatened the hostages was sufficient to sustain defendant's convictions for attempted escape, armed kidnapping, robbery, and riot. 18 U.S.C. § 751; D.C. Code §§ 22-502, 22-1122, 22-2901, 22-3202. United States v. Bridgeman, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Any person who, on encountering a riot, openly seizes goods he knows to have been looted or accessible to him only by virtue of disturbance will be deemed to have aided, encouraged and furthered the riot and, by so doing, to have engaged in it within meaning of antiriot statute of District of Columbia. D.C. Code § 22-1122(a, c). United States v. Matthews, 419 F.2d 1177, 1969 U.S. App. LEXIS 10118 (C.A.D.C. 1969).

By taking part in a mob-like action, defendants had made themselves liable to a joint trial on count charging engaging in a riot. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.; D.C. Code § 22-1122. United States v. Jeffries,

45 F.R.D. 119, 1968 U.S. Dist. LEXIS 12787 (D.D.C.1968).

A man may be convicted of a riot who was not actively engaged therein, if he was present and ready to give support if necessary. *U.S. v. Peaco*, 27 F.Cas. 477, 1835 U.S. App. LEXIS 322 (1835).

All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them, in furtherance of the common object of the assembly; and all who join them after the original meeting, and who were present at any subsequent act, and either active in doing, countenancing, or supporting, or ready, if necessary, to support the unlawful act, thereby become parties to the riot, and are equally guilty of all their subsequent acts. *U.S. v. Fenwick*, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

Presumptions and burden of proof.

Defendants need not have been acting in concert to be convicted of engaging in a riot and proof as to conduct of each defendant was proof as to other two. *United States v. Jeffries*, 45 F.R.D. 119, 1968 U.S. Dist. LEXIS 12787 (D.D.C.1968).

Upon an indictment for a riot, it is not necessary to prove an agreement or proposal to do the unlawful act before it was done, or at the time of doing it; but from the doing of the act, accompanied by declarations of an intent to do it, the jury may infer a previous intent and agreement to do it, and mutually to assist each other in doing it; and in the absence of all contradictory evidence they ought so to infer. *U.S. v. Stockwell*, 27 F.Cas. 1347, 1836 U.S. App. LEXIS 307 (1836).

It is not necessary, in order to convict the defendants of a riot, that the intended act of violence should have been perpetrated, or that they should all have been present, doing the act. *U.S. v. Fenwick*, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

Probable cause.

The police are obliged to show that the crowd acted unlawfully as a unit in order to have probable cause to arrest for rioting in violation of District of Columbia law; a requirement that the police verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot. *Carr v. District of Columbia*, 587 F.3d 401, 2009 U.S. App. LEXIS 25482 (C.A.D.C. 2009).

Police did not have probable cause to arrest participants in march to protest presidential inauguration for District of Columbia offense of conspiracy to riot, even if participants knew that some of the organizers of the march were planning to engage in unlawful action, absent probable cause that each arrested participant

specifically intended to further the unlawful actions of others. *Carr v. District of Columbia*, 565 F.Supp.2d 94, 2008 U.S. Dist. LEXIS 53335 (2008), reversed by, remanded by 587 F.3d 401, 388 U.S. App. D.C. 332, 2009 U.S. App. LEXIS 25482 (2009).

Police did not have probable cause to arrest participants in march to protest presidential inauguration for District of Columbia offense of rioting, although some unidentified march participants committed criminal acts such as spray-painting buildings and breaking windows, absent particularized showing that each arrested march participant intended to engage in or further riotous behavior. *Carr v. District of Columbia*, 565 F.Supp.2d 94, 2008 U.S. Dist. LEXIS 53335 (2008), reversed by, remanded by 587 F.3d 401, 388 U.S. App. D.C. 332, 2009 U.S. App. LEXIS 25482 (2009).

Sentence and punishment.

Imprisonment is not a necessary part of the punishment of riot at common law. *U.S. v. McFarlane*, 26 F.Cas. 1088, 1804 U.S. App. LEXIS 379 (1804).

Summary judgment.

Genuine issues of material fact as to whether police officers had reasonable grounds to believe that the 65 to 75 protest marchers who were arrested in an alley they had turned into after having been stopped by a police line were part of a rioting group precluded summary judgment on the marchers' claim that they were arrested for rioting under District of Columbia law without probable cause, in violation of the Fourth Amendment. *Carr v. District of Columbia*, 587 F.3d 401, 2009 U.S. App. LEXIS 25482 (C.A.D.C. 2009).

Suppression of riots.

Police were not required to first order protesters to disperse and then give an opportunity to comply prior to arresting them for rioting under District of Columbia law, so long as police had probable cause to believe that the protesters were engaging in or inciting a riot. *Carr v. District of Columbia*, 587 F.3d 401, 2009 U.S. App. LEXIS 25482 (C.A.D.C. 2009).

The marshal has a right to take a posse, and to call on all citizens to aid him in arresting rioters; and the citizens have a right to arm themselves. *U.S. v. Fenwick*, 25 F.Cas. 1062, 1836 U.S. App. LEXIS 291 (1836).

Validity.

District of Columbia's antiriot statute is not unconstitutional as being unduly vague in its employment of words such as "public disturbance," "tumultuous and violent conduct," and "grave danger of damage or injury." D.C. Code § 22-1122(a, c). *United States v. Matthews*, 419 F.2d 1177, 1969 U.S. App. LEXIS 10118 (C.A.D.C. 1969).

Statutes making it unlawful to travel interstate with intent to organize, promote, encourage and participate in a riot and to obstruct, impede and interfere with law enforcement officers during commission of a civil disorder are not violative of constitutional guarantees of free speech and assembly, nor are they unconstitutional exercises of the commerce power. 18 U.S.C. §§ 231(a)(3), 2101. *United States v. Hoffman*, 334 F. Supp. 504, 1971 U.S. Dist. LEXIS 10652 (1971).

Statute making it unlawful to travel interstate with intent to organize, promote, encourage and participate in a riot, when viewed with indictment in case, did not violate due process by authorizing conviction where unlawful intent and prohibited act did not coincide, nor was it an attempt to perpetuate status of inferiority imposed upon blacks by system of slavery. 18 U.S.C. § 2101. *United States v. Hoffman*, 334 F. Supp. 504, 1971 U.S. Dist. LEXIS 10652 (1971).

Word "engages" as used in statute prohibiting willfully engaging in a riot was not so vague as to make statute unconstitutional. D.C. Code § 22-1122. *United States v. Jeffries*, 45 F.R.D. 110, 1968 U.S. Dist. LEXIS 12791 (D.D.C.1968).

Where defendant's actions, in course of his efforts to gain entry into auditorium without ticket, appeared to bring him within scope of statute providing penalty for incitement to riot, evidence supported finding of guilt of disorderly conduct. D.C. Code §§ 22-1121, 22-1121(1), 22-1122. *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

Weight and sufficiency of evidence.

Where defendant's actions, in course of his efforts to gain entry into auditorium without ticket, appeared to bring him within scope of statute providing penalty for incitement to riot, evidence supported finding of guilt of disorderly conduct. D.C. Code §§ 22-1121, 22-1121(1), 22-1122. *Rodgers v. United States*, 290 A.2d 395, 1972 D.C. App. LEXIS 374 (1972).

§ 22-1323. Obstructing bridges connecting D.C. and Virginia.

Effective with respect to conduct occurring on or after August 5, 1997, whoever in the District of Columbia knowingly and willfully obstructs any bridge connecting the District of Columbia and the Commonwealth of Virginia:

(1) Shall be fined not less than \$1,000 and not more than \$5,000, and in addition may be imprisoned not more than 30 days; or

(2) If applicable, shall be subject to prosecution by the District of Columbia under the provisions of District law and regulation amended by the Safe Streets Anti-Prostitution Amendment Act of 1996.

(Aug. 5, 1997, 111 Stat. 782, Pub. L. 105-33, § 11712(e).)

Prior Codifications. — 1981 Ed., § 22-1123.

Effective date. — Section 11721 of title XI of Pub. L. 105-33, 111 Stat. 786, the National Capital Revitalization and Self-Government Improvement Act of 1997, provided that except as otherwise provided in this title, the provisions of this title shall take effect on the later of October 1, 1997, or the day the District of Columbia Financial Responsibility and Management Assistance Authority certifies that the

financial plan and budget for the District government for fiscal year 1998 meet the requirements of section 201(c)(1) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995, as amended by this title.

References in text. — The "regulation amended by the Safe Streets Anti-Prostitution Amendment Act of 1996," referred to in (2), is § 5 of D.C. Law 11-130, effective May 24, 1996, and found at 43 DCR 1570.

CHAPTER 13A. ENTRY OF A MOTOR VEHICLE.

Sec.

22-1341. Unlawful entry of a motor vehicle.

§ 22-1341. Unlawful entry of a motor vehicle.

(a) It is unlawful to enter or be inside of the motor vehicle of another person without the permission of the owner or person lawfully in charge of the motor vehicle. A person who violates this subsection shall, upon conviction, be fined not more than \$500, imprisoned for not more than 90 days, or both.

(b) Subsection (a) of this section shall not apply to:

(1) An employee of the District government in connection with his or her official duties;

(2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or

(3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle.

(c) For the purposes of this section, the term “enter the motor vehicle” means to insert any part of one’s body into any part of the motor vehicle, including the passenger compartment, the trunk or cargo area, or the engine compartment.

(Dec. 10, 2009, D.C. Law 18-88, § 102, 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 102 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 102 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — Law

18-88, the “Omnibus Public Safety and Justice Amendment Act of 2009”, as introduced in Council and assigned Bill No. 18-151, which was referred to the Committee on Public Safety and the Judiciary. The bill as adopted on first and second readings on June 30, 2009, and July 31, 2009, respectively. Signed by the Mayor on August 26, 2009, it was assigned Act No. 18-189 and transmitted to both Houses of Congress for its review. D.C. Law 18-88 became effective on December 10, 2009.

CHAPTER 14. FALSE PRETENSES; FALSE PERSONATION.

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|---|--|
| <p>Sec.
22-1401. [Repealed].
22-1402. Recordation of deed, contract, or conveyance with intent to extort money.
22-1403. False personation before court, officers, notaries.
22-1404. Falsely impersonating public officer or minister.</p> | <p>Sec.
22-1405. False personation of inspector of departments of District.
22-1406. False personation of police officer.
22-1407, 22-1408. [Repealed].
22-1409. Use of official insignia; penalty for unauthorized use.</p> |
|---|--|

§ 22-1401. False pretenses. [Repealed].

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(p), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-1301.

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-1402. Recordation of deed, contract, or conveyance with intent to extort money.

Whoever having no title or color of title to the land affected shall maliciously cause to be recorded in the office of the Recorder of Deeds of the District of Columbia any deed, contract, or other instrument purporting to convey or to relate to any land in said District with intent to extort money or anything of value from any person owning such land, or having any interest therein, shall be fined not less than \$1,000 or imprisoned not more than 180 days, or both.

(June 30, 1902, 32 Stat. 535, ch. 1329, § 845a; Aug. 20, 1994, D.C. Law 10-151, § 106, 41 DCR 2608.)

Cross references. — Extortion, see § 22-3251.

Prior Codifications. — 1981 Ed., § 22-1302.

1973 Ed., § 22-1302.

Emergency legislation. — For temporary amendment of section, see § 106 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law

10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

§ 22-1403. False personation before court, officers, notaries.

(a) Whoever falsely personates another person before any court of record or judge thereof, or clerk of court, or any officer in the District authorized to

administer oaths or take the acknowledgment of deeds or other instruments or to grant marriage licenses or accepts domestic partnership registrations, with intent to defraud, shall be imprisoned for not less than 1 year nor more than 5 years.

(b) For the purposes of this section, the term “domestic partnership” shall have the same meaning as provided in § 32-701(4).

(Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 859; Feb. 17, 1909, 35 Stat. 623, ch. 134; Sept. 12, 2008, D.C. Law 17-231, § 23(b), 55 DCR 6758.)

Prior Codifications. — 1981 Ed., § 22-1303.

1973 Ed., § 22-1303.

Effect of amendments. — D.C. Law 17-231 rewrote the section, which had read as follows: “Whoever falsely personates another person before any court of record or judge thereof, or clerk of court, or any officer in the District

authorized to administer oaths or take the acknowledgment of deeds or other instruments or to grant marriage licenses, with intent to defraud, shall be imprisoned for not less than 1 year nor more than 5 years.”

Legislative history of Law 17-231. — For Law 17-231, see notes following § 22-501.

CASE NOTES

In general.

By requiring defendant, prior to trial judge’s ruling on extent to which trial judge would permit defendant to be impeached by his past record, to take witness stand and be sworn as a witness before jury, trial judge pre-empted de-

fendant’s discretion regarding his decision whether to testify in his own behalf and, therefore, committed prejudicial error. D.C. Code § 22-1303. *Jones v. United States*, 243 A.2d 679, 1968 D.C. App. LEXIS 177 (App. 1968).

§ 22-1404. Falsely impersonating public officer or minister.

Whoever falsely represents himself or herself to be a judge of the Superior Court of the District of Columbia, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than 1 year nor more than 3 years.

(Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 860; Feb. 17, 1909, 35 Stat. 623, ch. 134; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); May 21, 1994, D.C. Law 10-119, § 2(h), 41 DCR 1639; May 17, 1996, D.C. Law 11-119, § 2, 43 DCR 528.)

Prior Codifications. — 1981 Ed., § 22-1304.

1973 Ed., § 22-1304.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February

1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 11-119. — Law 11-119, the “Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill

was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and trans-

mitted to both Houses of Congress for its review. D.C. Law 11-119 became effective May 17, 1996.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Indictment and information.
Instructions.
Nature and elements of offense.
Presumptions and burden of proof.
Purposes.
Review.
Weight and sufficiency of evidence.

Admissibility of evidence.

In prosecution for false personation of police officer, admission of badge which defendant allegedly showed to witness was not reversible error where there was no defense objection at trial and where witness testified that she believed defendant was trying to make her think he was a police officer. D.C. Code § 22-1304. *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

Indictment and information.

Indictment which charged defendant with false personation of police officer and which included date and place of offense, person to whom defendant allegedly made false personation, and allegations that defendant knew that his representation was false and that he wrongfully attempted to perform duty and exercise authority of police officer contained all elements of the offense, sufficiently apprised defendant of charge so that he could prepare to meet it, and was thus sufficient; if defendant had any doubt about the charge, he could have pursued additional details, if needed, by way of bill of particulars. U.S. Const. Amends. 5, 6; D.C. Code SCR, Criminal Rule 7(c); D.C. Code § 22-1304. *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

Instructions.

False personation is in the nature of positive aggressions or invasions, such as constitute common-law offenses, and hence proof of criminal intent is required and refusal of requested instruction requiring criminal or felonious intent was reversible error. D.C. Code 1951, § 22-1304. *Levine v. U.S.*, 261 F.2d 747, 1958 U.S. App. LEXIS 3329 (C.A.D.C. 1958).

In prosecution for falsely representing self to be a police officer, refusal of requested instruction on the factual defense theory, raised by defendant's testimony, that he merely stated truthfully that he was an attorney and "officer of the court," was reversible error. D.C. Code

1951, § 22-1304. *Levine v. U.S.*, 261 F.2d 747, 1958 U.S. App. LEXIS 3329 (C.A.D.C. 1958).

Nature and elements of offense.

Reliance is not an element of statutory offense of false personation, and prosecution need not establish that parties to whom the alleged false representation was made relied upon it. D.C. Code 1951, § 22-1304. *Levine v. U.S.*, 261 F.2d 747, 1958 U.S. App. LEXIS 3329 (C.A.D.C. 1958).

Presumptions and burden of proof.

In prosecution for falsely impersonating a police officer of the United States, burden is upon government to prove crime charged beyond a reasonable doubt though where defendant is charged with falsely pretending to be an officer and fails to produce evidence showing he was such officer, presumption arises that evidence if produced would have been unfavorable to defendant. D.C. Code, 1940 § 22-1304. *Taylor v. U.S.*, 167 F.2d 752, 1948 U.S. App. LEXIS 2493 (1948).

In prosecution for personation of police officer, Government presented prima facie case which shifted burden to defendant to rebut inference of false personation. D.C. Code § 22-1304. *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

Purposes.

Code section penalizing false representation of a person as police officer of District of Columbia is a protection of the citizenry against exercise of excess jurisdiction by an imposter as well as impersonation in the genuine jurisdiction which might have been exercised by a legitimate officer. D.C. Code 1940, § 22-1304. *Taylor v. U.S.*, 167 F.2d 752, 1948 U.S. App. LEXIS 2493 (1948).

Review.

Conviction for impersonating an officer was reversed and new trial ordered in view of defense's failure to call defendant to stand to rebut government's evidence that badge displayed by defendant who contended that he had exhibited a special police officer badge was not of the type officially issued to special police officers, failure to subpoena an allegedly material witness, presence of hearsay testimony and closeness of case. D.C. Code 1961, § 22-1304. *Dyer v. United States*, 379 F.2d 89, 1967 U.S. App. LEXIS 7017 (C.A.D.C. 1967).

Record on appeal from conviction for defendant's falsely representing himself as a notary public and attempting to exercise authority of a notary public disclosed no error affecting substantial rights. D.C. Code 1951, § 22-1304. *Fentress v. U.S.*, 228 F.2d 646, 1955 U.S. App. LEXIS 3713 (C.A.D.C. 1955).

Weight and sufficiency of evidence.

Evidence that accused was not a federal officer was sufficient to sustain conviction for false impersonation of a police officer of the

United States notwithstanding government failed to offer direct proof that defendant was not such officer by reference to official police rolls. D.C. Code 1940, § 22-1304. *Taylor v. U.S.*, 167 F.2d 752, 1948 U.S. App. LEXIS 2493 (1948).

Evidence, viewed in light most favorable to the Government, was sufficient to sustain conviction of false personation of a police officer. D.C. Code § 22-1304. *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

§ 22-1405. False personation of inspector of departments of District.

It shall be unlawful for any person in the District of Columbia to falsely represent himself or herself as being an inspector of the Department of Human Services of said District, or an inspector of any department of the District government; and any person so offending shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court of the District of Columbia shall be punished by a fine of not less than \$10 nor more than \$50 for the 1st offense, and for each subsequent offense by a fine of not less than \$50 nor more than \$100, or imprisonment in the Jail of the District not exceeding 6 months, or both, in the discretion of the court.

(Mar. 2, 1897, 29 Stat. 619, ch. 364; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a).)

Prior Codifications. — 1981 Ed., § 22-1305. 1973 Ed., § 22-1305.

§ 22-1406. False personation of police officer.

It shall be a misdemeanor, punishable by imprisonment in the District jail or penitentiary not exceeding 180 days, or by a fine not exceeding \$1,000, for any person, not a member of the police force, to falsely represent himself as being such member, with a fraudulent design.

(R.S., D.C., § 433; Aug. 20, 1994, D.C. Law 10-151, § 114, 41 DCR 2608.)

Prior Codifications. — 1981 Ed., § 22-1306.

1973 Ed., § 22-1306.

Emergency legislation. — For temporary amendment of section, see § 114 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see His-

torical and Statutory Notes following § 22-1402.

Editor's notes. — Uniform requirements for security officers amended: Section 2 of D.C. Law 5-180 amended § 4.2 of the Regulation Establishing Standards For Certification And Employment For Security Officers, enacted December 1, 1974 (Reg. 74-31; 17 DCMR 2112.1), to remove the prohibition against security officers wearing uniforms with stripes.

CASE NOTES

ANALYSIS

Admissibility of evidence.
 Indictment and information.
 Instructions.
 Presumptions and burden of proof.
 Remand.
 Sufficiency of evidence.

Admissibility of evidence.

In prosecution for false personation of police officer, testimony by custodian of police department records that defendant had never been a police officer was not inadmissible hearsay. D.C. Code SCR, Criminal Rule 27(b). *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

In prosecution for false personation of police officer, admission of badge which defendant allegedly showed to witness was not reversible error where there was no defense objection at trial and where witness testified that she believed defendant was trying to make her think he was a police officer. D.C. Code § 22-1304. *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

Indictment and information.

Indictment which charged defendant with false personation of police officer and which included date and place of offense, person to whom defendant allegedly made false personation, and allegations that defendant knew that his representation was false and that he wrongfully attempted to perform duty and exercise authority of police officer contained all elements of the offense, sufficiently apprised defendant of charge so that he could prepare to meet it, and was thus sufficient; if defendant had any doubt about the charge, he could have pursued additional details, if needed, by way of bill of particulars. U.S. Const. Amends. 5, 6; D.C. Code SCR, Criminal Rule 7(c); D.C. Code § 22-1304. *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

Instructions.

In prosecution for impersonating police officer, trial court's reading of statute defining crime as part of instructions to jury sufficiently charged elements of the crime. D.C. Code 1940, § 22-1306. *Wheeler v. U.S.*, 190 F.2d 663, 1951 U.S. App. LEXIS 2475 (C.A.D.C. 1951).

In prosecution on count charging impersonation of officer and count charging grand larceny, error, if any, in charge instructing that jury could convict on second count even if they acquitted on first was harmless in view of fact that jury found defendant guilty of both offenses. D.C. Code 1940, §§ 22-1306, 22-2201; Fed. Rules Crim. Proc. rule 52(a), 18 U.S.C.

Wheeler v. U.S., 190 F.2d 663, 1951 U.S. App. LEXIS 2475 (C.A.D.C. 1951).

Trial court erred when it gave an instruction that allowed the jury to convict defendant of false impersonation of a police officer if it found that he was trying to fool others into thinking he was an officer, even if he lacked the intent to gain an advantage thereby; in order to convict defendant, there had to be evidence that the defendant impersonated a police officer to deceive another in order to gain some advantage thereby. *Savoy v. United States*, 981 A.2d 1208, 2009 D.C. App. LEXIS 496 (2009).

Presumptions and burden of proof.

To prove the defendant's fraudulent design, which is an element of the offense of falsely representing oneself as a member of the police force, there must be evidence that the defendant impersonated a police officer to deceive another in order to gain some advantage thereby, but the advantage need not be monetary or even material in nature. *Gary v. United States*, 955 A.2d 152, 2008 D.C. App. LEXIS 361 (2008).

In prosecution for personation of police officer, Government presented prima facie case which shifted burden to defendant to rebut inference of false personation. D.C. Code § 22-1304. *Williams v. United States*, 404 A.2d 189, 1979 D.C. App. LEXIS 426 (1979).

Remand.

Because defendant was convicted of a misdemeanor punishable by imprisonment not exceeding 180 days, or by a fine not exceeding \$1,000, it violated the double jeopardy clause of the Fifth Amendment to impose both penalties, and consequently, case would be remanded for the trial court to correct the sentence it imposed, namely 180 days of incarceration and fine of \$300, and since defendant already had served his jail term, the court had to remit the fine, and if defendant already had paid it, he was entitled to be reimbursed. *Gary v. United States*, 955 A.2d 152, 2008 D.C. App. LEXIS 361 (2008).

Sufficiency of evidence.

Evidence was sufficient to support defendant's conviction for falsely representing himself as a member of the police force; although defendant did not tell motorist in so many words that he was a police officer, the trier of fact reasonably could find that defendant intentionally conveyed that impression by displaying a badge, having red light on dashboard of his car, threatening motorist with arrest, and otherwise acting with apparent law enforcement authority, and the fraudulent design element of the offense was met, in that defendant por-

trayed himself as a police officer to induce motorist to comply with his wishes and get back in his truck and stay there. Gary v. United

States, 955 A.2d 152, 2008 D.C. App. LEXIS 361 (2008).

§§ 22-1407, 22-1408. Wearing or using insignia of certain organizations; false certificate of acknowledgment [Repealed].

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(q), (r), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., §§ 22-1307, 22-1308.

legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-1401.

Legislative history of Law 4-164. — For

§ 22-1409. Use of official insignia; penalty for unauthorized use.

(a) The Metropolitan Police Department and the Fire and Emergency Medical Services Department shall have the sole and exclusive rights to have and use, in carrying out their respective missions, the official badges, patches, emblems, copyrights, descriptive or designating marks, and other official insignia displayed upon their current and future uniforms.

(b) Any person who, for any reason, makes or attempts to make unauthorized use of, or aids or attempts to aid another person in the unauthorized use or attempted unauthorized use of the official badges, patches, emblems, copyrights, descriptive or designated marks, or other official insignia of the Metropolitan Police Department or the Fire and Emergency Medical Services Department shall, upon conviction, be fined not more than \$1,000, imprisoned for not more than one year, or both.

(June 3, 2002, D.C. Law 14-194, § 702, 49 DCR 5306.)

Legislative history of Law 14-194. — Law 14-194, the “Omnibus Anti-Terrorism Act of 2002”, was introduced in Council and assigned Bill No. 14-373, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 9,

2002, and May 7, 2002, respectively. Signed by the Mayor on June 3, 2002, it was assigned Act No. 14-380 and transmitted to both Houses of Congress for its review. D.C. Law 14-194 became effective on October 17, 2002.

CHAPTER 15. FORGERY; FRAUDS.

Sec.

22-1501. [Repealed].

22-1502. Forging or imitating brands or packaging of goods.

22-1503 to 22-1509. [Repealed].

22-1510. Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; "credit" defined.

Sec.

22-1511. Fraudulent advertising.

22-1512. Prosecution under § 22-1511.

22-1513. Penalty under § 22-1511.

22-1514. Fraudulent interference or collusion in jury selection.

§ 22-1501. Forgery. [Repealed].

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(s), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-1401.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The

Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-1502. Forging or imitating brands or packaging of goods.

Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than \$500 or imprisoned not more than 180 days, or both.

(Mar. 3, 1901, 31 Stat. 1333, ch. 854, § 879; Aug. 20, 1994, D.C. Law 10-151, § 105(e), 41 DCR 2608.)

Cross references. — Fraud, see § 22-3221.

Violations pertaining to registration of containers of milk and beverages composed principally of milk, see §§ 36-130 and 36-153.

Violations pertaining to registration of labor union labels, see § 36-203.

Prior Codifications. — 1981 Ed., § 22-1402.

1973 Ed., § 22-1402.

Emergency legislation. — For temporary amendment of section, see § 105(e) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

CASE NOTES

In general.

Interests of justice supported transfer of food distributor's trademark and trade dress infringement action against competitor from District of Columbia to Eastern District of New York; distributor did not claim that any potential witnesses were located in District of Columbia, while competitor identified nine relevant nonparty witnesses located in Eastern District of New York or within 20 miles of federal courthouse there, all of competitor's business records were located in or easily accessible in New York, and competitor had greater contacts with New York than with Dis-

trict of Columbia. 18 U.S.C. § 1404(a). *Rhee Bros. v. Seoul Shik Poom, Inc.*, 869 F. Supp. 31, 1994 U.S. Dist. LEXIS 19580 (1994).

Food distributor was "transacting business" in District of Columbia within meaning of District of Columbia long-arm statute by selling Korean food products to at least one customer in district, amount to 3.6% of its total sales, permitting exercise of personal jurisdiction over distributor in competitor's trademark and trade dress infringement action. D.C. Code 1981, § 13-423(a)(1). *Rhee Bros. v. Seoul Shik Poom, Inc.*, 869 F. Supp. 31, 1994 U.S. Dist. LEXIS 19580 (1994).

§ 22-1503. Stealing, destroying, mutilating, secreting, or withholding will. [Repealed].

Repealed.

(Sept. 14, 1965, 79 Stat. 783, Pub. L. 89-183, § 8.)

Prior Codifications. — 1981 Ed., § 22-1403.

§§ 22-1504, 22-1505. Decedent's estate — Secreting or converting property, documents, or assets; taking away or concealing writings [Repealed].

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(t), (u), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., §§ 22-1404, 22-1405.

Legislative history of Law 4-164. — For

legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-1501.

§ 22-1506. Sale or concealment by conditional vendee, with intent to defraud. [Repealed].

Repealed.

(Dec. 30, 1963, 77 Stat. 774, Pub. L. 88-243, § 15(a)(1).)

Prior Codifications. — 1981 Ed., § 22-1406.

§§ 22-1507 to 22-1509. Fraud by use of slugs to operate coin-controlled mechanism; manufacture, sale, offer for sale, possession of slugs or device to operate coin-controlled mechanism; “person” defined [Repealed].

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(v)-(x), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., §§ 22-1407 to 22-1409.

legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-1501.

Legislative history of Law 4-164. — For

§ 22-1510. Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; “credit” defined.

Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, order, or other instrument for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation, shall, if the amount of such check, draft, order, or other instrument is \$100 or more, be guilty of a felony and fined not more than \$3,000 or imprisoned for not less than 1 year nor more than 3 years, or both; or if the amount of such check, draft, order, or other instrument is less than \$100, be guilty of a misdemeanor and fined not more than \$1,000 or imprisoned not more than 180 days, or both. As against the maker or drawer thereof the making, drawing, uttering, or delivering by such maker or drawer of a check, draft, order, or other instrument, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within 5 days after receiving notice in person, or writing, that such check, draft, order, or other instrument has not been paid. The word “credit,” as used herein, shall be construed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, order, or other instrument.

(July 1, 1922, 42 Stat. 820, ch. 273; Oct. 22, 1970, 84 Stat. 1094, Pub. L. 91-497, § 3; Aug. 20, 1994, D.C. Law 10-151, § 108, 41 DCR 2608.)

Cross references. — Fraud, see § 22-3221.
Proof of intent to defraud, see § 23-322.
Theft, see § 22-3211.

Prior Codifications. — 1981 Ed., § 22-1410.
1973 Ed., § 22-1410.

Emergency legislation. — For temporary amendment of section, see § 108 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1502.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Conduct of trial.
In general.
Indictment and information.
Instructions.
Limitation of actions.
Nature and elements of offense.
Questions of law and fact.

Admissibility of evidence.

In prosecution for making, drawing or uttering a check with intent to defraud, bringing alias of defendant to attention of jury where its relevance was dubious at best was not prejudicial error in view of eyewitness identification of defendant as well as positive testimony of an expert handwriting analyst. D.C. Code § 22-1410. *Johnson v. United States*, 389 A.2d 1353, 1978 D.C. App. LEXIS 396 (1978).

Conduct of trial.

In prosecution for making, drawing or uttering a check with intent to defraud, in view of fact that there was no indication that an arrest of witness was being made, trial court did not err in failing to voir dire jury as to whether any of them observed detention of defense witness in hallway behind the courtroom. D.C. Code § 22-1410. *Johnson v. United States*, 389 A.2d 1353, 1978 D.C. App. LEXIS 396 (1978).

In general.

The word "trading" in clause excluding trading loss from coverage of brokers' bond meant buying and selling of securities on customer's account, and loss occurring when brokers' employee accepted order to purchase substantial amount of stock for customer who gave bad check was such a loss. D.C. Code 1961, § 22-1410. *Sade v. National Sur. Corp.*, 203 F.Supp. 680, 1962 U.S. Dist. LEXIS 3210 (D.D.C.1962).

Indictment and information.

In prosecutions for passing bad checks payable to United States Treasurer and delivered to agent for Federal War Assets Administration, proof of fact, not alleged in informations, that checks covered purchases of war surplus articles under veterans' preference, was unnecessary for conviction. D.C. Code 1940, § 22-1410. *McGuinness v. U.S.*, 77 A.2d 22, 1950 D.C. App. LEXIS 194 (Cr.App. 1950).

Instructions.

Refusal to charge, in prosecution for false pretenses, on lesser included offense of passing

bad check was not error where defense testimony disclosed something had been obtained for value and that defrauded party had placed reliance on defendant's check. D.C. Code 1961, §§ 22-1301, 22-1410. *Ciullo v. United States*, 325 F.2d 227, 1963 U.S. App. LEXIS 3861 (C.A.D.C. 1963).

Limitation of actions.

The Wartime Suspension of Limitations Act was inapplicable to charges of violating District of Columbia statute by passing bad checks payable to United States Treasurer and delivered to agent for Federal War Assets Administration, though giving of such checks may have resulted in offenses within all categories of extension statute, as none of such offenses was essential ingredient of violation of local statute, so that prosecutions begun over three years after commission of offenses were barred by general statute of limitations for noncapital offenses. D.C. Code 1940, § 22-1410; 18 U.S.C. §§ 3282, 3287. *McGuinness v. U.S.*, 77 A.2d 22, 1950 D.C. App. LEXIS 194 (Cr.App. 1950).

The Federal Wartime Suspension of Limitations Act was not intended to embrace violations of District of Columbia bad check law, though such checks were received by federal government, but purpose of such act was to suspend running of statutes of limitation applicable to offenses involving fraud on Government. D.C. Code 1940, § 22-1410; 18 U.S.C. § 3287. *McGuinness v. U.S.*, 77 A.2d 22, 1950 D.C. App. LEXIS 194 (Cr.App. 1950).

Nature and elements of offense.

False representation, knowledge of falsity, and intent to defraud are sufficient to violate bad check statute when representation involves worthless check. D.C. Code 1961, § 22-1410. *Ciullo v. United States*, 325 F.2d 227, 1963 U.S. App. LEXIS 3861 (C.A.D.C. 1963).

Defendants' use of agents to pass bad checks in return for merchandise did not constitute grand larceny, but could only constitute the offense of uttering checks with intent to defraud. D.C. Code §§ 22-1410, 22-2201. *Locks v. United States*, 388 A.2d 873, 1978 D.C. App. LEXIS 539 (1978).

Fact that a check is issued for a past-due obligation does not preclude a conviction under the "worthless" statute. D.C. Code 1951, § 22-1410. *Clarke v. U.S.*, 140 A.2d 181, 1958 D.C. App. LEXIS 299 (Cr.App. 1958).

Questions of law and fact.

In prosecution for violation of statute making

it a crime for any person, with intent to deceive, to deliver any check while knowing that there are insufficient funds to his credit with bank for payment of such check, question of whether or not defendant had an intent to defraud in issuance of check for past consideration, presented a question of fact for the jury. D.C. Code 1951, § 22-1410. *Clarke v. U.S.*, 263 F.2d 269, 1959 U.S. App. LEXIS 4563 (C.A.D.C. 1959).

Under "worthless" check statute, fact that

checks were given in payment of antecedent debt did not destroy presumption of fraudulent intent, and evidence as to issuance of two checks which were dishonored for lack of sufficient funds established prima facie case authorizing submission of case to jury in absence of any evidence by defendant on the point. D.C. Code 1951, § 22-1410. *Clarke v. U.S.*, 140 A.2d 181, 1958 D.C. App. LEXIS 299 (Cr.App. 1958).

§ 22-1511. Fraudulent advertising.

It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse receipt, or any security; or with the purpose to deceive, mislead, or induce any person, firm, association, or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead, or induce any other person, firm, or corporation for a valuable consideration to employ the services of any person, firm, association, or corporation so advertising such services.

(May 29, 1916, 39 Stat. 165, ch. 130, § 1.)

Cross references. — Food sales, misrepresentation or false advertising, purchase authorization, see § 37-201.22a.

Fraud, see § 22-3221.

Proof of intent to defraud, see § 23-322.

Theft, see § 22-3211.

Section references. — This section is referred to in §§ 22-1512, 22-1513, and 37-201.22a.

Prior Codifications. — 1981 Ed., § 22-1411.

1973 Ed., § 22-1411.

CASE NOTES

ANALYSIS

Construction and application.

Jurisdiction.

Pleadings.

Weight and sufficiency of evidence.

Construction and application.

Statute making unlawful the publication of false advertising does not punish only a course of conduct but punishes each publication of a false advertisement. D.C. Code § 22-1411.

Green v. United States, 312 A.2d 788, 1973 D.C. App. LEXIS 401 (1973), writ of certiorari denied by 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51, 1974 U.S. LEXIS 2338 (1974).

Each daily publication of fraudulent advertising about sewing machines for sale in newspaper during 60-day period was properly treated as a separate offense of publishing fraudulent advertising. D.C. Code § 22-1411. *Green v. United States*, 312 A.2d 788, 1973 D.C. App. LEXIS 401 (1973), writ of certiorari de-

nied by 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51, 1974 U.S. LEXIS 2338 (1974).

Jurisdiction.

Superior court had jurisdiction over prosecution of defendant publishing fraudulent advertising in newspaper. D.C. Code §§ 22-1411 to 22-1413. *Green v. United States*, 312 A.2d 788, 1973 D.C. App. LEXIS 401 (1973), writ of certiorari denied by 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51, 1974 U.S. LEXIS 2338 (1974).

Pleadings.

Proceeding by way of indictment charging defendant with 60 counts of publishing fraudulent advertising was not error. D.C. Code §§ 22-1411 to 22-1413; D.C. Code SCR, Criminal Rule 7. *Green v. United States*, 312 A.2d 788, 1973 D.C. App. LEXIS 401 (1973), writ of certiorari denied by 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51, 1974 U.S. LEXIS 2338 (1974).

In prosecution upon two informations charging in effect that accused inserted advertising calculated to induce readers for a valuable consideration to employ the advertiser's service, "knowing the same to be false and contain-

ing certain false, untrue and misleading statements," action of trial court in permitting amendments whereby words "for a valuable consideration" were deleted and words "with intent to barter, sell or exchange any goods, wares, or merchandise, or anything of value" were added, was not, so far as appeared from record, prejudicial, and was not abuse of discretion. Municipal Court Rules, Criminal Division, rule 6(c); D.C. Code 1951, § 22-1411. *Robles v. U.S.*, 115 A.2d 303, 1955 D.C. App. LEXIS 185 (Cr.App. 1955).

Weight and sufficiency of evidence.

Evidence was sufficient to support finding in prosecution for publishing fraudulent advertising about sewing machines for sale that defendant who admitted he was in charge of advertising for sewing machines caused fraudulent advertising to be inserted in newspaper. D.C. Code § 22-1411. *Green v. United States*, 312 A.2d 788, 1973 D.C. App. LEXIS 401 (1973), writ of certiorari denied by 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51, 1974 U.S. LEXIS 2338 (1974).

§ 22-1512. Prosecution under § 22-1511.

Prosecution under § 22-1511 shall be in the Superior Court of the District of Columbia upon information filed by the United States Attorney for the District of Columbia or an Assistant U.S. Attorney.

(May 29, 1916, 39 Stat. 165, ch. 130, § 2; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; June 25, 1948, 62 Stat. 909, ch. 646, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); May 21, 1994, D.C. Law 10-119, § 10, 41 DCR 1639.)

Section references. — This section is referred to in § 37-201.22a.

Prior Codifications. — 1981 Ed., § 22-1412.

1973 Ed., § 22-1412.

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned

Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

CASE NOTES

Jurisdiction.

Superior court had jurisdiction over prosecution of defendant publishing fraudulent advertising in newspaper. D.C. Code §§ 22-1411 to

22-1413. *Green v. United States*, 312 A.2d 788, 1973 D.C. App. LEXIS 401 (1973), writ of certiorari denied by 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51, 1974 U.S. LEXIS 2338 (1974).

§ 22-1513. Penalty under § 22-1511.

Any person, firm, or association violating any of the provisions of § 22-1511 shall upon conviction thereof, be punished by a fine of not more than \$500 or

by imprisonment of not more than 60 days, or by both fine and imprisonment, in the discretion of the court. A corporation convicted of an offense under the provisions of § 22-1511 shall be fined not more than \$500, and its president or such other officials as may be responsible for the conduct and management thereof shall be imprisoned not more than 60 days, in the discretion of the court.

(May 29, 1916, 39 Stat. 165, ch. 130, § 3.)

Cross references. — Food sales, misrepresentation or false advertising, purchase authorization, see § 37-201.22a.

Section references. — This section is referred to in § 37-201.22a.

Prior Codifications. — 1981 Ed., § 22-1413.

1973 Ed., § 22-1413.

§ 22-1514. Fraudulent interference or collusion in jury selection.

If any person shall fraudulently tamper with any box or wheel used or intended by the jury commission for the names of prospective jurors, or of prospective condemnation jurors or commissioners, or shall fraudulently tamper with the contents of any such box or wheel, or with any jury list, or be guilty of any fraud or collusion with respect to the drawing of jurors or condemnation jurors or commissioners, or if any jury commissioner shall put in or leave out of any such box or wheel the name of any person at the request of such person, or at the request of any other person, or if any jury commissioner shall wilfully draw from any such box or wheel a greater number of names than is required by the court, any such person or jury commissioner so offending shall for each offense be punished by a fine of not more than \$1,000 or imprisonment for not more than 180 days, or both.

(Mar. 3, 1901, 31 Stat. 1223, ch. 854, § 213; Apr. 19, 1920, 41 Stat. 560, ch. 153, § 213; Mar. 27, 1968, 82 Stat. 63, Pub. L. 90-274, § 103(f); Aug. 20, 1994, D.C. Law 10-151, § 105(f), 41 DCR 2608.)

Cross references. — Proof of intent to defraud, see § 23-322.

Prior Codifications. — 1981 Ed., § 22-1414.

1973 Ed., § 22-1414.

Emergency legislation. — For temporary amendment of section, see § 105(f) of the Om-

nibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1502.

CHAPTER 16. FORNICATION.

Sec.

22-1601, 22-1602. [Repealed].

§ 22-1601. Fornication. [Repealed].

Repealed.

(June 25, 1948, 62 Stat. 864, ch. 645, § 21.)

Prior Codifications. — 1981 Ed., § 22-1001.

§ 22-1602. Fornication. [Repealed].

Repealed.

(June 29, 1953, 67 Stat. 99, ch. 150, § 214; Apr. 29, 2004, D.C. Law 15-154, § 7, 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1002.
1973 Ed., § 22-1002.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Construction with other laws.
Law governing.
Public officers and employees.

Admissibility of evidence.

In prosecution for perjury, teletype message sent by F.B.I. in Washington to Texas agent containing accusation that defendant had been guilty of fornication in District of Columbia was improperly received because of charge of another criminal offense. D.C. Code 1940, § 22-1001. *Pyle v. U.S.*, 156 F.2d 852, 1946 U.S. App. LEXIS 2650 (1946).

Construction with other laws.

Of the various forms of sexual conduct prohibited by statute, such as adultery, indecent exposure, incest, fornication, seduction, indecent liberties with children, and sodomy, only sodomy, indecent exposure, and indecent sexual acts with children can reasonably be deemed "lewd, obscene or indecent," within meaning of sexual proposal statute, with the result that statute's "sexual proposal" clause could be fairly construed to prohibit only proposals to commit sodomy, indecent exposure, or in the case of sexual proposals with children, to perform some sexual act. D.C. Code §§ 22-301,

22-1002, 22-1112, 22-1901, 22-3001, 22-3501, 22-3502. *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975), writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

Law governing.

Under District of Columbia choice of law rules, Virginia law applied to tort claims arising from sexual encounter within Virginia and District of Columbia law applied to claims arising from encounter in District of Columbia, in action by Virginia resident against District of Columbia sexual partner to recover damages for transmission of genital herpes and genital warts. *Doe v. Roe*, 841 F. Supp. 444, 1994 U.S. Dist. LEXIS 265 (1994).

Public officers and employees.

Government employee's alleged taking of a hotel room with a prostitute did not constitute "criminal conduct" which would support dismissal of the government employee where the conduct charged was not a crime under applicable laws even though employee had admitted his act to police and had forfeited collateral following a purported arrest therefor. D.C. Code 1961, §§ 22-1002, 22-2701. *Pelicone v. Hodges*, 320 F.2d 754, 1963 U.S. App. LEXIS 4988 (C.A.D.C. 1963).

CHAPTER 17. GAMBLING.

Subchapter I. General Provisions

- Sec.
 22-1701. Lotteries; promotion; sale or possession of tickets.
 22-1702. Possession of lottery or policy tickets.
 22-1703. Permitting sale of lottery tickets on premises.
 22-1704. Gaming; setting up gaming table; inducing play.
 22-1705. Gambling premises; definition; prohibition against maintaining; forfeiture; liens; deposit of moneys in Treasury; penalty; subsequent offenses.
 22-1706. Three-card monte and confidence games.

Sec.

- 22-1707. "Gaming table" defined.
 22-1708. Gambling pools and bookmaking; athletic contest defined.
 22-1709 to 22-1712. [Repealed].
 22-1713. Corrupt influence in connection with athletic contests.
 22-1714. Immunity of witnesses; record.
 22-1715. [Repealed].

Subchapter II. Legalization

- 22-1716. Statement of purpose.
 22-1717. Permissible gambling activities.
 22-1718. Advertising and promotion; sale and possession of lottery and numbers tickets and slips.

*Subchapter I. General Provisions.***§ 22-1701. Lotteries; promotion; sale or possession of tickets.**

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him or her to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall sell or transfer, or have in his or her possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he or she shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than 3 years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

(Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1; May 21, 1994, D.C. Law 10-119, § 2(i), 41 DCR 1639.)

Cross references. — Alcoholic beverages, licenses transfer or suspension, violation of laws, see §§ 25-316 and 25-823.

Other gambling criminal penalties, see § 16-1704.

Search warrants, see § 23-521 et seq.

Section references. — This section is referred to in §§ 22-1702, 22-1705 and 23-546.

Prior Codifications. — 1981 Ed., § 22-1501.

1973 Ed., § 22-1501.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to

both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Editor’s notes. — Advertisement of Maryland State Lottery Games: Section 2(a) of D.C. Law 11-272 provided that nothing in this section shall prohibit advertising a lottery by the Maryland State Lottery so long as Maryland does not prohibit advertising or otherwise publishing an account of a lottery by the District of Columbia. D.C. Law 11-272 became effective on June 3, 1997.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Arrest.

Conspiracy.

Construction with federal law.

Defenses, generally.

Discovery.

Forfeitures.

Indictment and information.

Instructions.

Joint or separate trials of codefendants.

Jury selection.

Nature and elements of offenses.

Presumptions and burden of proof.

Questions of law and fact.

Review.

—Harmless or reversible error, review.

—In general.

—Presentation and reservation of grounds for review.

Searches and seizures.

Sentence and punishment.

Validity of related laws.

Weight and sufficiency of evidence.

Wiretapping.

Witnesses.

Admissibility of evidence.

In prosecution for violation of District of Columbia gambling laws, it was unfortunate that, during course of trial, it was brought to attention of jury that a codefendant had pleaded guilty to felony count of indictment, which jointly charged all of defendants; but in view of overwhelming evidence of guilt, any prejudice which might have remained despite judge’s admonition to jury could be said to be harmless, and district court would not be put in error for refusing to grant motion for mistrial. D.C. Code 1951, § 22-1501. *Carter v. U.S.*, 281 F.2d 640, 1960 U.S. App. LEXIS 4114 (C.A.D.C. 1960).

That alleged coconspirator had been seen talking to defendant on day before that on which such alleged coconspirator allegedly informed government agent that he had turned his numbers work over to defendant did not establish that conspiracy was in existence on

that date; and in absence of evidence that conspiracy was then in existence, agent’s testimony with regard to alleged conversation was inadmissible against defendant, in prosecution for conspiracy to commit lottery offenses. D.C. Code 1951, §§ 22-1501, 22-1502. *Taylor v. U.S.*, 260 F.2d 737, 1958 U.S. App. LEXIS 3161 (C.A.D.C. 1958).

Whether lottery slips seized under search warrant were dead or alive they could be introduced in support of charge of operating a lottery. D.C. Code 1951, § 22-1501. *Shaw v. U.S.*, 209 F.2d 298, 1953 U.S. App. LEXIS 3165 (C.A.D.C. 1953).

Where defendant in prosecution for promotion of numbers game renewed, during trial, motion to suppress evidence obtained incident to arrest of defendant without a warrant, on ground that there was no probable cause for defendant’s arrest, and court, instead of determining issue of probable cause, improperly submitted issue of probable cause to jury, admission of testimony of police officers that they were experienced in the investigation of the numbers game and that because of such experience, officers knew from conduct of defendant that he was participating in operation of a lottery, was reversible error, because testimony trenching on jury’s duty to determine ultimate question whether defendant was guilty. D.C. Code 1951, § 22-1501. *Simmons v. U.S.*, 206 F.2d 427, 1953 U.S. App. LEXIS 2764 (C.A.D.C. 1953).

In prosecution for operation of lottery known as numbers game, admission of numbers slips, numbers books, and other physical evidence seized at time of defendant’s arrest, was proper, notwithstanding that it was not shown that numbers slips related to an existing lottery rather than to one already completed. D.C. Code 1940, § 22-1501. *Harvey v. U.S.*, 197 F.2d 594, 1952 U.S. App. LEXIS 2658 (C.A.D.C. 1952).

Under statute making it unlawful to keep, set up, or promote a lottery, the charge may contemplate an act already complete when officer arrives, and possession of numbers slips, whether expired or not, may be relevant and

material evidence that possessor has been conducting a lottery, and possessor need not be caught in the act, but may be caught with damaging evidence of a completed offense. D.C. Code 1940, § 22-1501. *Harvey v. U.S.*, 197 F.2d 594, 1952 U.S. App. LEXIS 2658 (C.A.D.C. 1952).

Actions of marshals who were searching premises in which was found property alleged to be gambling paraphernalia, in picking up telephones when they rang and listening to what callers had to say, did not constitute an "interception" within statute prohibiting divulging of intercepted communications, and statute did not preclude marshals from testifying as to what was said, in prosecution for managing or carrying on a lottery. D.C. Code, 1940 § 22-1501; 47 U.S.C. § 605. *Billeci v. U.S.*, 184 F.2d 394, 1950 U.S. App. LEXIS 3100 (C.A.D.C. 1950).

In prosecution for promoting a lottery and knowingly possessing lottery materials, wherein officers testified that they observed numbers slips in rear compartment of automobile, photographs of automobile similar to that involved showing that position of spare tire would make observation impossible were properly excluded where at time photographs were offered defendants had proved only that model of automobile pictured was the same as one involved and had not proved that automobile involved had a spare tire, or other matters usually required as foundation for admission of photographs. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Coupe v. U.S.*, 113 F.2d 145, 1940 U.S. App. LEXIS 3321 (1940).

In prosecution for promoting a lottery and knowingly possessing lottery materials, wherein officers testified that before searching automobile they observed numbers slips through rear compartment, exclusion of photographs proffered by defendants showing automobile similar to that involved and that position of tire allegedly made observation of rear compartment impossible was not error where it did not appear that photographs would have been persuasive in impeaching officers' story. D.C. Code Supp. V, T. 6, Secs. 151, 151a. *Coupe v. U.S.*, 113 F.2d 145, 1940 U.S. App. LEXIS 3321 (1940).

In prosecution for carrying on and promoting a lottery known as the numbers game, page from notebook which was found on person of accused was properly admitted over objection of accused that notation on page was a memorandum of a horse race bet which he was making for himself, notwithstanding that evidence may have tended, incidentally, to prove another distinct offense. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Coupe v. U.S.*, 113 F.2d 145, 1940 U.S. App. LEXIS 3321 (1940).

In prosecution against three defendants for violating the lottery law and for conspiracy to

violate the lottery law, where evidence disclosed that numbers plays were made with one defendant by an officer using marked money and slips of paper, and that numbers slips were transferred to second defendant who transferred them to third defendant, testimony of police officer relative to numbers plays and delivery of packages to first defendant was admissible as against other defendants and court did not commit error in not instructing jury to disregard such evidence as to such other defendants, since things seen by police of movements of the three defendants were all relevant, particularly on conspiracy count. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Smith v. U.S.*, 112 F.2d 217, 1940 U.S. App. LEXIS 4268 (1940).

In prosecution for violating the lottery law and for conspiracy to violate the lottery law, objection not made until trial was well under way, that warrant of arrest was improperly issued and that lottery papers obtained from defendant's person and automobile should have been excluded as evidence illegally obtained, was too late in absence of showing that defendant lacked opportunity to make motion in advance of trial. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Smith v. U.S.*, 112 F.2d 217, 1940 U.S. App. LEXIS 4268 (1940).

Arrest.

Where one officer through binoculars, observed defendant exiting from stores, walking to automobile and handing small pieces of white paper and money to occupant and other persons carrying on same type of activity in vicinity and then went to within three to five feet of parked automobile and observed several of the other persons pass money and slips which he recognized as "numbers slips" to occupant of automobile, there was probable cause for arrest of defendant pursuant to radio orders given to arresting officers by officer who had observed defendant and the other persons. D.C. Code §§ 22-1501, 22-1502. *United States v. Loundmannz*, 472 F.2d 1376, 1972 U.S. App. LEXIS 6662 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691, 1973 U.S. LEXIS 3263 (1973).

Where over period of two and a half months, officers had placed numbers bets on fifteen separate occasions at one location, and, on ten separate occasions, had observed a suspect depart from that location with bulging pockets and enter other premises, from which he subsequently departed "without the bulge," officers had reasonable grounds to believe that latter premises were being used in lottery operations, and that defendant, who at time such premises were searched pursuant to a search warrant was the only male present and was leaving "hastily," was participating therein, justifying arrest of defendant without an arrest warrant

and seizure and use of incriminating evidence found in course of search of defendant made in connection with such arrest. D.C. Code 1951, §§ 22-1501, 22-1502, 23-306. *Stephens v. U.S.*, 271 F.2d 832, 1959 U.S. App. LEXIS 3239 (C.A.D.C. 1959).

Where officers, while standing in place open to public, saw through open door into back room and observed activities and paraphernalia which were familiar indicia of numbers lottery operation, they had "probable cause" and duty to make arrest, and arrest and seizure of paraphernalia were "legal arrest and seizure", though made without search or arrest warrant. D.C. Code 1951, §§ 22-1501, 22-1502. *Fisher v. U.S.*, 205 F.2d 702, 1953 U.S. App. LEXIS 2661 (C.A.D.C. 1953).

The arrest without warrant of defendant accused of carrying on a lottery and possessing tickets and certificates designed for purpose of conducting a lottery was legal where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant man of reasonable caution in belief that defendant was taking numbers bets in corridor of building. D.C. Code 1940, §§ 22-1501, 22-1502. *De Bruhl v. U.S.*, 199 F.2d 175, 1952 U.S. App. LEXIS 3308 (C.A.D.C. 1952).

In prosecution for operating numbers game and knowingly possessing numbers slips, found in defendant's automobile at time of his arrest without warrant, evidence of circumstances leading to arrest was sufficient to show probable cause therefor, so as to render search of automobile and seizure of slips reasonable and valid and authorize admission of slips in evidence against defendant. D.C. Code 1940, §§ 22-1501, 22-1502. *Mills v. U.S.*, 196 F.2d 600, 1952 U.S. App. LEXIS 2500 (C.A.D.C. 1952).

Where police officers after three days of surveillance of certain premises obtained a search warrant and entered premises and found extensive evidence of numbers activities, officers were justified in inferring that all who were present or who entered the premises at that time of day were probably participants in operation of numbers game and had probable cause to arrest all persons present and defendant upon his entry into the premises. D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

Where police officers legally obtained search warrant for certain premises which they believed was being used in numbers lottery and entered and found extensive evidence of numbers activities and arrested all persons present, they could legally search the persons arrested, and evidence thereby obtained was admissible in prosecution for carrying on and promoting a numbers game and for possession of numbers

slips. D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

Where officers who had no warrant suspected defendant of violating gambling laws and knocked down door to defendant's apartment in the daytime after defendant failed to open door when officers identified themselves as police officers by calling out, and officers did not call out the cause of their demand for entry, breaking of door, presence of officers in defendant's apartment, and arrest of defendant and search was unlawful, and evidence procured as a result was inadmissible in prosecution for violation of gambling laws. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504. *Accarino v. U.S.*, 179 F.2d 456, 1949 U.S. App. LEXIS 2647 (C.A.D.C. 1949).

Evidence showed that officers had probable cause for arrest of defendant without a warrant in belief that he had committed in their presence the felony of conducting a numbers game. D.C. Code 1940, § 22-1501. *Newyahr v. U.S.*, 177 F.2d 658, 1949 U.S. App. LEXIS 3260 (C.A.D.C. 1949).

The act of looking through transom by police officers who had no search warrant or warrant for defendant's arrest, into room in a house where defendant roomed, did not constitute an "unlawful search", and, where officers as result thereof observed commission of misdemeanor by defendants in promoting a lottery, officers were justified in demanding entrance, arresting defendants, and seizing property being used by defendants. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; U.S. Const. Amends. 4, 5. *McDonald v. U.S.*, 166 F.2d 957, 1948 U.S. App. LEXIS 2392 (1948).

Where police agent in view of two police officers and a deputy marshal purchased from accused a chance in a lottery and paid therefor with a marked quarter, and thereafter police officers and deputy marshal followed accused into restaurant and arrested and searched him, the arrest and search of accused was lawful because made immediately after accused had committed felony for which he was apprehended. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Shettel v. U.S.*, 113 F.2d 34, 1940 U.S. App. LEXIS 3296 (1940).

Where police had rejected convenient present opportunity to make lawful arrest in public street, search of apartment, which defendant had entered before arrest was attempted, could not be supported as incidental to arrest. D.C. Code 1951, §§ 22-1501, 22-1502; Fed. Rules Crim. Proc. rule 41(c, e), 18 U.S.C. *Shettel v. U.S.*, 113 F.2d 34, 1940 U.S. App. LEXIS 3296 (1940).

Conspiracy.

Evidence was sufficient to sustain conviction of conspiracy arising out of gambling/bribery

operation. D.C. Code § 22-1501; 18 U.S.C. § 201(b, c). *United States v. McDaniel*, 538 F.2d 408, 1976 U.S. App. LEXIS 11288 (C.A.D.C. 1976).

The crime of conspiracy to violate lottery laws and lottery statute violations are not so closely connected as to render applicable a proposition that where a concert of action between two or more persons is logically necessary to a crime's completion, a charge of conspiracy will not lie against such persons. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 371. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

In prosecution of defendants for violation of lottery laws and conspiracy to violate laws, crime of conspiracy was not so merged in or indistinguishable from the lottery statute as to prevent conviction of defendants on both charges. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 271. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

Evidence, as to all defendants but one, was sufficient to support convictions on all counts, in prosecution for operating and conspiracy to operate lottery, and for possession of lottery tickets, and maintenance of gambling premises. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Construction with federal law.

Where same act constitutes both federal offense and state offense under police power, state may prosecute; mere existence of similar federal statute does not prevent prosecution under local law for same offense. *McEachin v. United States*, 432 A.2d 1212, 1981 D.C. App. LEXIS 312 (1981).

Defenses, generally.

Conclusory allegation of failure to prosecute others for violations of municipal gambling laws was insufficient to establish invidious discrimination such as would preclude defendant's conviction. D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

Discovery.

Discovery of identity of confidential informant who provided information supporting issuance of warrant to search small grocery store for evidence of numbers operation was properly refused in absence of any showing of special factors which would have favored violating privilege of nondisclosure in civil rights suit brought by owner of store. 42 U.S.C. § 1983; U.S. Const. Amend. 4. *Washington v. District of Columbia*, 685 F. Supp. 264, 1988 U.S. Dist. LEXIS 3743 (1988).

Forfeitures.

Evidence consisting of defendant either exit-

ing or entering buildings with rolled newspapers which were subsequently found, pursuant to search of automobile's front seat based on search warrant, to contain envelopes with numbers betting slips inside was insufficient to establish use of the automobile in a lottery or gambling operation for purpose of libel action, under statute, seeking forfeiture of the automobile. D.C. Code §§ 17-305(a), 22-1501, 22-1505(c). *Vasile v. District of Columbia*, 296 A.2d 443, 1972 D.C. App. LEXIS 275 (1972).

Indictment and information.

Where count one charged in effect that the defendant, among others, violated the District of Columbia statute relating to sale of lottery tickets, and counts two through seven charged that such defendant sold named person a chance in a lottery on six different dates, defendant's motion for dismissal of counts two through seven would not be granted even though the defendant could not be found guilty of count one if the government proved that defendant violated the statute by proving only the six sales that gave rise to counts two through seven; the determination of that matter must await the trial on the facts. D.C. Code 1951, § 22-1501. *U.S. v. Long*, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

Instructions.

In prosecution for operating lottery and for possession of numbers slips, wherein jury had been fully instructed as to the government's burden of proof, trial judge's answer to jury's question, whether possession of slips constituted prima facie evidence of operation of lottery, given in words of statute providing that such possession did constitute prima facie evidence, without explaining meaning of prima facie evidence, was appropriate and understandable within framework of entire charge. D.C. Code 1951, §§ 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Provision of lottery statute that possession of numbers slips shall be prima facie evidence that possessor was concerned in carrying on lottery, when quoted in instruction to jury, did not constitute instruction that it had become duty of lottery prosecution defendant, who had had possession of numbers slips, to establish his innocence to obtain acquittal. D.C. Code 1951, § 22-1501. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

In prosecution under six count indictment charging violation of laws against lotteries, instruction to effect that every circumstance relied upon by prosecution as part of circumstantial evidence tending to convict, must be established beyond reasonable doubt, was properly refused in view of other instructions. D.C.

Code 1951, § 22-1501. *Shaw v. U.S.*, 209 F.2d 298, 1953 U.S. App. LEXIS 3165 (C.A.D.C. 1953).

In prosecution for managing or carrying on a lottery, wherein defendants did not present evidence, but there was vigorous disagreement as to facts, strenuously pressed by cross examination and by argument, trial court improperly instructed jury that a failure to bring in verdict could arise only from wilful and flagrant disregard of evidence and law as given by trial judge, and a violation of obligation of jurors. D.C. Code 1940, § 22-1501. *Billeci v. U.S.*, 184 F.2d 394, 1950 U.S. App. LEXIS 3100 (C.A.D.C. 1950).

In prosecution for managing or carrying on a lottery, trial court improperly instructed jury that defendant must be found guilty if jury believed from the evidence that defendants committed crime charged, and must find verdict of not guilty if jury did not believe defendants guilty. D.C. Code 1940, § 22-1501. *Billeci v. U.S.*, 184 F.2d 394, 1950 U.S. App. LEXIS 3100 (C.A.D.C. 1950).

In prosecution for promoting a lottery and knowingly possessing lottery materials, recalling jury to deliver the "Allen charge" which is an instruction advising jurors to have deference for each other's views was not prejudicial where charge was given with consent of counsel. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Coupe v. U.S.*, 113 F.2d 145, 1940 U.S. App. LEXIS 3321 (1940).

Joint or separate trials of codefendants.

In prosecution for operation of lottery and for possession of numbers slips, trial court's denial of defendants' motions for severance did not constitute abuse of discretion. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.; D.C. Code 1951, §§ 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Jury selection.

In prosecution for violation of the lottery laws by promotion of numbers game, exclusion from jury, on objection by government, of persons who had played the numbers game within preceding two years was in trial court's discretion. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Shettel v. U.S.*, 113 F.2d 34, 1940 U.S. App. LEXIS 3296 (1940).

In prosecution for violating the lottery law and conspiracy to violate the lottery law, it was within discretion of judge to excuse prospective jurors who admitted on voir dire that they had played the numbers game within two years, regardless of whether the release was for cause or favor. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Smith v. U.S.*, 112 F.2d 217, 1940 U.S. App. LEXIS 4268 (1940).

Nature and elements of offenses.

Provision of Gamblers' Occupational Tax Act

requiring person engaged in business of wagering to pay a special tax of \$50 before engaging in such business does not give a person, upon payment of the fee, a license to engage in wagering in District of Columbia, where wagering is, by federal law, a crime. D.C. Code 1951, § 22-1501 et seq.; 26 U.S.C. (I.R.C.1939) §§ 3271, 3285, 3290. *Lewis v. U.S.*, 75 S.Ct. 415, 1955 U.S. LEXIS 1510 (U.S.Dist.Col. 1955).

Conviction of having possession of numbers slips in violation of lottery laws was warranted as against contention that there was not any evidence to indicate that such slips were "live" slips, that is, were tickets in an existing lottery. D.C. Code 1951, §§ 22-1501, 22-1502. *Ledbetter v. U.S.*, 211 F.2d 628, 1953 U.S. App. LEXIS 2713 (C.A.D.C. 1953).

Defendant's possession of used numbers slips, known in the game as "dead" slips, constituted an offense under statute penalizing possession of slips "used, or to be used" for carrying on a lottery, even though amendment adding the words "current or not current" had not yet been enacted. D.C. Code 1951, §§ 22-1501, 22-1502. *Clement v. U.S.*, 208 F.2d 46, 1953 U.S. App. LEXIS 3019 (C.A.D.C. 1953).

The statute penalizing anyone setting up in the District of Columbia any "gaming table", etc., or who permits any person to bet or play at or upon any such "gaming table" or device, etc., indicates a physical device of some sort and does not mean the mere taking of a bet on a race. D.C. Code 1940, §§ 22-1501, 22-1504, 22-1507. *Plummer v. U.S.*, 189 F.2d 19, 1951 U.S. App. LEXIS 3145 (C.A.D.C. 1951).

Statute captioned "lotteries," relating to drawing of prizes to be obtained in lottery or game commonly known as "policy lottery" or "policy," held not limited to "policy game," but is broad enough to include any lottery (D.C. Code 1929, T. 6, § 151). *Forté v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

Even if original slips used in "numbers game" which were turned over by seller to his backer were not "lottery tickets," duplicate slips which were handed over to player were since they were intended to insure to player chance of obtaining prize to be drawn in lottery (D.C. Code 1929, T. 6, § 151). *Forté v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

Operation of policy game, and sale, transfer, and possession of policy tickets, could be punished under statute relating to lotteries, even if that particular type of lottery had not been prohibited eo nomine in statute (D.C. Code 1929, T. 6, § 151). *Forté v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

"Numbers game," wherein players merely guess that result of mathematical calculations based on prices paid at certain race track would be certain number, held "lottery," and not direct bet or wager on horse race (D.C. Code 1929, T.

6, § 151). *Forte v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

Essential element of lottery is awarding of prize by chance, but exact method adopted for application of chance to distribution of prizes is immaterial (D.C. Code 1929, T. 6, § 151). *Forte v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

Under statute making it an offense to sell any ticket or other device purporting to entitle player to chance of drawing prize in lottery, drawing of ticket or certificate held not essential to make game a "lottery" (D.C. Code 1929, T. 6, § 151). *Forte v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

"Policy game" is a "lottery" (D.C. Code 1929, T. 6, § 151). *Forte v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

Six sales of lottery tickets on different dates to the same person are six violations of the District of Columbia statute relating to gambling. D.C. Code 1951, § 22-1501. *U.S. v. Long*, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

Words "record, notation, and receipt" added to list of contraband in statute proscribing knowing possession of items used or to be used in lotteries and other forms of gambling were not intended merely to be synonymous with "number slips", and cut cards, which are listings of number combinations which "hit" more frequently than others and on which reduced odds are to be paid, were included in the contraband. D.C. Code 1961, §§ 22-1501, 22-1502. *Bailey v. United States*, 223 A.2d 190, 1966 D.C. App. LEXIS 227 (App. 1966).

Defendants in possession of "cut cards" which were listings of number combinations which "hit" more frequently than others and on which odds are somewhat reduced from normal, violated statute proscribing knowing possession of items used or to be used in lotteries and other forms of gambling. D.C. Code 1961, §§ 22-1501, 22-1502. *Bailey v. United States*, 223 A.2d 190, 1966 D.C. App. LEXIS 227 (App. 1966).

Presumptions and burden of proof.

A statutory presumption of illegal activity which arises from possession of illegal material, such as lottery tickets, may be based on circumstantial evidence of possession, if such evidence is strong. D.C. Code 1951, § 22-1501. *Davis v. U.S.*, 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

The statutory presumption of promoting a lottery which arises from evidence of possession of lottery tickets may be properly invoked upon circumstantial evidence of possession of such tickets provided such circumstantial evidence is strong. D.C. Code 1951, § 22-1501. *Davis v. U.S.*, 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

In prosecution for operation of lottery and for possession of numbers slips, slips used as evidence to prove possession charge could also be used to prove charge of operation of lottery. D.C. Code 1951, §§ 22-105, 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Where witnesses put on stand by prosecution in prosecution for managing or carrying on a lottery refused to testify on ground that their answers might incriminate them, jury could not infer that their testimony, if given, would be adverse to defendant. D.C. Code 1940, § 22-1501. *Billeci v. U.S.*, 184 F.2d 394, 1950 U.S. App. LEXIS 3100 (C.A.D.C. 1950).

Where witnesses who were equally available to either side in prosecution for managing or carrying on a lottery, were not called by either defendant or by prosecution, jury was not entitled to infer that their testimony if introduced would have been unfavorable to defendant. D.C. Code 1940, § 22-1501. *Billeci v. U.S.*, 184 F.2d 394, 1950 U.S. App. LEXIS 3100 (C.A.D.C. 1950).

Proof of possession of numbers slips is not essential to conviction for operating lottery. D.C. Code 1951, § 22-1501. *U.S. v. Lewis*, 171 F.Supp. 71, 1959 U.S. Dist. LEXIS 3538 (D.D.C.1959).

Even possession of "dead" or "hit" lottery tickets falls within statutory language raising presumption of violation of statute proscribing operation of lottery. D.C. Code 1951, § 22-1501. *U.S. v. Lewis*, 171 F.Supp. 71, 1959 U.S. Dist. LEXIS 3538 (D.D.C.1959).

Questions of law and fact.

Evidence justified submitting to jury prosecution for operating a lottery and possessing materials therefor. D.C. Code 1940, §§ 22-1501, 22-1502. *Kenney v. U.S.*, 157 F.2d 442, 1946 U.S. App. LEXIS 2729 (1946).

Whether there was probable cause for arrest of defendant for operating a lottery and whether subsequent search of his person was lawful were questions for trier of fact, in prosecution for violation of statute proscribing knowing possession of items used or to be used in lotteries and other forms of gambling, wherein defendant moved to suppress "cut cards" found in his possession. D.C. Code 1961, §§ 22-1501, 22-1502. *Bailey v. United States*, 223 A.2d 190, 1966 D.C. App. LEXIS 227 (App. 1966).

Review.

— Harmless or reversible error, review.

In joint prosecutions for violations of lottery laws, admission of one defendant's accusatory statement against the other three defendants was not error in view of later instructions that jury should disregard such statement. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b).

Davis v. U.S., 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

Even if defendant was twice convicted for same offense, any error was cured by concurrent sentences imposed. D.C. Code 1951, § 22-1501. Lewis v. U.S., 263 F.2d 265, 1958 U.S. App. LEXIS 6116 (C.A.D.C. 1958).

Erroneous admission of evidence that alleged coconspirator had told government agent that he had turned his numbers work over to defendant would require reversal of conviction under indictment count charging conspiracy to commit lottery offenses; and since it was probable that such evidence had also been considered by jury in connection with related count charging defendant with operation of a lottery, conviction on that count would also be reversed. D.C. Code 1951, §§ 22-1501, 22-1502. Taylor v. U.S., 260 F.2d 737, 1958 U.S. App. LEXIS 3161 (C.A.D.C. 1958).

In prosecution of numerous defendants for violation of lottery laws and conspiracy to violate those laws, where evidence obtained at one of several places raided was inadmissible because it had been obtained as a result of illegal entry into premises, but mass of other evidence legally seized sustained convictions, error in admitting such illegally obtained evidence was not, except as to one defendant who was found guilty of possessing lottery slips seized at such address, prejudicial. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1050; 18 U.S.C. §§ 371, 3109. Woods v. U.S., 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

Where Court of Appeals could not determine from record of more than 2,000 pages that jury would have convicted defendant had not evidence obtained through unreasonable search and seizure been adduced, conviction would be reversed and case remanded for new trial. D.C. Code 1951, § 22-1501; 18 U.S.C. § 371; U.S. Const. Amendments. 4, 5. Nelson v. U.S., 208 F.2d 505, 1953 U.S. App. LEXIS 3074 (C.A.D.C. 1953).

Where papers and documents obtained from one of several defendants in joint prosecution for violation of lottery laws, were obtained as result of unreasonable search and seizure, the use of evidence so obtained infected the cases of other defendants, and denial of motion to suppress such evidence, made by defendant from whom the papers and documents were illegally seized, was error prejudicial to other defendants as well. D.C. Code 1951, § 22-1501; 18 U.S.C. § 371; U.S. Const. Amendments. 4, 5. Nelson v. U.S., 208 F.2d 505, 1953 U.S. App. LEXIS 3074 (C.A.D.C. 1953).

In prosecution for promoting a lottery and knowingly possessing lottery materials, sentences imposed were not erroneous on ground that counts of indictment charged the same offense where sentences were to run concurrently, longest sentence imposed on each defen-

dant was based on a valid count of indictment and conviction was supported by evidence. D.C. Code Supp. V, T. 6, §§ 151, 151a. Coupe v. U.S., 113 F.2d 145, 1940 U.S. App. LEXIS 3321 (1940).

— In general.

An order granting suppression of evidence seized from defendant's person at time of his arrest, entered before trial in criminal case, is not appealable as a "final decision", regardless of whether, in the particular case, effect of suppressing the evidence would be to force dismissal of indictment for lack of evidence. 18 U.S.C. §§ 371, 3731; Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C.; D.C. Code 1951, §§ 22-1501, 22-1502; 18 U.S.C. § 1291. Carroll v. U.S., 77 S.Ct. 1332, 1957 U.S. LEXIS 583 (U.S. Dist. Col. 1957).

In prosecution for promoting a lottery and knowingly possessing lottery materials, credibility of officers who testified that they saw a carton of numbers pads in back of automobile and some slips in glove compartment was for trial court sitting without jury whose finding on disputed evidence could not be disturbed. D.C. Code Supp. V, T. 6, §§ 151, 151a. Coupe v. U.S., 113 F.2d 145, 1940 U.S. App. LEXIS 3321 (1940).

— Presentation and reservation of grounds for review.

Where defendants, each of whom was convicted of substantive offense of operating lottery, and jointly of conspiracy to operate lottery, did not request trial court to compel election of counts on ground that substantive and conspiracy counts were duplicative, in view of identity of proof under each count, and constituted double jeopardy, defendants did not save question for review on appeal, and Court of Appeals would not consider merits of contention. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b); Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. Aikens v. U.S., 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Where former counsel for defendants in prosecution for carrying on and promoting a numbers game and for possession of numbers slips, stated that he had no desire for further instructions and made no objections to court's charge as given, defendants could not raise objection to the charge for the first time on appeal. Fed. Rules Crim. Proc. rule 30, 18 U.S.C.; D.C. Code 1940, §§ 22-1501, 22-1502. Wyche v. U.S., 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

In prosecution for carrying on and promoting a numbers game and for possession of numbers slips, wherein defendants' former counsel of their own choice disclaimed any desire to enter a motion to suppress evidence and also gave specific reasons for disclaimer, contention of

defendants' present counsel on appeal that trial court erred in refusing to suppress evidence would be rejected as asking Court of Appeals to substitute its judgment of proper trial tactics for that of the lawyer of the forum. D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

In prosecution for violating the lottery law and for conspiracy to violate the lottery law, action of court in excusing for cause six jurors who admitted on voir dire that they had played the numbers game within two years was not objectionable on ground that in that way the government exercised more peremptory challenges than the law allowed, especially where defendants did not complain of fairness of jury as impaneled. D.C. Code Supp. V, T. 6, §§ 151, 151a. *Smith v. U.S.*, 112 F.2d 217, 1940 U.S. App. LEXIS 4268 (1940).

Searches and seizures.

Where defendant, who had been under police observation, was observed entering rooming house where he had rented a room and one of police officers, without search warrant, opened window leading to landlady's room, climbed through and admitted other officers to the house, officer looked through transom, observed defendant and a guest as well as numbers slips, money and adding machines, and officers then arrested defendant and his guest and seized the machines, numbers slips and money, denial of defendant's motion for suppression of evidence and return of property to him was error, and convictions of both defendant and his guest for carrying on a lottery would be reversed. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; U.S. Const. Amend. 4. *McDonald v. U.S.*, 69 S.Ct. 191, 1948 U.S. LEXIS 1456 (U.S. Dist. Col. 1948).

Failure of search warrant affidavit to set forth factual circumstances from which magistrate could appraise informant's credibility and to state circumstances upon which informant based his conclusion was not fatal where, according to affidavits, information triggered investigation by officers who set out details and results of their investigation of gambling and lottery law violations. D.C. Code §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 294(c). *United States v. Berry*, 463 F.2d 1278, 1972 U.S. App. LEXIS 9265 (C.A.D.C. 1972).

Search warrant affidavit reciting uncorroborated tip that first person was picking up numbers and taking them to address of second person, a well-known gambler, together with investigative officers' observations of observed comings and goings and delivery of "small package," all in accordance with officers' knowledge as to operation of numbers game, was sufficient to support warrant for search, leading to lottery and gambling charges, where affidavit recited

that participants had gambling law convictions and that premises had been established by police records to have recently housed gambling operation, although it would have been helpful had officers elaborated on modus operandi of numbers operation. D.C. Code §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 294(c). *United States v. Berry*, 463 F.2d 1278, 1972 U.S. App. LEXIS 9265 (C.A.D.C. 1972).

Evidence which was seized in room wherein defendant, charged with violations of gambling laws, was arrested was admissible where it was relevant and material, although defendant claimed that others apparently not associated with unlawful venture occupied house and that warrant authorizing search of entire house was too broad in description of premises. D.C. Code 1961, §§ 22-1501, 1502, 1505, 1508. *Minovitz v. U.S.*, 298 F.2d 682, 1962 U.S. App. LEXIS 6323 (C.A.D.C. 1962).

Personal observations of suspicious conduct of defendant, charged with violations of gambling laws, during careful investigation, together with information received, gave probable cause for issuance of search warrant and warrant for arrest. D.C. Code 1961, §§ 22-1501, 1502, 1505, 1508. *Minovitz v. U.S.*, 298 F.2d 682, 1962 U.S. App. LEXIS 6323 (C.A.D.C. 1962).

In joint prosecutions for violations of lottery laws, evidence sustained trial judge's finding that police gave sufficient notice of their purpose and authority before breaking in door of one defendant's premises in executing search warrant. 18 U.S.C. § 3109; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Davis v. U.S.*, 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

Conviction for operating lottery in violation of District of Columbia statutes was affirmed on appeal, notwithstanding defendant's contentions (1) that number slips and other gambling paraphernalia were seized under warrants which were not supported by showing of adequate probable cause and (2) that evidence was insufficient to sustain conviction. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. *Ellis v. U.S.*, 270 F.2d 448, 1959 U.S. App. LEXIS 3641 (C.A.D.C. 1959).

In prosecution for operation of lottery and for possession of numbers slips, evidence sustained finding of validity of search warrant, and evidence secured under such warrant was properly admitted. D.C. Code 1951, §§ 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Where defendants, although present at time when premises were searched pursuant to warrant, made no claim to property when inquiry was made in that respect by searching officers, and defendants disavowed any interest in premises, they were without right to have been served with a copy of search warrant, and could

not claim that copy left on premises was defective. D.C. Code 1951, §§ 22-1501, 23-301; Fed.Rules Crim.Proc. rule 41(c, d), 18 U.S.C. Shaw v. U.S., 209 F.2d 298, 1953 U.S. App. LEXIS 3165 (C.A.D.C. 1953).

In prosecution for violation of lottery laws, evidence against defendant which resulted directly from government's use of illegally seized papers and documents, was inadmissible. D.C. Code 1951, § 22-1501; 18 U.S.C. § 371; U.S. Const. Amendments. 4, 5. Nelson v. U.S., 208 F.2d 505, 1953 U.S. App. LEXIS 3074 (C.A.D.C. 1953).

Where suspected gambler appeared, without counsel, before Senate Crime Investigating Committee, under compulsion of subpoena, and committee, without advising him of his rights to counsel and against self-incrimination, threatened prosecution for contempt if he refused to answer, for perjury if he lied, and for gambling activities if he told truth, and, with warning that he was still under subpoena, directed him to lead policeman to his home and there turn over a book, and where policeman, upon entering the home and learning that the book was not available, examined and took without process other papers and documents, such papers and documents were obtained by unreasonable search and seizure, and such evidence was inadmissible. D.C. Code 1951, § 22-1501; 18 U.S.C. § 371; U.S. Const. Amendments. 4, 5. Nelson v. U.S., 208 F.2d 505, 1953 U.S. App. LEXIS 3074 (C.A.D.C. 1953).

Government's exhibits in prosecution for violation of lottery laws, consisting of papers and documents obtained from defendant by unreasonable searches and seizure, were subject to be returned and suppressed upon defendant's motion therefor. D.C. Code 1951, § 22-1501; 18 U.S.C. § 371; U.S. Const. Amendments. 4, 5. Nelson v. U.S., 208 F.2d 505, 1953 U.S. App. LEXIS 3074 (C.A.D.C. 1953).

Circumstances revealed in police officer's affidavit provided sufficient probable cause to sustain issuance to officer of warrant for search of premises where it was believed defendants were operating a numbers game by telephone. Fed.Rules Crim. Proc. rule 41(e), 18 U.S.C.; D.C. Code 1951, §§ 22-1501, 22-1502. Washington v. U.S., 202 F.2d 214, 1953 U.S. App. LEXIS 3222 (C.A.D.C. 1953).

Defendant who made no claim to ownership or possession of property seized by police acting under search warrant, or to interest in premises searched, had no standing to contest seizure. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C. Gorland v. U.S., 197 F.2d 685, 1952 U.S. App. LEXIS 2674 (C.A.D.C. 1952).

Where police officers received information that certain premises were being used as a numbers establishment, and they conducted a surveillance of the premises for three days

during hours significant in conduct of numbers lottery, and carefully checked information received from informant, they were justified in concluding as discreet and prudent men that the premises were being used in connection with numbers game, and search warrant obtained by officers was valid. D.C. Code 1940, §§ 22-1501, 22-1502. Wyche v. U.S., 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

In prosecution for promoting a lottery and knowingly possessing lottery materials, wherein officers testified that they obtained information from source which they had found to be reliable that defendant was engaged in "numbers racket" using a certain automobile to collect numbers slips, and that officers observed a carton containing numbers pads in rear compartment and some slips in glove compartment, the numbers slips and pads obtained by search of automobile were properly admitted. D.C. Code Supp. V, T. 6, §§ 151, 151a. Coupe v. U.S., 113 F.2d 145, 1940 U.S. App. LEXIS 3321 (1940).

Grocery store owner's civil rights were not violated when police officers searched his person and arrested him following discovery of ledger book containing lottery numbers during search of his business for evidence of numbers operation conducted pursuant to search warrant where officers had had probable cause to search and arrest owner, notwithstanding fact that search of owner's person was not authorized in search warrant. 42 U.S.C. § 1983. Washington v. District of Columbia, 685 F. Supp. 264, 1988 U.S. Dist. LEXIS 3743 (1988).

Where police investigation extending over a ten week period established probable cause for issuance of search warrant for gambling activities in violation of District of Columbia statutes, the fact that eleven day period elapsed between last police observation of premises and issuance of such warrant did not require suppression of evidence seized from the premises searched on any theory of lack of probable cause. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. U.S. v. Long, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

In prosecution for violation of District of Columbia gambling statutes by engaging in the numbers business and for violation of federal statute requiring payment of tax as prerequisite to engaging in business of accepting wagers, evidence relating to police investigation extending over a ten week period disclosed probable cause for issuance of search warrant. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. U.S. v. Long, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

Where District of Columbia Metropolitan Police received information linking telephone number to numbers game and the source stated that bets were placed by named person using

designated code number and Metropolitan Police received additional information from Arlington County police that very heavy number bets were called in to the telephone number and policeman made series of telephone calls to that number and identified himself as such person and gave such code number and received numbers information, there was probable cause for issuance of search warrant which led to seizure of numbers slips and other numbers paraphernalia. U.S. Const. Amend. 4; D.C. Code 1951, § 22-1501 et seq. U.S. v. Haje, 159 F.Supp. 870, 1958 U.S. Dist. LEXIS 2703 (D.D.C.1958).

In numbers game prosecution, wherein defendants moved to suppress evidence and for return of property, evidence established that police officers, who had submitted affidavits upon which warrants had issued, had had probable cause to believe, through personal contact, knowledge, observation and information, that the premises searched were being used for operation of a numbers lottery and that evidence of crime was there concealed. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; U.S. Const. Amend. 4. U.S. v. Bell, 126 F.Supp. 612, 1955 U.S. Dist. LEXIS 3819 (D.D.C.1955).

In proceedings on defendant's motion to suppress and for return of property seized from his custody, possession and person under a warrant for the search of an apartment, evidence required finding that there had been a lack of probable cause to believe that grounds existed to support issuance of search warrant. D.C. Code 1951, §§ 22-1501, 22-1502; Fed. Rules Crim. Proc. rule 41(c, e), 18 U.S.C. U.S. v. Johnson, 113 F.Supp. 359, 1953 U.S. Dist. LEXIS 2583 (D.D.C.1953).

Information in affidavit for warrant to search defendant's room on lottery charge on information received from informant, stating that informant had overheard sounds from defendant's room, that informant had previously given information leading to lottery convictions, and that officer had himself overheard sounds from room and had watched defendant elsewhere and checked his record, sufficiently set forth factual basis for informant's belief, basis for judging informant's credibility, record of defendant's prior involvement in lottery, and personal observations by officer corroborative of informant. D.C. Code §§ 22-1501, 22-1502, 22-1505(b); U.S. Const. Amend. 4. Ray v. United States, 288 A.2d 239, 1972 D.C. App. LEXIS 353 (1972).

Appellant's possession of numbers paraphernalia on premises was prima facie evidence of her participation in illegal lottery. D.C. Code § 22-1501. \$3265.28 in United States Currency v. District of Columbia, 249 A.2d 516, 1969 D.C. App. LEXIS 202 (App. 1969).

Sentence and punishment.

Revocation of petitioner's operator's permit

for operating motor vehicle in conducting lottery and while possessing numbers slips was an abuse of discretion, where there was no evidence of any threat or danger to the safety of persons or property through petitioner's use of an automobile. D.C. Code 1961, §§ 22-1501, 22-1502. Stoneburner v. England, 202 A.2d 652, 1964 D.C. App. LEXIS 259 (App. 1964).

Validity of related laws.

Gamblers' Occupational Tax Act is not unconstitutional as applied to person in District of Columbia on ground that it violates privilege against self-incrimination notwithstanding fact that wagering is by federal law a crime in the District of Columbia. U.S. Const. Amend. 5; 26 U.S.C. §§ 3271, 3285, 3290; D.C. Code 1951, § 22-1501 et seq. Lewis v. U.S., 75 S.Ct. 415, 1955 U.S. LEXIS 1510 (U.S. Dist. Col. 1955).

Weight and sufficiency of evidence.

Evidence that defendant and others had been observed going from stores to parked automobile and handing small pieces of white paper and money to occupant of automobile, that pieces of paper were recognized by officer as "numbers slips," that paper bag which defendant had placed behind trash can was recovered and found to contain numbers slips and that numbers slips, gambling paraphernalia and money were recovered from parked automobile was sufficient to sustain convictions of being concerned in a lottery and of possession of lottery tickets. D.C. Code §§ 22-1501, 22-1502. United States v. Loundmannz, 472 F.2d 1376, 1972 U.S. App. LEXIS 6662 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691, 1973 U.S. LEXIS 3263 (1973).

Even if documents which defendant, charged with violation of lottery laws, sought to introduce showed that others were engaging in activities which defendant considered to be lotteries uncondemned by law, offer was insufficient to show statutory discrimination in violation of statute and court properly refused to admit same. D.C. Code § 22-1501. Washington v. United States, 401 F.2d 915, 1968 U.S. App. LEXIS 8231 (C.A.D.C. 1968).

Evidence, including possession of lottery tickets, was sufficient to sustain conviction of one defendant for promoting a lottery but was insufficient to sustain conviction as to another defendant. D.C. Code 1951, § 22-1501. Davis v. U.S., 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

Evidence that search of previously occupied apartment of defendant uncovered numbers slips and notebook, and that defendant was seen entering apartment in company of other defendant, in absence of evidence of possession of lottery tickets by defendant, was insufficient to support conviction of defendant for operation

of or conspiracy to operate lottery, or for maintaining gambling premises. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b); 18 U.S.C. § 371. *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Evidence sustained convictions for operation of lottery and possession of numbers slips and for aiding and abetting in such operation. D.C. Code 1951, §§ 22-105, 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Defendant's possession of used numbers slips, known in the game as "dead" slips, constituted prima facie evidence of carrying on of a lottery. D.C. Code 1951, §§ 22-1501, 22-1502. *Clement v. U.S.*, 208 F.2d 46, 1953 U.S. App. LEXIS 3019 (C.A.D.C. 1953).

Evidence was insufficient to establish beyond a reasonable doubt that defendant set up or kept a gaming table for the purpose of gaming. D.C. Code 1940, §§ 22-1501, 22-1504, 22-1507. *Plummer v. U.S.*, 189 F.2d 19, 1951 U.S. App. LEXIS 3145 (C.A.D.C. 1951).

Evidence held to establish that accused and codefendant engaged in conducting "numbers game," authorizing conviction for sale and possession of lottery tickets (D.C. Code 1929, T. 6, § 151). *Forte v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

Evidence that lunchroom operators were operating "numbers game" and that one of them sold and transferred to police officer a duplicate numbers slip in presence of accused, who then received original slip from seller, held to justify finding that accused was engaged in common criminal enterprise with lunchroom operators (D.C. Code 1929, T. 6, § 151). *Forte v. U.S.*, 83 F.2d 612, 1936 U.S. App. LEXIS 2596 (1936).

Evidence that defendant was in possession of number slips in the District of Columbia was sufficient to sustain his conviction of possessing number slips, and it was no defense that he was taking the number slips to Maryland to use in buying lottery tickets. D.C. Code 1981, § 22-1502. *Mack v. United States*, 464 A.2d 114, 1983 D.C. App. LEXIS 431 (1983).

Possession of number slips is prima facie evidence of possessor's involvement in an ille-

gal lottery. D.C. Code § 22-1501. *\$1,407.00 in United States Currency v. District of Columbia*, 242 A.2d 217, 1968 D.C. App. LEXIS 162 (App. 1968).

Wiretapping.

When metropolitan police department officers intercept conversations relating to offenses specified in order of authorization, District of Columbia statute requiring officer who intercepts communications relating to offenses other than those specified in order of authorization to make application to a judge for disclosure and use is not operative, and officers may disclose or use those conversations to extent that such disclosure or use is appropriate to the proper performance of their official duties. 18 U.S.C. § 2517(5); D.C. Code §§ 22-1501, 22-1505, 23-546(c)(1), 23-548(b). *United States v. Moore*, 513 F.2d 485, 1975 U.S. App. LEXIS 14534 (C.A.D.C. 1975), vacated without op. by 556 F.2d 77 (D.C. Cir. 1977).

Witnesses.

In prosecution for violating lottery laws, District Court did not abuse discretion in denying motion for new trial on ground that defendant's trial counsel refused to permit her to testify and failed to introduce certain other testimony. D.C. Code 1951, §§ 22-1501, 22-1502. *Ingram v. U.S.*, 209 F.2d 818, 1954 U.S. App. LEXIS 3675 (C.A.D.C. 1954).

Defendant charged with violating municipal gambling laws was not denied Sixth Amendment right to compulsory process when trial court quashed three subpoenas which had been served on Attorney General of United States, acting chief of metropolitan police department and director of Maryland lottery, where defendant intended to use their testimony to support his claim of selective enforcement, but he did not make clear showing that testimony of the officials was essential to prevent prejudice or injustice. U.S. Const. Amend. 6; D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

§ 22-1702. Possession of lottery or policy tickets.

If any person shall, within the District of Columbia, knowingly have in his or her possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of § 22-1701, 22-1704, or 22-1708, he or she shall, upon conviction of each such offense, be fined not more than \$1,000 or be imprisoned for not more than 180 days, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

(Mar. 3, 1901, ch. 854, § 863a; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 2; June 29, 1953, 67 Stat. 95, ch. 159, § 206(a); May 21, 1994, D.C. Law 10-119, § 2(j), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(g), 41 DCR 2608.)

Cross references. — Search warrants, see § 23-521 et seq.

Prior Codifications. — 1981 Ed., § 22-1502.

1973 Ed., § 22-1502.

Emergency legislation. — For temporary amendment of section, see § 105(g) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1701.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

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That alleged coconspirator had been seen talking to defendant on day before that on which such alleged coconspirator allegedly informed government agent that he had turned his numbers work over to defendant did not establish that conspiracy was in existence on that date; and in absence of evidence that conspiracy was then in existence, agent's testimony with regard to alleged conversation was inadmissible against defendant, in prosecution for conspiracy to commit lottery offenses. D.C.

Code 1951, §§ 22-1501, 22-1502. *Taylor v. U.S.*, 260 F.2d 737, 1958 U.S. App. LEXIS 3161 (C.A.D.C. 1958).

Arrest.

Where one officer through binoculars, observed defendant exiting from stores, walking to automobile and handing small pieces of white paper and money to occupant and other persons carrying on same type of activity in vicinity and then went to within three to five feet of parked automobile and observed several of the other persons pass money and slips which he recognized as “numbers slips” to occupant of automobile, there was probable cause for arrest of defendant pursuant to radio orders given to arresting officers by officer who had observed defendant and the other persons. D.C. Code §§ 22-1501, 22-1502. *United States v. Loundmannz*, 472 F.2d 1376, 1972 U.S. App. LEXIS 6662 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691, 1973 U.S. LEXIS 3263 (1973).

Where over period of two and a half months, officers had placed numbers bets on fifteen separate occasions at one location, and, on ten separate occasions, had observed a suspect depart from that location with bulging pockets and enter other premises, from which he subsequently departed “without the bulge,” officers had reasonable grounds to believe that latter premises were being used in lottery operations, and that defendant, who at time such premises were searched pursuant to a search warrant was the only male present and was leaving “hastily,” was participating therein, justifying arrest of defendant without an arrest warrant and seizure and use of incriminating evidence found in course of search of defendant made in connection with such arrest. D.C. Code 1951,

§§ 22-1501, 22-1502, 23-306. *Stephens v. U.S.*, 271 F.2d 832, 1959 U.S. App. LEXIS 3239 (C.A.D.C. 1959).

Where officers, while standing in place open to public, saw through open door into back room and observed activities and paraphernalia which were familiar indicia of numbers lottery operation, they had "probable cause" and duty to make arrest, and arrest and seizure of paraphernalia were "legal arrest and seizure", though made without search or arrest warrant. D.C. Code 1951, §§ 22-1501, 22-1502. *Fisher v. U.S.*, 205 F.2d 702, 1953 U.S. App. LEXIS 2661 (C.A.D.C. 1953).

The arrest without warrant of defendant accused of carrying on a lottery and possessing tickets and certificates designed for purpose of conducting a lottery was legal where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant man of reasonable caution in belief that defendant was taking numbers bets in corridor of building. D.C. Code 1940, §§ 22-1501, 22-1502. *De Bruhl v. U.S.*, 199 F.2d 175, 1952 U.S. App. LEXIS 3308 (C.A.D.C. 1952).

In prosecution for operating numbers game and knowingly possessing numbers slips, found in defendant's automobile at time of his arrest without warrant, evidence of circumstances leading to arrest was sufficient to show probable cause therefor, so as to render search of automobile and seizure of slips reasonable and valid and authorize admission of slips in evidence against defendant. D.C. Code 1940, §§ 22-1501, 22-1502. *Mills v. U.S.*, 196 F.2d 600, 1952 U.S. App. LEXIS 2500 (C.A.D.C. 1952).

Where police officers after three days of surveillance of certain premises obtained a search warrant and entered premises and found extensive evidence of numbers activities, officers were justified in inferring that all who were present or who entered the premises at that time of day were probably participants in operation of numbers game and had probable cause to arrest all persons present and defendant upon his entry into the premises. D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

Where officers who had no warrant suspected defendant of violating gambling laws and knocked down door to defendant's apartment in the daytime after defendant failed to open door when officers identified themselves as police officers by calling out, and officers did not call out the cause of their demand for entry, breaking of door, presence of officers in defendant's apartment, and arrest of defendant and search was unlawful, and evidence procured as a result was inadmissible in prosecution for violation of gambling laws. D.C. Code 1940, §§ 22-

1501, 22-1502, 22-1504. *Accarino v. U.S.*, 179 F.2d 456, 1949 U.S. App. LEXIS 2647 (C.A.D.C. 1949).

Arrest of defendant, a cafeteria employee, after manager voiced suspicions to officer that defendant was stealing food, was without probable cause, and incidental search that turned up lottery tickets and other paraphernalia for use in lottery was illegal. D.C. Code 1951, § 22-1502. *Mathis v. U.S.*, 129 A.2d 178, 1957 D.C. App. LEXIS 196 (Cr.App. 1957).

Officer, who found billfold containing numbers slips, possession of which constituted crime, had right to determine owner and to arrest him, and, therefore, when party admitted ownership of billfold, no warrant for his arrest was necessary. D.C. Code 1940, §§ 4-140, 22-1502. *Roseborough v. U.S.*, 86 A.2d 920, 1952 D.C. App. LEXIS 145 (Cr.App. 1952).

Conspiracy.

The crime of conspiracy to violate lottery laws and lottery statute violations are not so closely connected as to render applicable a proposition that where a concert of action between two or more persons is logically necessary to a crime's completion, a charge of conspiracy will not lie against such persons. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 371. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

In prosecution of defendants for violation of lottery laws and conspiracy to violate laws, crime of conspiracy was not so merged in or indistinguishable from the lottery statute as to prevent conviction of defendants on both charges. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 271. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

Defenses.

Conclusory allegation of failure to prosecute others for violations of municipal gambling laws was insufficient to establish invidious discrimination such as would preclude defendant's conviction. D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

United States district court ruling, in prosecution for narcotics violation, suppressing certain evidence as products of illegal search and seizure was not binding on District of Columbia Court of General Sessions, in which defendant was charged with possession of prohibited weapon and possession of numbers slips, and which had held previously to United States District Court ruling that certain evidence, which was seized under same circumstances as evidence in federal prosecution, was admissible. D.C. Code §§ 11-521, 11-963, 22-1502, 22-3204, 22-3214; 26 U.S.C. (I.R.C.1954) § 4704(a); Narcotic Drugs Import and Export

Act, § 2(c, f), 21 U.S.C. § 174. *Burrell v. United States*, 252 A.2d 897, 1969 D.C. App. LEXIS 244 (App. 1969).

Discovery.

Defendant, accused of receiving stolen goods and of possession of lottery tickets, was not entitled to confront and cross-examine informer, upon whose information search warrant was in part based, where warrant was issued upon an ample showing of probable cause. D.C. Code 1951, §§ 22-1502, 22-2205. *Madre v. U.S.*, 173 A.2d 917, 1961 D.C. App. LEXIS 281 (Cr.App. 1961).

Evidence, generally.

In prosecution for operation of lottery and for possession of numbers slips, slips used as evidence to prove possession charge could also be used to prove charge of operation of lottery. D.C. Code 1951, §§ 22-105, 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Defendant's possession of used numbers slips, known in the game as "dead" slips, constituted prima facie evidence of carrying on of a lottery. D.C. Code 1951, §§ 22-1501, 22-1502. *Clement v. U.S.*, 208 F.2d 46, 1953 U.S. App. LEXIS 3019 (C.A.D.C. 1953).

Forfeitures.

Condemnation and forfeiture of moneys seized from defendant's person at time of his arrest was warranted by evidence, including evidence that defendant attempted to conceal the money from the arresting officers and that, although he claimed that money seized represented savings which he intended to use to purchase a business, he was admittedly unfamiliar with business which he claimed to be planning to purchase, the person from whom he expected to make the purchase and the terms of the purchase. D.C. Code §§ 22-1502, 22-1505(c)(1). \$1,407.00 in United States Currency v. District of Columbia, 242 A.2d 217, 1968 D.C. App. LEXIS 162 (App. 1968).

Indictment or information.

Where defendants, each of whom was convicted of substantive offense of operating lottery, and jointly of conspiracy to operate lottery, did not request trial court to compel election of counts on ground that substantive and conspiracy counts were duplicative, in view of identity of proof under each count, and constituted double jeopardy, defendants did not save question for review on appeal, and Court of Appeals would not consider merits of contention. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b); Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Instructions.

In prosecution for operating lottery and for possession of numbers slips, wherein jury had

been fully instructed as to the government's burden of proof, trial judge's answer to jury's question, whether possession of slips constituted prima facie evidence of operation of lottery, given in words of statute providing that such possession did constitute prima facie evidence, without explaining meaning of prima facie evidence, was appropriate and understandable within framework of entire charge. D.C. Code 1951, §§ 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Joint or separate trials of codefendants.

In prosecution for operation of lottery and for possession of numbers slips, trial court's denial of defendants' motions for severance did not constitute abuse of discretion. Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C.; D.C. Code 1951, §§ 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Nature and elements of offenses.

Statute defining as a felony setting up of gaming table and keeping of any house or place for purpose of gaming reaches any operator who would permit any person to bet on side of or against the keeper of house, and persons who operated betting office where they received wagers and maintained records of wins and losses, were guilty of violating statute, notwithstanding fact that they conducted their operations by telephone and that they did not invite public to their offices. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1507, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Conviction of having possession of numbers slips in violation of lottery laws was warranted as against contention that there was not any evidence to indicate that such slips were "live" slips, that is, were tickets in an existing lottery. D.C. Code 1951, §§ 22-1501, 22-1502. *Ledbetter v. U.S.*, 211 F.2d 628, 1953 U.S. App. LEXIS 2713 (C.A.D.C. 1953).

Defendant's possession of used numbers slips, known in the game as "dead" slips, constituted an offense under statute penalizing possession of slips "used, or to be used" for carrying on a lottery, even though amendment adding the words "current or not current" had not yet been enacted. D.C. Code 1951, §§ 22-1501, 22-1502. *Clement v. U.S.*, 208 F.2d 46, 1953 U.S. App. LEXIS 3019 (C.A.D.C. 1953).

Words "record, notation, and receipt" added to list of contraband in statute proscribing knowing possession of items used or to be used in lotteries and other forms of gambling were not intended merely to be synonymous with "number slips", and cut cards, which are listings of number combinations which "hit" more frequently than others and on which reduced

odds are to be paid, were included in the contraband. D.C. Code 1961, §§ 22-1501, 22-1502. *Bailey v. United States*, 223 A.2d 190, 1966 D.C. App. LEXIS 227 (App. 1966).

Defendants in possession of "cut cards" which were listings of number combinations which "hit" more frequently than others and on which odds are somewhat reduced from normal, violated statute proscribing knowing possession of items used or to be used in lotteries and other forms of gambling. D.C. Code 1961, §§ 22-1501, 22-1502. *Bailey v. United States*, 223 A.2d 190, 1966 D.C. App. LEXIS 227 (App. 1966).

Though consideration together with chance and prize is one of three elements necessary to constitute a lottery, it is unnecessary, in prosecution for possession of numbers slips, to prove that consideration has passed for them or that they have entered the play of the numbers game. D.C. Code 1951, § 22-1502. *Ferguson v. U.S.*, 123 A.2d 615, 1956 D.C. App. LEXIS 279 (Cr.App. 1956).

New trial.

In prosecution for violating lottery laws, District Court did not abuse discretion in denying motion for new trial on ground that defendant's trial counsel refused to permit her to testify and failed to introduce certain other testimony. D.C. Code 1951, §§ 22-1501, 22-1502. *Ingram v. U.S.*, 209 F.2d 818, 1954 U.S. App. LEXIS 3675 (C.A.D.C. 1954).

Presumptions and burden of proof.

Where conscious possession of papers to be used in violating statute making it unlawful to "purchase, possess, own or acquire any chance, right, or interest. . . in any policy lottery or any lottery. . ." was clearly proved, accused was properly convicted under statute prohibiting any person from knowingly having in his possession any paper used or to be used in violating the statute. D.C. Code 1951, §§ 22-1502, 22-1508. *Ferguson v. U.S.*, 239 F.2d 952, 1956 U.S. App. LEXIS 4252 (C.A.D.C. 1956).

In order to prove defendant's possession of number slips it is not essential that the number slips be received in evidence. D.C. Code § 22-1502. *Harris v. United States*, 254 A.2d 726, 1969 D.C. App. LEXIS 276 (App. 1969).

Evidence that defendant admitted ownership of billfold containing quantity of undated numbers slips was prima facie indicative that possession of such tickets was violative of statute forbidding possession of lottery slips and shifted burden of going forward with the evidence to defendant to prove that numbers slips were not lottery slips within meaning of statute. D.C. Code 1940, § 22-1502. *Roseborough v. U.S.*, 86 A.2d 920, 1952 D.C. App. LEXIS 145 (Cr.App. 1952).

Purposes.

Intention of statutes proscribing knowing possession of certain items used or to be used in

lotteries and other forms of gambling was to ban not only knowing possession of lottery tickets and similar writings but also knowing possession of any records used or to be used in violating provisions of the law relating to lotteries and other forms of gambling. D.C. Code 1961, § 22-1502. *Bailey v. United States*, 223 A.2d 190, 1966 D.C. App. LEXIS 227 (App. 1966).

Questions of law or fact.

Evidence justified submitting to jury prosecution for operating a lottery and possessing materials therefor. D.C. Code 1940, §§ 22-1501, 22-1502. *Kenney v. U.S.*, 157 F.2d 442, 1946 U.S. App. LEXIS 2729 (1946).

Whether there was probable cause for arrest of defendant for operating a lottery and whether subsequent search of his person was lawful were questions for trier of fact, in prosecution for violation of statute proscribing knowing possession of items used or to be used in lotteries and other forms of gambling, wherein defendant moved to suppress "cut cards" found in his possession. D.C. Code 1961, §§ 22-1501, 22-1502. *Bailey v. United States*, 223 A.2d 190, 1966 D.C. App. LEXIS 227 (App. 1966).

Review.

— Harmless or reversible error, review.

In joint prosecutions for violations of lottery laws, admission of one defendant's accusatory statement against the other three defendants was not error in view of later instructions that jury should disregard such statement. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Davis v. U.S.*, 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

Conviction for operating lottery in violation of District of Columbia statutes was affirmed on appeal, notwithstanding defendant's contentions (1) that number slips and other gambling paraphernalia were seized under warrants which were not supported by showing of adequate probable cause and (2) that evidence was insufficient to sustain conviction. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. *Ellis v. U.S.*, 270 F.2d 448, 1959 U.S. App. LEXIS 3641 (C.A.D.C. 1959).

Erroneous admission of evidence that alleged coconspirator had told government agent that he had turned his numbers work over to defendant would require reversal of conviction under indictment count charging conspiracy to commit lottery offenses; and since it was probable that such evidence had also been considered by jury in connection with related count charging defendant with operation of a lottery, conviction on that count would also be reversed. D.C. Code 1951, §§ 22-1501, 22-1502. *Taylor v. U.S.*, 260 F.2d 737, 1958 U.S. App. LEXIS 3161 (C.A.D.C. 1958).

In prosecution of numerous defendants for violation of lottery laws and conspiracy to violate those laws, where evidence obtained at one of several places raided was inadmissible because it had been obtained as a result of illegal entry into premises, but mass of other evidence legally seized sustained convictions, error in admitting such illegally obtained evidence was not, except as to one defendant who was found guilty of possessing lottery slips seized at such address, prejudicial. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1050; 18 U.S.C. §§ 371, 3109. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

In prosecution of defendant for possessing lottery slips which were seized by police after illegally entering premises at which they arrested defendant, admission of slips constituted prejudicial error. D.C. Code 1951, § 22-1502; 18 U.S.C. § 3109. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

Trial court's failure to rule on government's exhibits consisting of documents including number slips seized in bedrooms and hallway of house occupied by defendant prior to beginning of defendant's case, though error, was not prejudicial where defendant did not bring court's failure to so rule to court's attention and where there was considerable oral testimony from arresting officers that number slips were found in front bedroom occupied by defendant. D.C. Code § 22-1502. *Harris v. United States*, 254 A.2d 726, 1969 D.C. App. LEXIS 276 (App. 1969).

— In general.

An order granting suppression of evidence seized from defendant's person at time of his arrest, entered before trial in criminal case, is not appealable as a "final decision", regardless of whether, in the particular case, effect of suppressing the evidence would be to force dismissal of indictment for lack of evidence. 18 U.S.C. §§ 371, 3731; Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C.; D.C. Code 1951, §§ 22-1501, 22-1502; 18 U.S.C. § 1291. *Carroll v. U.S.*, 77 S.Ct. 1332, 1957 U.S. LEXIS 583 (U.S. Dist. Col. 1957).

Where there was conflicting evidence as to means by which defendant's notebook, upon which conviction for illegal possession of numbers slips was based, was acquired, Municipal Court of Appeals was not authorized to resolve questions under such circumstances and could not disturb finding of trial court adverse to defendant. D.C. Code 1951, § 22-1502. *Moody v. U.S.*, 163 A.2d 337, 1960 D.C. App. LEXIS 234 (Cr.App. 1960).

— Presentation and reservation of grounds for review.

Where former counsel for defendants in prosecution for carrying on and promoting a num-

bers game and for possession of numbers slips, stated that he had no desire for further instructions and made no objections to court's charge as given, defendants could not raise objection to the charge for the first time on appeal. Fed. Rules Crim. Proc. rule 30, 18 U.S.C.; D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

In prosecution for carrying on and promoting a numbers game and for possession of numbers slips, wherein defendants' former counsel of their own choice disclaimed any desire to enter a motion to suppress evidence and also gave specific reasons for disclaimer, contention of defendants' present counsel on appeal that trial court erred in refusing to suppress evidence would be rejected as asking Court of Appeals to substitute its judgment of proper trial tactics for that of the lawyer of the forum. D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

Search and seizure.

Where defendant, who had been under police observation, was observed entering rooming house where he had rented a room and one of police officers, without search warrant, opened window leading to landlady's room, climbed through and admitted other officers to the house, officer looked through transom, observed defendant and a guest as well as numbers slips, money and adding machines, and officers then arrested defendant and his guest and seized the machines, numbers slips and money, denial of defendant's motion for suppression of evidence and return of property to him was error, and convictions of both defendant and his guest for carrying on a lottery would be reversed. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; U.S. Const. Amend. 4. *McDonald v. U.S.*, 69 S.Ct. 191, 1948 U.S. LEXIS 1456 (U.S. Dist. Col. 1948).

Failure of search warrant affidavit to set forth factual circumstances from which magistrate could appraise informant's credibility and to state circumstances upon which informant based his conclusion was not fatal where, according to affidavits, information triggered investigation by officers who set out details and results of their investigation of gambling and lottery law violations. D.C. Code §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 294(c). *United States v. Berry*, 463 F.2d 1278, 1972 U.S. App. LEXIS 9265 (C.A.D.C. 1972).

Search warrant affidavit reciting uncorroborated tip that first person was picking up numbers and taking them to address of second person, a well-known gambler, together with investigative officers' observations of observed comings and goings and delivery of "small package," all in accordance with officers' knowledge

as to operation of numbers game, was sufficient to support warrant for search, leading to lottery and gambling charges, where affidavit recited that participants had gambling law convictions and that premises had been established by police records to have recently housed gambling operation, although it would have been helpful had officers elaborated on *modus operandi* of numbers operation. D.C. Code §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 294(c). *United States v. Berry*, 463 F.2d 1278, 1972 U.S. App. LEXIS 9265 (C.A.D.C. 1972).

In joint prosecutions for violations of lottery laws, evidence sustained trial judge's finding that police gave sufficient notice of their purpose and authority before breaking in door of one defendant's premises in executing search warrant. 18 U.S.C. § 3109; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Davis v. U.S.*, 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

In prosecution for operation of lottery and for possession of numbers slips, evidence sustained finding of validity of search warrant, and evidence secured under such warrant was properly admitted. D.C. Code 1951, §§ 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Circumstances revealed in police officer's affidavit provided sufficient probable cause to sustain issuance to officer of warrant for search of premises where it was believed defendants were operating a numbers game by telephone. Fed.Rules Crim. Proc. rule 41(e), 18 U.S.C.; D.C. Code 1951, §§ 22-1501, 22-1502. *Washington v. U.S.*, 202 F.2d 214, 1953 U.S. App. LEXIS 3222 (C.A.D.C. 1953).

Defendant who made no claim to ownership or possession of property seized by police acting under search warrant, or to interest in premises searched, had no standing to contest seizure. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C. *Gorland v. U.S.*, 197 F.2d 685, 1952 U.S. App. LEXIS 2674 (C.A.D.C. 1952).

Where police officers legally obtained search warrant for certain premises which they believed was being used in numbers lottery and entered and found extensive evidence of numbers activities and arrested all persons present, they could legally search the persons arrested, and evidence thereby obtained was admissible in prosecution for carrying on and promoting a numbers game and for possession of numbers slips. D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

Where police officers received information that certain premises were being used as a numbers establishment, and they conducted a surveillance of the premises for three days during hours significant in conduct of numbers lottery, and carefully checked information re-

ceived from informant, they were justified in concluding as discreet and prudent men that the premises were being used in connection with numbers game, and search warrant obtained by officers was valid. D.C. Code 1940, §§ 22-1501, 22-1502. *Wyche v. U.S.*, 193 F.2d 703, 1951 U.S. App. LEXIS 2941 (C.A.D.C. 1951).

The act of looking through transom by police officers who had no search warrant or warrant for defendant's arrest, into room in a house where defendant roomed, did not constitute an "unlawful search", and, where officers as result thereof observed commission of misdemeanor by defendants in promoting a lottery, officers were justified in demanding entrance, arresting defendants, and seizing property being used by defendants. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; U.S. Const. Amends. 4, 5. *McDonald v. U.S.*, 166 F.2d 957, 1948 U.S. App. LEXIS 2392 (1948).

Grocery store owner's civil rights were not violated when police officers searched his person and arrested him following discovery of ledger book containing lottery numbers during search of his business for evidence of numbers operation conducted pursuant to search warrant where officers had had probable cause to search and arrest owner, notwithstanding fact that search of owner's person was not authorized in search warrant. 42 U.S.C. § 1983. *Washington v. District of Columbia*, 685 F. Supp. 264, 1988 U.S. Dist. LEXIS 3743 (1988).

Where police investigation extending over a ten week period established probable cause for issuance of search warrant for gambling activities in violation of District of Columbia statutes, the fact that eleven day period elapsed between last police observation of premises and issuance of such warrant did not require suppression of evidence seized from the premises searched on any theory of lack of probable cause. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. *U.S. v. Long*, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

In prosecution for violation of District of Columbia gambling statutes by engaging in the numbers business and for violation of federal statute requiring payment of tax as prerequisite to engaging in business of accepting wagers, evidence relating to police investigation extending over a ten week period disclosed probable cause for issuance of search warrant. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. *U.S. v. Long*, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

Where District of Columbia Metropolitan Police received information linking telephone number to numbers game and the source stated that bets were placed by named person using designated code number and Metropolitan Police received additional information from Arlington County police that very heavy number

bets were called in to the telephone number and policeman made series of telephone calls to that number and identified himself as such person and gave such code number and received numbers information, there was probable cause for issuance of search warrant which led to seizure of numbers slips and other numbers paraphernalia. U.S. Const. Amend. 4; D.C. Code 1951, § 22-1501 et seq. U.S. v. Haje, 159 F.Supp. 870, 1958 U.S. Dist. LEXIS 2703 (D.D.C.1958).

In numbers game prosecution, wherein defendants moved to suppress evidence and for return of property, evidence established that police officers, who had submitted affidavits upon which warrants had issued, had had probable cause to believe, through personal contact, knowledge, observation and information, that the premises searched were being used for operation of a numbers lottery and that evidence of crime was there concealed. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; U.S. Const. Amend. 4. U.S. v. Bell, 126 F.Supp. 612, 1955 U.S. Dist. LEXIS 3819 (D.D.C.1955).

Where police had rejected convenient present opportunity to make lawful arrest in public street, search of apartment, which defendant had entered before arrest was attempted, could not be supported as incidental to arrest. D.C. Code 1951, §§ 22-1501, 22-1502; Fed. Rules Crim. Proc. rule 41(c, e), 18 U.S.C. U.S. v. Johnson, 113 F.Supp. 359, 1953 U.S. Dist. LEXIS 2583 (D.D.C.1953).

In proceedings on defendant's motion to suppress and for return of property seized from his custody, possession and person under a warrant for the search of an apartment, evidence required finding that there had been a lack of probable cause to believe that grounds existed to support issuance of search warrant. D.C. Code 1951, §§ 22-1501, 22-1502; Fed. Rules Crim. Proc. rule 41(c, e), 18 U.S.C. U.S. v. Johnson, 113 F.Supp. 359, 1953 U.S. Dist. LEXIS 2583 (D.D.C.1953).

Information in affidavit for warrant to search defendant's room on lottery charge on information received from informant, stating that informant had overheard sounds from defendant's room, that informant had previously given information leading to lottery convictions, and that officer had himself overheard sounds from room and had watched defendant elsewhere and checked his record, sufficiently set forth factual basis for informant's belief, basis for judging informant's credibility, record of defendant's prior involvement in lottery, and personal observations by officer corroborative of informant. D.C. Code §§ 22-1501, 22-1502, 22-1505(b); U.S. Const. Amend. 4. Ray v. United States, 288 A.2d 239, 1972 D.C. App. LEXIS 353 (1972).

Where police officers had what they believed was credible information that defendant who fit description given officers had a gun in his pocket, where defendant was reluctant to remove his hand from his pocket and where there was obvious large bulge in pocket when he did remove his hand, officers were justified in conducting a limited protective search for weapons, and removal of currency and numbers slips by officer who claimed to have found gun was reasonable and fact numbers slips and money rather than gun were removed from pocket did not render those items inadmissible. D.C. Code §§ 22-1502, 23-105(b). United States v. Dowling, 271 A.2d 406, 1970 D.C. App. LEXIS 358 (App. 1970).

Where defendant, who was lawfully arrested for operating automobile without valid permit, who was taken to police station in his own automobile, and who was charged with driving without valid permit, possession of prohibited weapon and possession of numbers slips, did not protest or withhold his consent to use by police of his automobile to drive him to police station and was not coerced in any way, there was no seizure of defendant's automobile by police prior to arrival at police station. D.C. Code §§ 22-1502, 22-3214. Burrell v. United States, 252 A.2d 897, 1969 D.C. App. LEXIS 244 (App. 1969).

Table drawer from which secretaries and other employees would take paper clips or pencils and which was located in messenger room where defendant, a messenger charged with violating statute prohibiting possession of numbers slips, had been temporarily assigned on daily basis and where he spent only 20 to 25 minutes of each hour was in effect open for common use by other employees of agency, and search of drawer did not violate defendant's right of privacy under the Fourth Amendment. D.C. Code 1961, § 22-1502; U.S. Const. Amend. 4. Freeman v. United States, 201 A.2d 22, 1964 D.C. App. LEXIS 236 (App. 1964).

Where numbers slips taken from defendant were admitted without objection on trial which commenced three days after his arrest, motion to suppress made for first time when trial resumed following a continuance was not timely, and denial of the motion was not error. D.C. Code 1940, § 22-1502. Harris v. U.S., 32 A.2d 101, 1943 D.C. App. LEXIS 150 (Cr.App. 1943).

Sentence and punishment.

Revocation of petitioner's operator's permit for operating motor vehicle in conducting lottery and while possessing numbers slips was an abuse of discretion, where there was no evidence of any threat or danger to the safety of persons or property through petitioner's use of an automobile. D.C. Code 1961, §§ 22-1501,

22-1502. *Stoneburner v. England*, 202 A.2d 652, 1964 D.C. App. LEXIS 259 (App. 1964).

Validity.

Statute making possession of numbers slips a crime is constitutional. D.C. Code 1951, § 22-1502. *Ferguson v. U.S.*, 123 A.2d 615, 1956 D.C. App. LEXIS 279 (Cr.App. 1956).

Verdict.

Convictions of defendants who were jointly indicted on four counts charging violations of District of Columbia Code sections proscribing gambling and on a fifth count charging that they had engaged in business of accepting wagers without having paid special tax required by Internal Revenue Code and who were acquitted on charges in fourth and fifth counts, were not subject to reversal because of claimed inconsistencies of verdict. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508; 26 U.S.C. (I.R.C.1954) §§ 4401-4423, 7262. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Weight and sufficiency of evidence.

Evidence that defendant and others had been observed going from stores to parked automobile and handing small pieces of white paper and money to occupant of automobile, that pieces of paper were recognized by officer as "numbers slips," that paper bag which defendant had placed behind trash can was recovered and found to contain numbers slips and that numbers slips, gambling paraphernalia and money were recovered from parked automobile was sufficient to sustain convictions of being concerned in a lottery and of possession of lottery tickets. D.C. Code §§ 22-1501, 22-1502. *United States v. Loundmannz*, 472 F.2d 1376, 1972 U.S. App. LEXIS 6662 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691, 1973 U.S. LEXIS 3263 (1973).

Evidence showing that defendants operated betting office where they received wagers sustained convictions for violation of statutes proscribing gaming. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Evidence, as to all defendants but one, was sufficient to support convictions on all counts, in prosecution for operating and conspiracy to operate lottery, and for possession of lottery tickets, and maintenance of gambling premises. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Evidence that search of previously occupied apartment of defendant uncovered numbers slips and notebook, and that defendant was seen entering apartment in company of other defendant, in absence of evidence of possession of lottery tickets by defendant, was insufficient to support conviction of defendant for operation of or conspiracy to operate lottery, or for maintaining gambling premises. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b); 18 U.S.C. § 371. *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Evidence sustained convictions for operation of lottery and possession of numbers slips and for aiding and abetting in such operation. D.C. Code 1951, §§ 22-105, 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Evidence that defendant was in possession of number slips in the District of Columbia was sufficient to sustain his conviction of possessing number slips, and it was no defense that he was taking the number slips to Maryland to use in buying lottery tickets. D.C. Code 1981, § 22-1502. *Mack v. United States*, 464 A.2d 114, 1983 D.C. App. LEXIS 431 (1983).

Evidence was sufficient to sustain conviction for possession of numbers slips. D.C. Code § 22-1502. *Burrell v. United States*, 252 A.2d 897, 1969 D.C. App. LEXIS 244 (App. 1969).

Evidence sustained conviction of receiving stolen goods. D.C. Code 1951, §§ 22-1502, 22-2205. *Madre v. U.S.*, 173 A.2d 917, 1961 D.C. App. LEXIS 281 (Cr.App. 1961).

Evidence sustained conviction for illegal possession of numbers slips. D.C. Code 1951, § 22-1502. *Moody v. U.S.*, 163 A.2d 337, 1960 D.C. App. LEXIS 234 (Cr.App. 1960).

Evidence was insufficient to sustain conviction of defendant for knowingly having in his possession "numbers slips" in violation of statute. D.C. Code 1940, § 22-1502. *Fletcher v. U.S.*, 49 A.2d 88, 1946 D.C. App. LEXIS 168 (Cr.App. 1946).

Witnesses.

Defendant charged with violating municipal gambling laws was not denied Sixth Amendment right to compulsory process when trial court quashed three subpoenas which had been served on Attorney General of United States, acting chief of metropolitan police department and director of Maryland lottery, where defendant intended to use their testimony to support his claim of selective enforcement, but he did not make clear showing that testimony of the officials was essential to prevent prejudice or injustice. U.S. Const. Amend. 6; D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

§ 22-1703. Permitting sale of lottery tickets on premises.

If any person shall knowingly permit, on any premises under his or her control in the District, the sale of any chance or ticket in or share of a ticket in any lottery or policy lottery, or shall knowingly permit any lottery or policy lottery, or policy shop on such premises, he or she shall be fined not less than \$50 nor more than \$500, or be imprisoned not more than 180 days, or both.

(Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 864; May 21, 1994, D.C. Law 10-119, § 2(k), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(h), 41 DCR 2608.)

Cross references. — Search warrants, see § 23-521 et seq.

Prior Codifications. — 1981 Ed., § 22-1503.

1973 Ed., § 22-1503.

Emergency legislation. — For temporary amendment of section, see § 105(h) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1701.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1702.

§ 22-1704. Gaming; setting up gaming table; inducing play.

Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than 5 years. For the purposes of this section, the term “gambling device” shall not include slot machines manufactured before 1952, intended for exhibition or private use by the owner, and not used for gambling purposes. The term “slot machine” means a mechanical device, an essential part of which is a drum or reel which bears an insignia and which when operated may deliver, as a result of the application of an element of chance, a token, money, or property, or by operation of which a person may become entitled to receive, as a result of this application of an element of chance, a token, money, or property.

(Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 865; Jan. 26, 1982, D.C. Law 4-59, § 2, 28 DCR 4766.)

Cross references. — Search warrants, see § 23-521 et seq.

Section references. — This section is referred to in §§ 22-1702, 22-1705, and 22-1707.

Prior Codifications. — 1981 Ed., § 22-1504.

1973 Ed., § 22-1504.

Legislative history of Law 4-59. — Law 4-59, the “Antique Slot Machine Act of 1981,”

was introduced in Council and assigned Bill No. 4-129, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on September 29, 1981, and October 13, 1981, respectively. Signed by the Mayor on October 30, 1981, it was assigned Act No. 4-105 and transmitted to both Houses of Congress for its review.

CASE NOTES

ANALYSIS

Admissibility of evidence.
 Arrest.
 Indictment and information.
 Instructions.
 Joint or separate trials of codefendants.
 Nature and elements of offenses.
 Persons liable.
 Purposes.
 Questions of law and fact.
 Searches and seizures.
 Verdict.
 Weight and sufficiency of evidence.

Admissibility of evidence.

Action of police officers in attaching electronic device, a so-called "spike mike" to heating duct of house used by defendant, and, in effect, turning duct into a gigantic microphone running throughout entire house, violated the Fourth Amendment, and conversations overheard by officers were inadmissible in prosecutions for gambling offenses. *U.S. Const. Amend. 4. Silverman v. U.S.*, 81 S.Ct. 679, 1961 U.S. LEXIS 1605 (U.S. Dist. Col. 1961).

In prosecution for keeping gambling tables, testimony of a defendant at a previous trial, together with a bank statement to which it related, were properly admitted, where the testimony had some tendency to establish such defendant's guilt. *D.C. Code 1940, § 22-1504. Warde v. U.S.*, 158 F.2d 651, 1946 U.S. App. LEXIS 2447 (1946).

In prosecution for setting up and keeping a gaming place for purpose of betting on result of horse races, where prima facie evidence of corpus delicti was made out, damaging admissions made by defendant were admissible in evidence. *D.C. Code 1940, § 22-1504. Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

In prosecution for maintaining gaming establishment and for conspiracy, evidence obtained by wire tapping held competent to establish that place was gambling place and was being used for gambling, even though police were unable to identify voices. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

In prosecution for maintaining gaming establishment and for conspiracy, evidence of character of place and that defendants were present at place at time of raid just after officers had heard betting could be considered by jury in connection with charge that defendants were conspiring to violate law. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

In prosecution for maintaining gaming table, for maintaining place for gaming, and for conspiracy regarding such offenses, permitting introduction of evidence of police raids made on

gambling places located in different parts of city on theory that each was branch connected with gambling room involved in prosecution held not error under circumstances. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

In prosecution for maintaining gaming table, for maintaining place for gaming, permitting introduction of evidence of police raids made on gambling places located in different parts of city on theory that each was branch connected with gambling room involved in prosecution held not error under circumstances. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

Arrest.

Where officers who had no warrant suspected defendant of violating gambling laws and knocked down door to defendant's apartment in the daytime after defendant failed to open door when officers identified themselves as police officers by calling out, and officers did not call out the cause of their demand for entry, breaking of door, presence of officers in defendant's apartment, and arrest of defendant and search was unlawful, and evidence procured as a result was inadmissible in prosecution for violation of gambling laws. *D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504. Accarino v. U.S.*, 179 F.2d 456, 1949 U.S. App. LEXIS 2647 (C.A.D.C. 1949).

The act of looking through transom by police officers who had no search warrant or warrant for defendant's arrest, into room in a house where defendant roomed, did not constitute an "unlawful search", and, where officers as result thereof observed commission of misdemeanor by defendants in promoting a lottery, officers were justified in demanding entrance, arresting defendants, and seizing property being used by defendants. *D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; U.S. Const. Amendments. 4, 5. McDonald v. U.S.*, 166 F.2d 957, 1948 U.S. App. LEXIS 2392 (1948).

Where police had immediately prior to and on day of raid heard several hundred bets on horse races being taken, notice that place was being used for gaming held sufficient to make subsequent entrance and arrests lawful, even without warrant. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

No warrant for arrest of one apprehended while violating statute imposing five years' imprisonment for keeping gaming table, a felony, was necessary. *Code, § 865 (D.C. Code 1929, T. 6, § 153); Cr. Code, § 335 (18 U.S.C. § 541). Zerega v. U.S.*, 32 F.2d 963, 1929 U.S. App. LEXIS 3925 (1929).

Indictment and information.

Indictments, charging that accused in the District of Columbia set up and kept a gam-

bling table for purposes of betting and wagering on results of horse races contrary to statute, charged an offense against the laws of the United States. D.C. Code 1929, T. 6, § 153. *Nuckols v. U.S.*, 99 F.2d 353, 1938 U.S. App. LEXIS 2876 (1938).

Count charging setting up and keeping a gaming table and count charging setting up and keeping a certain place for gaming held properly joined with count charging conspiracy regarding substantive offenses, since all counts related to same acts and transactions, and all depended on substantially same proof. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

Indictment charging the maintaining of a gaming table and a place in which gaming was done and that both as to place and table defendants were conducting a gaming establishment, held sufficient. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

The fourth count of an indictment under Code, § 865, D.C. Code 1929, T. 6, § 153, alleging the setting up of a gaming table and keeping it for the purpose of betting on the results of horse races, held sufficient to furnish defendant all the protection against further prosecution to which he is legally entitled, in view of section 868. D.C. Code 1929, T. 6, § 156. *Swan v. U.S.*, 295 F. 921, 1923 U.S. App. LEXIS 3123 (1923).

Instructions.

Where evidence obtained by tapping wire was admissible to show that place was gambling place, instruction that, to convict, it was necessary that jury should find, as to each individual defendant, that he participated in carrying on unlawful enterprise, held sufficient to confine evidence to purpose for which it was admissible. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

Joint or separate trials of codefendants.

Where there was proof that all four defendants operated a gambling house, that wife of a regular customer called at house and demanded that one of the defendants return some of the customer's lost money, that such defendant gave the customer's wife a push, that customer started up from his seat, and that such defendant pointed a pistol at customer and struck him with it, there was no error in denying the motions of three of the defendants, who were charged only with keeping a gaming table to be tried separately from defendant charged not only with operating a gaming table but with assault with intent to kill and assault with a dangerous weapon. D.C. Code 1940, § 22-1504; Fed.Rules Crim.Proc. rules 8, 14, 18 U.S.C. *Scheve v. U.S.*, 184 F.2d 695, 1950 U.S. App. LEXIS 3169 (C.A.D.C. 1950).

Where four defendants were charged with keeping a gaming table and fourth defendant was charged also with assault with intent to kill and assault with a dangerous weapon, and though evidence was introduced in defense of assault charges none was introduced in defense of the gaming charges, and counsel told court at beginning of trial that he would call no witness in the gambling case, alleged error of court in denying the motions of the three defendants not charged with assault, to be tried separately from the defendant charged with assault, was not prejudicial error. D.C. Code 1940, § 22-1504. *Scheve v. U.S.*, 184 F.2d 695, 1950 U.S. App. LEXIS 3169 (C.A.D.C. 1950).

Nature and elements of offenses.

Statute defining as a felony setting up of gaming table and keeping of any house or place for purpose of gaming reaches any operator who would permit any person to bet on side of or against the keeper of house, and persons who operated betting office where they received wagers and maintained records of wins and losses, were guilty of violating statute, notwithstanding fact that they conducted their operations by telephone and that they did not invite public to their offices. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1507, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

The statute penalizing anyone setting up in the District of Columbia any "gaming table", etc., or who permits any person to bet or play at or upon any such "gaming table" or device, etc., indicates a physical device of some sort and does not mean the mere taking of a bet on a race. D.C. Code 1940, §§ 22-1501, 22-1504, 22-1507. *Plummer v. U.S.*, 189 F.2d 19, 1951 U.S. App. LEXIS 3145 (C.A.D.C. 1951).

The term "property" as used in anti-gambling statute includes goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, or money or right or title to property, real or personal, is created or transferred but none of such terms should be expanded to include a free amusement feature such as privilege of playing an additional free game if certain score is made. D.C. Code 1940, § 22-1504. *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97, 1944 U.S. App. LEXIS 3265 (1944).

Where player of pinball amusement machine achieving certain minimum score would receive a "free play" or another "try" without an additional coin but nothing more, the machine was not a "gambling device" designed for purpose of playing game of chance for "property" within anti-gambling statute. D.C. Code 1940, § 22-1504. *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97, 1944 U.S. App. LEXIS 3265 (1944).

The gravamen of offense of setting up and keeping a gaming place is furnishing the facilities for gaming activities and it is immaterial that betting actually took place or that money actually passed. D.C. Code 1940, § 22-1504. *Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

In prosecution for setting up and keeping a gaming place for purpose of betting upon result of horse races, it is not necessary that defendant should have been in permanent possession of the premises or that he should have been a lessee or even a keeper. D.C. Code 1940, § 22-1504. *Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

In prosecution for setting up and keeping a gaming place for purpose of betting upon result of horse races, it was only incumbent upon the government to show that defendant was in charge, possession or control of the place when the offense occurred. D.C. Code 1940, § 22-1504. *Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

Persons liable.

Where tenant of premises, wherein gaming tables were kept, was an incorporated club, but there was evidence that defendants took part in carrying on its gambling activities, defendants were responsible as principals. D.C. Code 1940, §§ 22-105, 22-1504. *Warde v. U.S.*, 158 F.2d 651, 1946 U.S. App. LEXIS 2447 (1946).

Under statute making it unlawful to keep any gambling device or to permit any person to bet at or upon any such device, manager of a club with whom bets were placed was within the statute. D.C. Code 1929, T. 6, § 153. *Donald v. U.S.*, 102 F.2d 618, 1939 U.S. App. LEXIS 3907 (1939).

Purposes.

The purpose of Congress in enacting statute of District of Columbia making it unlawful to set up or keep in the District any kind of gambling device designed for purpose of playing any game of chance for money or property was to make criminal the use of all contrivances by which money or property is bet or wagered or risked on the chance of some material reward. D.C. Code 1940, § 22-1504. *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97, 1944 U.S. App. LEXIS 3265 (1944).

Questions of law and fact.

In prosecution for setting up and keeping gaming table, for setting up and keeping place for gaming, evidence held sufficient for jury. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

In prosecution for setting up and keeping gaming table, for setting up and keeping place for gaming, and for conspiracy regarding such offenses, evidence held sufficient for jury. *Beard*

v. U.S., 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

Searches and seizures.

Where defendant, who had been under police observation, was observed entering rooming house where he had rented a room and one of police officers, without search warrant, opened window leading to landlady's room, climbed through and admitted other officers to the house, officer looked through transom, observed defendant and a guest as well as numbers slips, money and adding machines, and officers then arrested defendant and his guest and seized the machines, numbers slips and money, denial of defendant's motion for suppression of evidence and return of property to him was error, and convictions of both defendant and his guest for carrying on a lottery would be reversed. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; U.S. Const. Amend. 4. *McDonald v. U.S.*, 69 S.Ct. 191, 1948 U.S. LEXIS 1456 (U.S. Dist. Col. 1948).

Defendant who made no claim to ownership or possession of property seized by police acting under search warrant, or to interest in premises searched, had no standing to contest seizure. D.C. Code 1940, §§ 22-1501, 22-1502, 22-1504; Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C. *Gorland v. U.S.*, 197 F.2d 685, 1952 U.S. App. LEXIS 2674 (C.A.D.C. 1952).

Search warrants were not invalid because affidavits did not show that property to be seized was used as a means of committing a felony, where affidavits were to the effect that in premises to be searched a gaming table devised for purpose of playing games of chance for money was set up and in operation. Fed. Rules Crim. Proc. rule 41, 18 U.S.C., 18 U.S.C. §§ 5, 1621, 2231, 2234, 2235, 3105, 3109; D.C. Code 1929, T. 6, § 153. *Nuckols v. U.S.*, 99 F.2d 353, 1938 U.S. App. LEXIS 2876 (1938).

Search warrants commanding marshal to take possession of gaming tables, gambling devices, race horse slips, and gambling paraphernalia, were not invalid as failing to describe property with sufficient particularity, since, in search of gambling establishment, same descriptive particularity is not necessary as in case of stolen goods. Fed. Rules Crim. Proc. rule 41, 18 U.S.C., 18 U.S.C. §§ 5, 1621, 2231, 2234, 2235, 3105, 3109; D.C. Code 1929, T. 6, § 153. *Nuckols v. U.S.*, 99 F.2d 353, 1938 U.S. App. LEXIS 2876 (1938).

Verdict.

Convictions of defendants who were jointly indicted on four counts charging violations of District of Columbia Code sections proscribing gambling and on a fifth count charging that they had engaged in business of accepting wagers without having paid special tax required

by Internal Revenue Code and who were acquitted on charges in fourth and fifth counts, were not subject to reversal because of claimed inconsistencies of verdict. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508; 26 U.S.C. (I.R.C.1954) §§ 4401-4423, 7262. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Weight and sufficiency of evidence.

Evidence showing that defendants operated betting office where they received wagers sustained convictions for violation of statutes proscribing gaming. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Evidence was insufficient to establish beyond a reasonable doubt that defendant set up or kept a gaming table for the purpose of gaming. D.C. Code 1940, §§ 22-1501, 22-1504, 22-1507. *Plummer v. U.S.*, 189 F.2d 19, 1951 U.S. App. LEXIS 3145 (C.A.D.C. 1951).

Evidence was sufficient to support conviction for keeping gambling tables. D.C. Code 1940, § 22-1504. *Warde v. U.S.*, 158 F.2d 651, 1946 U.S. App. LEXIS 2447 (1946).

Evidence of gambling on one occasion is sufficient to sustain conviction for keeping gambling tables. D.C. Code 1940, § 22-1504. *Warde v. U.S.*, 158 F.2d 651, 1946 U.S. App. LEXIS 2447 (1946).

In prosecution for setting up and keeping a gaming place for purpose of betting upon result

of horse races, evidence sustained finding that a gaming place was illegally set up and maintained. D.C. Code 1940, § 22-1504. *Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

In prosecution for setting up and keeping a gaming place, evidence necessary to show a gaming place need not be direct, and the intent with which the act was done may be gathered from all the circumstances shown in evidence. D.C. Code 1940, § 22-1504. *Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

In prosecution for setting up and keeping a gaming place for purpose of betting on result of horse races, evidence authorized inference that defendant was in control and possession of the premises when the offense occurred. D.C. Code 1940, § 22-1504. *Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

Evidence sustained conviction of setting up and keeping a gaming place for purpose of betting upon result of horse races. D.C. Code 1940, § 22-1504. *Sesso v. U.S.*, 133 F.2d 381, 1942 U.S. App. LEXIS 2508 (1942).

Evidence that police officers on breaking down doors to room in which betting was heard discovered defendants in shirtsleeves in retreat at far end of adjoining room could be considered by jury, together with things found tending to show character of place and that law was being violated, in gambling prosecution. *Beard v. U.S.*, 82 F.2d 837, 1936 U.S. App. LEXIS 3128 (1936).

§ 22-1705. Gambling premises; definition; prohibition against maintaining; forfeiture; liens; deposit of moneys in Treasury; penalty; subsequent offenses.

(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of § 22-1701 or § 22-1704, shall be deemed "gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain, or aid, or permit the maintaining of any gambling premises.

(c) All moneys, vehicles, furnishings, fixtures, equipment, stock (including, without limitation, furnishings and fixtures adaptable to nongambling uses, and equipment and stock for printing, recording, computing, transporting, safekeeping, or communication), or other things of value used or to be used: (1) in carrying on or conducting any lottery, or the game or device commonly known as a policy lottery or policy, contrary to the provisions of § 22-1701; (2) in setting up or keeping any gaming table, bank, or device contrary to the provisions of § 22-1704; or (3) in maintaining any gambling premises; shall be subject to seizure by any designated civilian employee of the Metropolitan

Police Department or any member of the Metropolitan Police force, or the United States Park Police, or the United States Marshal, or any Deputy Marshal, for the District of Columbia, and any property seized regardless of its value shall be proceeded against in the Superior Court of the District of Columbia by libel action brought in the name of the District of Columbia by the Corporation Counsel or any Assistant Corporation Counsel, and shall, unless good cause be shown to the contrary, be forfeited to the District of Columbia and shall be made available for the use of any agency of the government of the District of Columbia, or otherwise disposed of as the Mayor of the District of Columbia may, by order or by regulation, provide; provided, that if there be bona fide liens against the property so forfeited, then such property shall be disposed of by public auction. The proceeds of the sale of such property shall be available, first, for the payment of all expenses incident to such sale; and, second, for the payment of such liens; and the remainder shall be deposited in the General fund of the District of Columbia. To the extent necessary, liens against said property so forfeited shall, on good cause shown by the lienor, be transferred from the property to the proceeds of the sale of the property.

(d) Whoever violates this section shall be imprisoned not more than 180 days or fined not more than \$1,000, or both, unless the violation occurs after the person has been convicted of a violation of this section, in which case the person may be imprisoned for not more than 5 years, or fined not more than \$2,000, or both.

(Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 866; June 29, 1953, 67 Stat. 95, ch. 159, § 206(b); Sept. 21, 1961, 75 Stat. 540, Pub. L. 87-259, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); May 21, 1994, D.C. Law 10-119, § 2(l), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(i), 41 DCR 2608; June 12, 1999, D.C. Law 12-284, § 4, 46 DCR 1328; Sept. 14, 2011, D.C. Law 19-21, § 9045, 58 DCR 6226.)

Cross references. — Return of property by property clerk, see § 5-119.16.

Search warrants, see § 23-521 et seq.

Section references. — This section is referring to in §§ 22-1707 and 23-546.

Prior Codifications. — 1981 Ed., § 22-1505.

1973 Ed., § 22-1505.

Effect of amendments. — D.C. Law 19-21, in subsec. (c), substituted “General Fund” for “Treasury of the United States to the credit”.

Temporary Amendment of Section. — Section 4 of D.C. Law 12-282 inserted “designated civilian employee of the Metropolitan Police Department or any” in (c).

Section 13(b) of D.C. Law 12-282 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 105(i) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary amendment of section, see § 4

of the Metropolitan Police Department Civilianization and Street Solicitation for Prostitution Emergency Amendment Act of 1998 (D.C. Act 12-428, August 6, 1998, 45 DCR 5884).

For temporary amendment of section, see § 4 of the Metropolitan Police Department Civilianization Legislative Review Emergency Amendment Act of 1998 (D.C. Act 12-506, November 10, 1998, 45 DCR 45 8139), and § 4 of the Metropolitan Police Department Civilianization Congressional Review Emergency Amendment Act of 1999 (D.C. Act 13-13, February 8, 1999, 46 DCR 2333).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1701.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1702.

Legislative history of Law 12-282. — Law 12-282, the “Metropolitan Police Department

Civilianization Temporary Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-709. The Bill was adopted on first and second readings on July 7, 1998, and September 22, 1998, respectively. Signed by the Mayor, it was assigned Act No. 12-492 and transmitted to both Houses of Congress for its review. D.C. Law 12-282 became effective on May 28, 1999.

Legislative history of Law 12-284. — Law 12-284, the “Metropolitan Police Department Civilianization Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-710, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor, it was assigned Act No. 12-613 and transmitted to both Houses of Congress for its review. D.C. Law 12-284 became effective on June 12, 1999.

Legislative history of Law 19-21. — Law 19-21, the “Fiscal Year 2012 Budget Support Act of 2011”, was introduced in Council and assigned Bill No. 19-203, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May

25, 2011, and June 14, 2011, respectively. Signed by the Mayor on July 22, 2011, it was assigned Act No. 19-98 and transmitted to both Houses of Congress for its review. D.C. Law 19-21 became effective on September 14, 2011.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

CASE NOTES

ANALYSIS

Admissibility of evidence.
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Admissibility of evidence.

In joint prosecutions for violations of lottery laws, admission of one defendant’s accusatory statement against the other three defendants was not error in view of later instructions that jury should disregard such statement. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Davis v. U.S.*, 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

Conspiracy.

The crime of conspiracy to violate lottery laws and lottery statute violations are not so

closely connected as to render applicable a proposition that where a concert of action between two or more persons is logically necessary to a crime’s completion, a charge of conspiracy will not lie against such persons. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 371. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

In prosecution of defendants for violation of lottery laws and conspiracy to violate laws, crime of conspiracy was not so merged in or indistinguishable from the lottery statute as to prevent conviction of defendants on both charges. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 271. *Woods v. U.S.*, 240 F.2d 37, 1956 U.S. App. LEXIS 4262 (C.A.D.C. 1956).

Defenses, generally.

Where defendants, each of whom was convicted of substantive offense of operating lottery, and jointly of conspiracy to operate lottery, did not request trial court to compel election of counts on ground that substantive and conspiracy counts were duplicitous, in view of identity of proof under each count, and constituted double jeopardy, defendants did not save question for review on appeal, and Court of Appeals would not consider merits of contention. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b); Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Conclusory allegation of failure to prosecute others for violations of municipal gambling laws was insufficient to establish invidious discrimination such as would preclude defendant's conviction. D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

Evidence and witnesses, generally.

Defendant charged with violating municipal gambling laws was not denied Sixth Amendment right to compulsory process when trial court quashed three subpoenas which had been served on Attorney General of United States, acting chief of metropolitan police department and director of Maryland lottery, where defendant intended to use their testimony to support his claim of selective enforcement, but he did not make clear showing that testimony of the officials was essential to prevent prejudice or injustice. U.S. Const. Amend. 6; D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

Forfeiture action, generally.

A "claw machine" with which players, after inserting coins, tried to pick up valuable articles inclosed in glass case, running risk that mechanically operated claw would not seize any article, was a "gambling device" subject to forfeiture under statute, notwithstanding that skill played some part when players suspended claw in the vicinity of a desired article or, by acts not called for by the directions for operation, increased the likelihood that claw would retain articles already grasped. D.C. Code 1929, T. 6, Secs. 153, 156. *Boosalis v. Crawford*, 99 F.2d 374, 1938 U.S. App. LEXIS 2882 (1938).

Owners of property, held by District of Columbia as preliminary to libel proceedings for its forfeiture pursuant to statute authorizing forfeiture of property used in lottery or gaming activities, could apply for administrative relief, could sue officers who seized the property in trespass, or could assert their right as claimants in the libel when filed. District of Columbia Law Enforcement Act of 1953, § 206(b), 67 Stat. 95; 18 U.S.C. § 2461(b). *U.S. v. Bell*, 120 F.Supp. 670, 1954 U.S. Dist. LEXIS 3614 (D.D.C.1954).

Property held as preliminary to forfeiture proceeding, under statute authorizing forfeiture of property used in lottery or gaming activities, would be ordered returned unless libel for forfeiture were filed within five days, in view of fact that District of Columbia Municipality had notice of two motions for more than sixty days and of three motions for more than fifty days wherein property owner sought return of property. District of Columbia Law Enforcement Act of 1953, § 206(b), 67 Stat. 95.

U.S. v. Bell, 120 F.Supp. 670, 1954 U.S. Dist. LEXIS 3614 (D.D.C.1954).

A "libel for forfeiture of property" is a "civil action" at law, not a "criminal action". *U.S. v. Bell*, 120 F.Supp. 670, 1954 U.S. Dist. LEXIS 3614 (D.D.C.1954).

The inclusion of "other things of value" in enumeration of property subject to forfeiture under criminal gambling statutes does not encompass realty. D.C. Code 1981, § 22-1505(c). *District of Columbia v. 313 M St.*, 633 A.2d 820, 1993 D.C. App. LEXIS 292 (1993).

Condemnation and forfeiture of moneys seized from defendant's person at time of his arrest was warranted by evidence, including evidence that defendant attempted to conceal the money from the arresting officers and that, although he claimed that money seized represented savings which he intended to use to purchase a business, he was admittedly unfamiliar with business which he claimed to be planning to purchase, the person from whom he expected to make the purchase and the terms of the purchase. D.C. Code §§ 22-1502, 22-1505(c)(1). \$1,407.00 in United States Currency v. District of Columbia, 242 A.2d 217, 1968 D.C. App. LEXIS 162 (App. 1968).

Even though sale at public auction, of motor vehicle seized because it was used for gambling purposes in violation of law, would result in insufficient funds to fully discharge lien, court was without power to direct transfer in specie as alternative to auction sale directed by statute. D.C. Code 1961, § 22-1505(c). *General Motors Acceptance Corp. v. One 1962 Chevrolet Sedan*, 191 A.2d 140, 1963 D.C. App. LEXIS 238 (App. 1963).

Guilty plea.

Assistant United States attorney had no power to authorize, in exchange for defendant's guilty plea to maintaining gambling premises, return to defendant of \$750 of money seized in search of premises, with remainder being forfeited to District of Columbia government, where implicit in statutory command that District shall proceed in libel action against any property seized in search of gambling premises was requirement that property shall not be released without consent of District's corporation counsel unless and until court ordered otherwise. D.C. Code §§ 22-1505, 22-1505(c)(3). *Peak v. United States*, 419 A.2d 1006, 1980 D.C. App. LEXIS 365 (1980).

Jurisdiction.

Court, in criminal proceeding against owners of property, held by District of Columbia as preliminary to proceeding for its forfeiture, pursuant to statute authorizing forfeiture of property used in lottery or gaming activities, had jurisdiction to order return of the property. District of Columbia Law Enforcement Act of

1953, § 206(b), 67 Stat. 95; Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C. U.S. v. Bell, 120 F.Supp. 670, 1954 U.S. Dist. LEXIS 3614 (D.D.C.1954).

Limitation of actions.

One-year limitations period governing actions for statutory penalty or forfeiture under D.C. Code 1981, § 12-301(5) applies to libel actions for forfeiture brought by District of Columbia under D.C. Code 1981, § 22-1505(c), governing forfeitures of money related to gambling. Ward v. District of Columbia, 494 A.2d 666, 1985 D.C. App. LEXIS 412 (1985).

One-year statute of limitations in D.C. Code 1981, § 12-301(5), as applied to libel actions for forfeiture of moneys used in connection with gambling, is tolled during time period between seizure of property and judgment in underlying prosecution. D.C. Code 1981, § 22-1505(c). Ward v. District of Columbia, 494 A.2d 666, 1985 D.C. App. LEXIS 412 (1985).

Nature and elements of offense.

Statute defining as a felony setting up of gaming table and keeping of any house or place for purpose of gaming reaches any operator who would permit any person to bet on side of or against the keeper of house, and persons who operated betting office where they received wagers and maintained records of wins and losses, were guilty of violating statute, notwithstanding fact that they conducted their operations by telephone and that they did not invite public to their offices. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1507, 22-1508. Silverman v. U.S., 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Statute prohibiting maintaining gambling premises applies not only to owners, occupants, and persons in control, but also to persons who knowingly maintain or aid or permit in the maintaining of the premises. D.C. Code 1981, § 22-1505(b). Lawson v. United States, 596 A.2d 504, 1991 D.C. App. LEXIS 217 (1991).

Presumptions and burden of proof.

In forfeiture proceeding brought to take property used in illegal activity, introduction of evidence sufficient to show by preponderance that relevant property was used or intended for use in illegal gambling activity raised rebuttable presumption of forfeitability. D.C. Code 1981, §§ 17-305(a), 22-1505(c). Spencer v. District of Columbia, 615 A.2d 586, 1992 D.C. App. LEXIS 272 (1992).

In civil actions involving forfeiture, government need prove its case only by preponderance of evidence. D.C. Code 1981, §§ 22-1505(c), 33-552. Spencer v. District of Columbia, 615 A.2d 586, 1992 D.C. App. LEXIS 272 (1992).

Government's prima facie showing that property was involved in illegal activity gives rise to rebuttable presumption of forfeitability. D.C.

Code 1981, §§ 22-1505(c), 33-552; Tariff Act of 1930, § 615, 19 U.S.C. § 1615. Spencer v. District of Columbia, 615 A.2d 586, 1992 D.C. App. LEXIS 272 (1992).

It was required of the government in libel action, under statute, seeking forfeiture of seized automobile to show by a preponderance of the evidence that the automobile was "used or to be used" in unlawful gambling operation. D.C. Code § 22-1505(c). Vasile v. District of Columbia, 296 A.2d 443, 1972 D.C. App. LEXIS 275 (1972).

A showing by preponderance of the evidence that moneys found on defendant were in fact used or to be used in an unlawful gambling operation is sufficient to meet statutory test required for forfeiture of property. D.C. Code § 22-1505(c)(1). \$1,407.00 in United States Currency v. District of Columbia, 242 A.2d 217, 1968 D.C. App. LEXIS 162 (App. 1968).

Replevin action.

In replevin action to recover "claw machines" seized by police as gambling devices, testimony of police officers concerning their observation of the use of the machines by others was not inadmissible as res inter alios acta. Boosalis v. Crawford, 99 F.2d 374, 1938 U.S. App. LEXIS 2882 (1938).

In replevin action to recover "claw machines" seized by police as gambling devices, testimony of police officers that they operated machines according to directions but unsuccessfully was admissible over objection that it was negative testimony, since such objection affected weight of evidence only. Boosalis v. Crawford, 99 F.2d 374, 1938 U.S. App. LEXIS 2882 (1938).

Right to trial by jury.

Claimant of property, which was not per se unlawful and which was sought to be forfeited pursuant to statute authorizing forfeiture of property used or to be used in gambling enterprise, was entitled to trial by jury to decide issue whether property was illegally employed. D.C. Code § 22-1505(c); U.S. Const. Amend. 7. Carithers v. District of Columbia, 326 A.2d 798, 1974 D.C. App. LEXIS 280 (1974).

Searches and seizures.

Failure of search warrant affidavit to set forth factual circumstances from which magistrate could appraise informant's credibility and to state circumstances upon which informant based his conclusion was not fatal where, according to affidavits, information triggered investigation by officers who set out details and results of their investigation of gambling and lottery law violations. D.C. Code §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 294(c). United States v. Berry, 463 F.2d 1278, 1972 U.S. App. LEXIS 9265 (C.A.D.C. 1972).

Search warrant affidavit reciting uncorroborated tip that first person was picking up num-

bers and taking them to address of second person, a well-known gambler, together with investigative officers' observations of observed comings and goings and delivery of "small package," all in accordance with officers' knowledge as to operation of numbers game, was sufficient to support warrant for search, leading to lottery and gambling charges, where affidavit recited that participants had gambling law convictions and that premises had been established by police records to have recently housed gambling operation, although it would have been helpful had officers elaborated on modus operandi of numbers operation. D.C. Code §§ 22-1501, 22-1502, 22-1505; 18 U.S.C. § 294(c). *United States v. Berry*, 463 F.2d 1278, 1972 U.S. App. LEXIS 9265 (C.A.D.C. 1972).

In joint prosecutions for violations of lottery laws, evidence sustained trial judge's finding that police gave sufficient notice of their purpose and authority before breaking in door of one defendant's premises in executing search warrant. 18 U.S.C. § 3109; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Davis v. U.S.*, 274 F.2d 585, 1959 U.S. App. LEXIS 2901 (C.A.D.C. 1959).

Conviction for operating lottery in violation of District of Columbia statutes was affirmed on appeal, notwithstanding defendant's contentions (1) that number slips and other gambling paraphernalia were seized under warrants which were not supported by showing of adequate probable cause and (2) that evidence was insufficient to sustain conviction. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. *Ellis v. U.S.*, 270 F.2d 448, 1959 U.S. App. LEXIS 3641 (C.A.D.C. 1959).

In prosecution for violation of District of Columbia gambling statutes by engaging in the numbers business and for violation of federal statute requiring payment of tax as prerequisite to engaging in business of accepting wagers, evidence relating to police investigation extending over a ten week period disclosed probable cause for issuance of search warrant. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. *U.S. v. Long*, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

Where police investigation extending over a ten week period established probable cause for issuance of search warrant for gambling activities in violation of District of Columbia statutes, the fact that eleven day period elapsed between last police observation of premises and issuance of such warrant did not require suppression of evidence seized from the premises searched on any theory of lack of probable cause. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505. *U.S. v. Long*, 169 F.Supp. 730, 1959 U.S. Dist. LEXIS 3873 (D.D.C.1959).

In numbers game prosecution, wherein defendants moved to suppress evidence and for return of property, evidence established that

police officers, who had submitted affidavits upon which warrants had issued, had had probable cause to believe, through personal contact, knowledge, observation and information, that the premises searched were being used for operation of a numbers lottery and that evidence of crime was there concealed. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505; U.S. Const. Amend. 4. *U.S. v. Bell*, 126 F.Supp. 612, 1955 U.S. Dist. LEXIS 3819 (D.D.C.1955).

The legality of seizure of property which may be subject to forfeiture should ordinarily be determined upon proceedings for forfeiture, as the proper and orderly procedure, and not by summary motion for return of the property. *U.S. v. Bell*, 120 F.Supp. 670, 1954 U.S. Dist. LEXIS 3614 (D.D.C.1954).

District of Columbia government had right to resist return of defendant's property pursuant to plea agreement with assistant United States attorney, under which \$750 of money seized in search of premises was to be returned to defendant in exchange for defendant's guilty plea to maintaining gambling premises, even though demand therefor was made before libel action was commenced, where only District's corporation counsel's office could consent to release of money seized in gambling raid, and libel action which was brought two and one-half months after entry of plea, was within reasonable time and within statutory period of limitation. D.C. Code §§ 12-301(5), 22-1505, 22-1505(c)(3). *Peak v. United States*, 419 A.2d 1006, 1980 D.C. App. LEXIS 365 (1980).

Evidence not objected to was sufficient to support finding that money seized in execution of search warrant was the product of an illegal activity. D.C. Code § 22-1505. *Short v. District of Columbia*, 300 A.2d 450, 1973 D.C. App. LEXIS 225 (1973).

Information in affidavit for warrant to search defendant's room on lottery charge on information received from informant, stating that informant had overheard sounds from defendant's room, that informant had previously given information leading to lottery convictions, and that officer had himself overheard sounds from room and had watched defendant elsewhere and checked his record, sufficiently set forth factual basis for informant's belief, basis for judging informant's credibility, record of defendant's prior involvement in lottery, and personal observations by officer corroborative of informant. D.C. Code §§ 22-1501, 22-1502, 22-1505(b); U.S. Const. Amend. 4. *Ray v. United States*, 288 A.2d 239, 1972 D.C. App. LEXIS 353 (1972).

Verdict.

Convictions of defendants who were jointly indicted on four counts charging violations of District of Columbia Code sections proscribing

gambling and on a fifth count charging that they had engaged in business of accepting wagers without having paid special tax required by Internal Revenue Code and who were acquitted on charges in fourth and fifth counts, were not subject to reversal because of claimed inconsistencies of verdict. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508; 26 U.S.C. (I.R.C.1954) §§ 4401-4423, 7262. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Weight and sufficiency of evidence.

Evidence showing that defendants operated betting office where they received wagers sustained convictions for violation of statutes proscribing gaming. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Evidence that search of previously occupied apartment of defendant uncovered numbers slips and notebook, and that defendant was seen entering apartment in company of other defendant, in absence of evidence of possession of lottery tickets by defendant, was insufficient to support conviction of defendant for operation of or conspiracy to operate lottery, or for maintaining gambling premises. D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b); 18 U.S.C. § 371. *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Evidence, as to all defendants but one, was sufficient to support convictions on all counts, in prosecution for operating and conspiracy to operate lottery, and for possession of lottery tickets, and maintenance of gambling premises. 18 U.S.C. § 371; D.C. Code 1951, §§ 22-1501, 22-1502, 22-1505(b). *Aikens v. U.S.*, 232 F.2d 66, 1956 U.S. App. LEXIS 4335 (C.A.D.C. 1956).

Even absent criminal conviction, government adequately proved that currency and automobile seized from alleged owner were used to facilitate illegal gambling operation as necessary for property to be subject to forfeiture. D.C. Code 1981, §§ 22-1505(c), 33-552. *Spencer v. District of Columbia*, 615 A.2d 586, 1992 D.C. App. LEXIS 272 (1992).

Evidence showed by preponderance of evidence that currency and automobile seized from alleged owner facilitated running of illegal lottery and thus property was subject to forfeiture even absent any conviction. D.C. Code 1981, §§ 17-305(a), 22-1505(c). *Spencer v. District of Columbia*, 615 A.2d 586, 1992 D.C. App. LEXIS 272 (1992).

Defendant's conviction for maintaining gambling premises was supported by evidence that house was being used for gambling, that defendant had dice and more than \$500 in his possession when he was arrested, that he held himself out as executive vice president of the

club located at the house, and that he received mail there. D.C. Code 1981, § 22-1505. *Lawson v. United States*, 596 A.2d 504, 1991 D.C. App. LEXIS 217 (1991).

Defendant's conviction for maintaining gambling premises was supported by evidence that she was on the premises when gambling occurred, that she had key to storage closet where liquor and other supplies were kept and a key to the front door, and that she had signed membership cards. D.C. Code 1981, § 22-1505. *Lawson v. United States*, 596 A.2d 504, 1991 D.C. App. LEXIS 217 (1991).

Defendant's conviction for maintaining gambling premises was not supported by evidence that, on one occasion, he opened the door to premises where gambling was occurring and immediately tried to close it when he saw 20 to 25 men, some with guns drawn and one wearing a police badge. D.C. Code 1981, § 22-1505. *Lawson v. United States*, 596 A.2d 504, 1991 D.C. App. LEXIS 217 (1991).

Evidence consisting of defendant either exiting or entering buildings with rolled newspapers which were subsequently found, pursuant to search of automobile's front seat based on search warrant, to contain envelopes with numbers betting slips inside was insufficient to establish use of the automobile in a lottery or gambling operation for purpose of libel action, under statute, seeking forfeiture of the automobile. D.C. Code §§ 17-305(a), 22-1501, 22-1505(c). *Vasile v. District of Columbia*, 296 A.2d 443, 1972 D.C. App. LEXIS 275 (1972).

Evidence supported judgment of forfeiture of automobile on ground that it was used, or to be used, in carrying on or conducting a lottery. D.C. Code § 22-1505(c). *Thomas v. District of Columbia*, 293 A.2d 882, 1972 D.C. App. LEXIS 409 (1972).

Sufficient evidence existed to support forfeiture judgment in relation to money allegedly used in carrying on or conducting a lottery. D.C. Code § 22-1505(c). \$6200.00 in *United States Currency v. District of Columbia*, 250 A.2d 551, 1969 D.C. App. LEXIS 209 (App. 1969).

Libel actions for forfeiture of monies used or to be used in carrying on lottery are civil in nature and government need prove its case only by preponderance of evidence. D.C. Code § 22-1505(c). \$3265.28 in *United States Currency v. District of Columbia*, 249 A.2d 516, 1969 D.C. App. LEXIS 202 (App. 1969).

Wiretapping.

When metropolitan police department officers intercept conversations relating to offenses specified in order of authorization, District of Columbia statute requiring officer who intercepts communications relating to offenses other than those specified in order of authorization to make application to a judge for disclosure and use is not operative, and officers may disclose or

use those conversations to extent that such disclosure or use is appropriate to the proper performance of their official duties. 18 U.S.C. § 2517(5); D.C. Code §§ 22-1501, 22-1505, 23-

546(c)(1), 23-548(b). *United States v. Moore*, 513 F.2d 485, 1975 U.S. App. LEXIS 14534 (C.A.D.C. 1975), vacated without op. by 556 F.2d 77 (D.C. Cir. 1977).

§ 22-1706. Three-card monte and confidence games.

Whoever shall in the District deal, play, or practice, or be in any manner accessory to the dealing or practicing, of the confidence game or swindle known as 3-card monte, or of any such game, play, or practice, or any other confidence game, play, or practice, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding \$1,000 and by imprisonment for not more than 180 days.

(Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 867; Aug. 20, 1994, D.C. Law 10-151, § 105(j), 41 DCR 2608.)

Cross references. — Fraud, see § 22-3221. Search warrants, see § 23-521 et seq.

Theft, see § 22-3211.

Section references. — This section is referred to in § 22-1707.

Prior Codifications. — 1981 Ed., § 22-1506.

1973 Ed., § 22-1506.

Emergency legislation. — For temporary

amendment of section, see § 105(j) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1702.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Arrest.

Construction and application.

Indictment and information.

Nature and elements of offense.

Validity.

Admissibility of evidence.

Any conceivable prejudice by reception of testimony of arresting officers concerning nature of articles, which were characterized by officer as typical confidence game paraphernalia, as incident to proper arrest was cured by subsequent rejection of the exhibits as irrelevant in absence of a showing that the items were actually used in the particular incident on which prosecution for violation of three-card monte statute and grand jury was based. D.C. Code §§ 22-1506, 22-2201. *Bond v. United States*, 310 A.2d 221, 1973 D.C. App. LEXIS 362 (1973).

Arrest.

In prosecution for practicing confidence game and swindle known as three-card monte, evidence as to what arresting officers saw transpiring indicated that they were justified in making arrest without warrant, and articles seized as incident to such arrest were admissi-

ble in evidence regardless whether crime charged was misdemeanor, as indicated by statute, or felony, because punishable by imprisonment for more than one year. Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.; 18 U.S.C. § 1; D.C. Code 1951, § 22-1506. *Coleman v. U.S.*, 215 F.2d 681, 1954 U.S. App. LEXIS 2877 (C.A.D.C. 1954).

Where officer had victim point out suspects, officer took victim to office of prosecutor for protection and upon returning was unable to find defendant and another and then went to motel at which defendant was reportedly staying and arrested defendant and his companion as they were about to leave the city, arrest without a warrant, effectuated by unconsented to entry into motel room, for not only violations of the three-card monte statute but grand larceny was valid and paraphernalia seized as incident to arrest were admissible. D.C. Code §§ 22-1506, 22-2201. *Bond v. United States*, 310 A.2d 221, 1973 D.C. App. LEXIS 362 (1973).

Even assuming the illegality of prior arrest of defendant, he could not successfully invoke the poisonous tree doctrine where he pointed to no particular fruit of the alleged poisonous tree which was introduced into evidence against him and assuming that there was such actual fruit sought to be suppressed the connection

between the fruits and the assertedly unlawful arrest and the evidence presented at trial for grand larceny in violation of three-card monte statute was so tenuous that any taint was dissipated. D.C. Code §§ 22-1506, 22-2201. *Bond v. United States*, 310 A.2d 221, 1973 D.C. App. LEXIS 362 (1973).

Construction and application.

"Three-card monte" statute did not apply to commission of classic "short con" game known as "pigeon drop." D.C. Code §§ 22-1506, 22-2201. *Pender v. United States*, 310 A.2d 252, 1973 D.C. App. LEXIS 378 (1973).

Three-card monte statute could not be applied for purpose of prosecuting the obtaining of money by trick. D.C. Code § 22-1506. *Pender v. United States*, 310 A.2d 252, 1973 D.C. App. LEXIS 378 (1973).

Conduct of defendant, in two-man scheme procuring money from victim to place in envelope, with subsequent substitution of envelope for another containing newspaper clippings, was not violative of statute proscribing confidence game known as "three-card monte" and any other such games or swindles. *Pender v. United States*, 310 A.2d 252, 1973 D.C. App. LEXIS 378 (1973).

Since the "three-card monte" statute deals with gambling, it is not a proper vehicle for prosecuting other forms of fraud or deceit. D.C. Code §§ 22-1301, 22-1506, 22-2201 to 22-2203. *United States v. Brown*, 309 A.2d 256, 1973 D.C. App. LEXIS 345 (1973).

Indictment and information.

Indictments charging that defendants practiced a confidence game and swindle the nature of which was to persuade victim to entrust money to defendants, which money defendants allegedly intended to fraudulently convert to their own use, did not sufficiently state the elements of the offense called the "confidence game or swindle known as three-card monte." D.C. Code § 22-1506. *United States v. Brown*,

309 A.2d 256, 1973 D.C. App. LEXIS 345 (1973).

Though denominated a misdemeanor by statute, prescribed penalty of up to five years imprisonment made offense of "three-card monte and confidence games" prosecutable only by indictment. D.C. Code §§ 22-1506, 23-301; 18 U.S.C. § 1. *United States v. Brown*, 309 A.2d 256, 1973 D.C. App. LEXIS 345 (1973).

Nature and elements of offense.

Statute was enacted to outlaw mere playing of three-card monte, and it was not necessary element of offense that there be intent by defendant to deceive or trick. D.C. Code 1981, § 22-1506. *Thorne v. United States*, 452 A.2d 170, 1982 D.C. App. LEXIS 472 (1982).

The elements of the crime of "confidence game" are (1) an intentional false representation to the victim as to some present fact, (2) knowing it to be false, (3) with intent that the victim rely on the representation, (4) the representation being made to obtain the victim's confidence and thereafter his money and property, (5) which confidence is then abused by defendant. D.C. Code § 22-1506. *United States v. Brown*, 309 A.2d 256, 1973 D.C. App. LEXIS 345 (1973).

Since the thrust of the statute prescribing penalty for practicing the confidence game known as three-card monte "or any other confidence game, play, or practice" is against gambling, the doctrine of ejusdem generis is controlling and the general language "any other confidence game, play, or practice" must be limited in application to gambling activities similar to "three-card monte." D.C. Code § 22-1506. *United States v. Brown*, 309 A.2d 256, 1973 D.C. App. LEXIS 345 (1973).

Validity.

Constitutional attack for vagueness of gaming statute was rejected where statute proscribed game which defendant conceded played. D.C. Code 1981, § 22-1506. *Thorne v. United States*, 452 A.2d 170, 1982 D.C. App. LEXIS 472 (1982).

§ 22-1707. "Gaming table" defined.

All games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of §§ 22-1704 to 22-1706; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against.

(Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 868.)

Cross references. — Search warrants, see § 23-521 et seq.

Prior Codifications. — 1981 Ed., § 22-1507.

1973 Ed., § 22-1507.

CASE NOTES

ANALYSIS

Construction and application.
Indictment or information.
Weight and sufficiency of evidence.

Construction and application.

Statute defining as a felony setting up of gaming table and keeping of any house or place for purpose of gaming reaches any operator who would permit any person to bet on side of or against the keeper of house, and persons who operated betting office where they received wagers and maintained records of wins and losses, were guilty of violating statute, notwithstanding fact that they conducted their operations by telephone and that they did not invite public to their offices. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1507, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

The statute penalizing anyone setting up in the District of Columbia any "gaming table", etc., or who permits any person to bet or play at or upon any such "gaming table" or device, etc.,

indicates a physical device of some sort and does not mean the mere taking of a bet on a race. D.C. Code 1940, §§ 22-1501, 22-1504, 22-1507. *Plummer v. U.S.*, 189 F.2d 19, 1951 U.S. App. LEXIS 3145 (C.A.D.C. 1951).

Indictment or information.

The fourth count of an indictment under Code, § 865, D.C. Code 1929, T. 6, § 153, alleging the setting up of a gaming table and keeping it for the purpose of betting on the results of horse races, held sufficient to furnish defendant all the protection against further prosecution to which he is legally entitled, in view of section 868. D.C. Code 1929, T. 6, § 156. *Swan v. U.S.*, 295 F. 921, 1923 U.S. App. LEXIS 3123 (1923).

Weight and sufficiency of evidence.

Evidence was insufficient to establish beyond a reasonable doubt that defendant set up or kept a gaming table for the purpose of gaming. D.C. Code 1940, §§ 22-1501, 22-1504, 22-1507. *Plummer v. U.S.*, 189 F.2d 19, 1951 U.S. App. LEXIS 3145 (C.A.D.C. 1951).

§ 22-1708. Gambling pools and bookmaking; athletic contest defined.

It shall be unlawful for any person, or association of persons, within the District of Columbia to purchase, possess, own, or acquire any chance, right, or interest, tangible or intangible, in any policy lottery or any lottery, or to make or place a bet or wager, accept a bet or wager, gamble or make books or pools on the result of any athletic contest. For the purpose of this section, the term "athletic contest" means any of the following, wherever held or to be held: a football, baseball, softball, basketball, hockey, or polo game, or a tennis, golf, or wrestling match, or a tennis or golf tournament, or a prize fight or boxing match, or a trotting or running race of horses, or a running race of dogs, or any other athletic or sporting event or contest. Any person or association of persons violating this section shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both.

(Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § 3; June 29, 1953, 67 Stat. 96, ch. 159, § 206c; Aug. 20, 1994, D.C. Law 10-151, § 105(k), 41 DCR 2608.)

Cross references. — Search warrants, see § 23-521 et seq.

Section references. — This section is referred to in § 22-1702.

Prior Codifications. — 1981 Ed., § 22-1508.

1973 Ed., § 22-1508.

Emergency legislation. — For temporary

amendment of section, see § 105(k) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1702.

CASE NOTES

ANALYSIS

Defenses, generally.
 Electronic surveillance.
 Nature and elements of offenses.
 Verdict.
 Weight and sufficiency of evidence.
 Witnesses, generally.

Defenses, generally.

Conclusory allegation of failure to prosecute others for violations of municipal gambling laws was insufficient to establish invidious discrimination such as would preclude defendant's conviction. D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

Electronic surveillance.

Assuming that probable cause was required for pen registers, information supplied by informer and personal observations of police officers of gambling activities presented probable cause. U.S. Const. Amend. 4; D.C. Code §§ 22-1508, 23-546(c); D.C. Code SCR, Criminal Rule 41-1(a). *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

Nature and elements of offenses.

Statute defining as a felony setting up of gaming table and keeping of any house or place for purpose of gaming reaches any operator who would permit any person to bet on side of or against the keeper of house, and persons who operated betting office where they received wagers and maintained records of wins and losses, were guilty of violating statute, notwithstanding fact that they conducted their operations by telephone and that they did not invite public to their offices. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1507, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Where conscious possession of papers to be used in violating statute making it unlawful to "purchase, possess, own or acquire any chance, right, or interest. . . in any policy lottery or any lottery. . ." was clearly proved, accused was properly convicted under statute prohibiting any person from knowingly having in his possession any paper used or to be used in violating the statute. D.C. Code 1951, §§ 22-1502,

22-1508. *Ferguson v. U.S.*, 239 F.2d 952, 1956 U.S. App. LEXIS 4252 (C.A.D.C. 1956).

Verdict.

Convictions of defendants who were jointly indicted on four counts charging violations of District of Columbia Code sections proscribing gambling and on a fifth count charging that they had engaged in business of accepting wagers without having paid special tax required by Internal Revenue Code and who were acquitted on charges in fourth and fifth counts, were not subject to reversal because of claimed inconsistencies of verdict. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508; 26 U.S.C. (I.R.C.1954) §§ 4401-4423, 7262. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

Weight and sufficiency of evidence.

Evidence showing that defendants operated betting office where they received wagers sustained convictions for violation of statutes proscribing gaming. D.C. Code 1951, §§ 22-1502, 22-1504, 22-1505, 22-1508. *Silverman v. U.S.*, 275 F.2d 173, 1960 U.S. App. LEXIS 5452 (C.A.D.C. 1960).

In gambling prosecution, Government's uncontroverted evidence established beyond a reasonable doubt that defendants conducted, financed, managed, supervised, directed, and owned a gambling operation involving no less than seven individuals during the fall of 1975 and winter of 1976 in violation of District of Columbia law. 18 U.S.C. § 1955; D.C. Code § 22-1508. *United States v. Gianaris*, 454 F. Supp. 505, 1977 U.S. Dist. LEXIS 13451 (1977), affirmed without opinion by 589 F.2d 1116, 191 U.S. App. D.C. 213 (1978).

Witnesses, generally.

Defendant charged with violating municipal gambling laws was not denied Sixth Amendment right to compulsory process when trial court quashed three subpoenas which had been served on Attorney General of United States, acting chief of metropolitan police department and director of Maryland lottery, where defendant intended to use their testimony to support his claim of selective enforcement, but he did not make clear showing that testimony of the officials was essential to prevent prejudice or injustice. U.S. Const. Amend. 6; D.C. Code §§ 22-1501, 22-1502, 22-1505, 22-1508. *Davis v. United States*, 390 A.2d 976, 1978 D.C. App. LEXIS 397 (1978).

§ 22-1709. Bucketing, and bucket-shopping and bucket-shops; definitions. [Repealed].

Repealed.

(Mar. 3, 1901, ch. 854, § 869a; Mar. 1, 1909, 35 Stat. 670, ch. 233; May 21, 1994, D.C. Law 10-119, § 2(m), 41 DCR 1639; Apr. 29, 2004, D.C. Law 15-154, § 3(g), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1509.

1973 Ed., § 22-1509.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1701.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

Editor's notes. — Effect of state law prohibiting or regulating operation of bucket-shops: Section 4 of the Act of October 13, 1982, Pub. L. 97-303 provided that no state law which pro-

hibits or regulates the operation of "bucket-shops" or other similar or related activities shall invalidate any put, call, straddle, option, privilege, or other security, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such instrument, if such instrument is traded pursuant to rules and regulations to a self-regulatory organization that are filed with the Securities and Exchange Commission pursuant to § 19(b) of the Securities Exchange Act of 1934.

CASE NOTES

In general.

The provision in the first section of the act of Congress of March 1, 1909, Code D.C. §§ 869a-869d, D.C. Code 1929, T. 6, §§ 158-161, prohibiting bucketing and bucket shopping, and to abolish bucket shops, that, unless a different meaning is plainly required by the context, the word, "contract," when used in the act, shall mean "any agreement, trade, or transaction," does not invalidate the act as prohibiting all agreements, trades, and transactions. U.S. v.

Cella, 37 App.D.C. 423, 1911 U.S. App. LEXIS 5688 (1911).

In the prosecution of keepers of a bucket shop for violating Act Cong. March 1, 1909, Code D.C. §§ 869a-869d, D.C. Code 1929, T. 6, §§ 158-161, relating to bucket shopping, the act will not be declared invalid because of the possibility that under it innocent customers might be penalized. U.S. v. Cella, 37 App.D.C. 423, 1911 U.S. App. LEXIS 5688 (1911).

§ 22-1710. Penalty for bucketing or keeping bucket-shop. [Repealed].

Repealed.

(Mar. 3, 1901, ch. 854, § 869b; Mar. 1, 1909, 35 Stat. 671, ch. 233; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 909, 991, ch. 646, §§ 1, 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(c) (1) (E); Aug. 20, 1994, D.C. Law 10-151, § 105(l), 41 DCR 2608; Apr. 29, 2004, D.C. Law 15-154, § 3(h), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1510.

1973 Ed., § 22-1510.

Emergency legislation. — For temporary amendment of section, see § 105(l) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1702.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

Change in Government. — This section originated at a time when local government

powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and

the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 22-1711. Penalty for communicating, receiving, exhibiting, or displaying quotations of prices. [Repealed].

Repealed.

(Mar. 3, 1901, ch. 854, § 869c; Mar. 1, 1909, 35 Stat. 671, ch. 233; Apr. 29, 2004, D.C. Law 15-154, § 3(i), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1511.
1973 Ed., § 22-1511.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

§ 22-1712. Bucketing; written statement to be furnished; contents. [Repealed].

Repealed.

(Mar. 3, 1901, ch. 854, § 869d; Mar. 1, 1909, 35 Stat. 671, ch. 233; Apr. 29, 2004, D.C. Law 15-154, § 3(j), 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 22-1512.
1973 Ed., § 22-1512.

Legislative history of Law 15-154. — For Law 15-154, see notes following § 22-101.

§ 22-1713. Corrupt influence in connection with athletic contests.

(a) It shall be unlawful to pay or give, or to agree to pay or give, or to promise or offer, any valuable thing to any individual:

(1) With intent to influence such individual to lose or cause to be lost, or to attempt to lose or cause to be lost, or to limit or attempt to limit such individual or his or her team's margin of victory or score in, any professional or amateur athletic contest in which such individual is or may be a contestant or participant; or

(2) With intent to influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual (as a manager, coach, owner, second, jockey, trainer, handler, groom, or otherwise) has or will have any duty or responsibility with respect to a contestant, participant, or team who or which is engaging or may engage therein, to cause or attempt to cause:

(A) The loss of such athletic contest by such contestant, participant, or team; or

(B) The margin of victory or score of such contestant, participant, or team to be limited; or

(3) With intent to influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual is to be or

may be a referee, judge, umpire, linesman, starter, timekeeper, or other similar official, to cause or attempt to cause:

(A) The loss of such athletic contest by any contestant, participant, or team who or which is engaging or may engage therein; or

(B) The margin of victory or score of any such contestant, participant, or team to be limited.

(b) It shall be unlawful for any individual to solicit or accept, or to agree to accept, any valuable thing or a promise or offer of any valuable thing:

(1) To influence such individual to lose or cause to be lost, or to attempt to lose or cause to be lost, or to limit or attempt to limit such individual or his or her team's margin of victory or score in, any professional or amateur athletic contest in which such individual is or may be a contestant or participant; or

(2) To influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual (as a manager, coach, owner, second, jockey, trainer, handler, groom, or otherwise) has or will have any duty or responsibility with respect to a contestant, participant, or team who or which is engaging or may engage therein, to cause or attempt to cause:

(A) The loss of such athletic contest by such contestant, participant, or team; or

(B) The margin of victory or score of such contestant, participant, or team to be limited; or

(3) To influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual is to be or may be a referee, judge, umpire, linesman, starter, timekeeper, or other similar official, to cause or attempt to cause:

(A) The loss of such athletic contest by any contestant, participant, or team who or which is engaging or may engage therein; or

(B) The margin of victory or score of any such contestant, participant, or team to be limited.

(c) Whoever violates any provision of subsection (a) of this section shall be guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment for not less than 1 year nor more than 5 years and by a fine of not more than \$10,000.

(d) Whoever violates any provision of subsection (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than 1 year and by a fine of not more than \$5,000.

(e) As used in this section, the term "athletic contest" means any of the following, wherever held or to be held: a football, baseball, softball, basketball, hockey, or polo game, or a tennis or wrestling match, or a prize fight or boxing match, or a horse race or any other athletic or sporting event or contest.

(f) Nothing in this section shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager, coach, or professional player, or to any league, association, or conference for the purpose of encouraging such manager, coach, or player to a higher degree of skill, ability, or diligence in the performance of his or her duties.

(Mar. 3, 1901, ch. 854, § 869e; July 11, 1947, 61 Stat. 313, ch. 230; Dec. 27,

1967, 81 Stat. 737, Pub. L. 90-226, title VI, § 604; May 21, 1994, D.C. Law 10-119, § 2(n), 41 DCR 1639.)

Section references. — This section is referred to in § 23-546.

Prior Codifications. — 1981 Ed., § 22-1513.

1973 Ed., § 22-1513.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1701.

§ 22-1714. Immunity of witnesses; record.

(a) Whenever, in the judgment of the United States Attorney for the District of Columbia, the testimony of any witness, or the production of books, papers, or other records or documents, by any witness, in any case or proceeding involving a violation of this subchapter before any grand jury or a court in the District of Columbia, is necessary in the public interest, such witness shall not be excused from testifying or from producing books, papers, and other records and documents on the grounds that the testimony or evidence, documentary or otherwise, required of such witness may tend to incriminate such witness, or subject such witness to penalty or forfeiture; but such witness shall not be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such witness is compelled, after having claimed his or her privilege against self-incrimination, to testify or produce evidence, documentary or otherwise; except that such witness so testifying shall not be exempt from prosecution and punishment for perjury or contempt committed in so testifying.

(b) The judgment of the United States Attorney for the District of Columbia that any testimony, or the production of any books, papers, or other records or documents, is necessary in the public interest shall be confirmed in a written communication over the signature of the United States Attorney for the District of Columbia, addressed to the grand jury or the court in the District of Columbia concerned, and shall be made a part of the record of the case or proceeding in which such testimony or evidence is given.

(Mar. 3, 1901, ch. 854, § 869f; June 29, 1953, 67 Stat. 96, ch. 159, § 206(d); Mar. 10, 1981, D.C. Law 3-172, § 2, 27 DCR 4736; May 21, 1994, D.C. Law 10-119, § 2(o), 41 DCR 1639.)

Prior Codifications. — 1981 Ed., § 22-1514.

1973 Ed., § 22-1514.

Legislative history of Law 3-172. — Law 3-172, the “Law to Legalize Lotteries, Daily Numbers Games, and Bingo and Raffles for Charitable Purposes in the District of Columbia,” was submitted to the electors of the District of Columbia on November 4, 1980, as Initiative No. 6. The results of the voting,

certified by the Board of Elections and Ethics on November 21, 1980, were 104,899 for the Initiative and 59,833 against the Initiative. It was transmitted to both Houses of Congress for its review on January 19, 1981.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1701.

CASE NOTES

ANALYSIS

In general.
Validity.

In general.

Immunity granted by terms of Code encompassed immunity for offense for which witness had been convicted although judgment of conviction was not final because timely appeal from judgment was pending, but that did not alter witness' obligation to testify before grand

jury when directed to do so and failure to do so constituted civil contempt. D.C. Code 1961, § 22-1514. In re Flanagan, 350 F.2d 746, 1965 U.S. App. LEXIS 5014 (C.A.D.C. 1965).

Validity.

District of Columbia immunity statute is not unconstitutional on basis of alleged uncertainty as immunity provided with reference to state as well as federal prosecutions. D.C. Code 1961, § 22-1514. In re Flanagan, 350 F.2d 746, 1965 U.S. App. LEXIS 5014 (C.A.D.C. 1965).

§ 22-1715. Presence in illegal establishments. [Repealed].

Repealed.

(Aug. 20, 1994, D.C. Law 10-151, § 110(a), 41 DCR 2608.)

Prior Codifications. — 1981 Ed., § 22-1515.

Emergency legislation. — For temporary repeal of section, see § 110(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see His-

torical and Statutory Notes following § 22-1701.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-1702.

Editor's notes. — Former § 22-1515 had also been amended by D.C. Law 10-119, § 9(b).

Subchapter II. Legalization.

§ 22-1716. Statement of purpose.

It is the purpose of this subchapter to legalize lotteries, daily numbers games, bingo, raffles, and Monte Carlo night parties, which activities are to be conducted only by the District of Columbia and only those licensed by the District of Columbia and subject to the jurisdiction, authority, and control of the District of Columbia. These activities will provide revenue to the District of Columbia and will provide the citizens of the District of Columbia financial benefits.

(Mar. 10, 1981, D.C. Law 3-172, § 3, 27 DCR 4736; Apr. 11, 1987, D.C. Law 6-220, § 2(a)(1), 34 DCR 900.)

Prior Codifications. — 1981 Ed., § 22-1516.

Legislative history of Law 3-172. — For legislative history of D.C. Law 3-172, see Historical and Statutory Notes following § 22-1714.

Legislative history of Law 6-220. — Law 6-220, the "Monte Carlo Night Party Licensure Amendment Act of 1986," was introduced in

Council and assigned Bill No. 6-527, which referred to the Committee on Government Operations. The Bill was adopted on first and second readings on November 18, 1986 and December 16, 1986, respectively. Signed by the Mayor on January 8, 1987, it was assigned Act No. 6-276 and transmitted to both Houses of Congress for its review.

CASE NOTES

In general.

Statement on lottery ticket that “[a]ll tickets, transactions, drawings, players and prizes are subject” to rules and regulations of Lottery and Charitable Games Control Board did not reveal clear intention of parties to be bound by future changes in regulations. *Peterson v. District of Columbia Lottery & Charitable Games Control Bd.*, 673 A.2d 664, 1996 D.C. App. LEXIS 54 (1996).

D.C. Lottery and Charitable Games Control Board regulations in effect in 1986, discharging Board of all liability upon payment of prize to owner, defined as person whose name appeared on back of ticket, did not preclude lottery winner from assigning his future payments to third party in return for present-value lump sum; while such language might be read to express intent to bar assignments, it could also express no more than direction on how payment was to be made, conveying lesser intent that only single winner may claim prize, and thus, it was too ambiguous to overcome presumption favoring free assignment of contracts. D.C.

Mun.Reg. title 29, §§ 603-603.3; title 31, § 1136.1. *Peterson v. District of Columbia Lottery & Charitable Games Control Bd.*, 673 A.2d 664, 1996 D.C. App. LEXIS 54 (1996).

Anti-assignment regulation adopted by D.C. Lottery and Charitable Games Control Board in 1992, making unassignable the “rights of any person to a prize or portion of a prize,” did not preclude plaintiff, who won lottery in 1986, from assigning his future payments in 1993 in return for present-value lump sum; although “or portion of a prize” could be interpreted to include future payments on pre-1992 prizes, it could just as reasonably be interpreted to cover person who won lottery after effective date of rule but sought to assign remaining portion of prize years later, and there was no question that when plaintiff won his prize, he acquired right to assign his winnings in keeping with normal rule of free assignability of contracts. D.C. Mun.Reg. title 39, § 607.1. *Peterson v. District of Columbia Lottery & Charitable Games Control Bd.*, 673 A.2d 664, 1996 D.C. App. LEXIS 54 (1996).

§ 22-1717. Permissible gambling activities.

Nothing in subchapter I of this chapter shall be construed to prohibit the operation of or participation in lotteries and/or daily numbers games operated by and for the benefit of the District of Columbia by the Lottery and Charitable Games Control Board; bingo, raffles, and Monte Carlo night parties organized for educational and charitable purposes, regulated by the District of Columbia Lottery and Charitable Games Control Board.

(Mar. 10, 1981, D.C. Law 3-172, § 3, 27 DCR 4736; Apr. 11, 1987, D.C. Law 6-220, § 2(a)(2), 34 DCR 900.)

Section references. — This section is referred to in § 22-1718.

Prior Codifications. — 1981 Ed., § 22-1517.

Legislative history of Law 3-172. — For legislative history of D.C. Law 3-172, see His-

torical and Statutory Notes following § 22-1714.

Legislative history of Law 6-220. — For legislative history of D.C. Law 6-220, see Historical and Statutory Notes following § 22-1716.

§ 22-1718. Advertising and promotion; sale and possession of lottery and numbers tickets and slips.

(a) Nothing in subchapter I of this chapter shall be construed to prohibit the advertising and promotion of excepted permissible gambling activities pursuant to § 22-1717, hereof, including, but not limited to, the sale, by agents authorized by the District of Columbia, and the possession of tickets, certificates, or slips for lottery and daily numbers games excepted and permissible pursuant to § 22-1717, hereof, and the sale, lease, purchase, or possession of

tickets, slips, certificates, or cards for bingo, raffles, and Monte Carlo night parties, excepted and permissible pursuant to § 22-1717, hereof.

(b) Nothing in § 22-1701 shall prohibit advertising a lottery by the Maryland State Lottery so long as Maryland does not prohibit advertising or otherwise publishing an account of a lottery by the District of Columbia.

(Mar. 10, 1981, D.C. Law 3-172, § 3, 27 DCR 4736; Apr. 11, 1987, D.C. Law 6-220, § 2(a)(3), 34 DCR 900; June 3, 1997, D.C. Law 11-272, § 2(a), 43 DCR 4672; May 22, 1998, D.C. Law 12-114, § 2, 45 DCR 486.)

Prior Codifications. — 1981 Ed., § 22-1518.

Legislative history of Law 3-172. — For legislative history of D.C. Law 3-172, see Historical and Statutory Notes following § 22-1714.

Legislative history of Law 6-220. — For legislative history of D.C. Law 6-220, see Historical and Statutory Notes following § 22-1716.

Legislative history of Law 11-272. — Law 11-272, the "Lottery Games Amendment Act of 1996," was introduced in Council and assigned Bill No. 11-698. The Bill was adopted on first and second readings on July 3, 1996, and July 17, 1996, respectively. Signed by the Mayor on

August 5, 1996, it was assigned Act No. 11-371 and transmitted to both Houses of Congress for its review. D.C. Law 11-272 became effective on June 3, 1997.

Legislative history of Law 12-114. — Law 12-114, the "Criminal Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-406, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 4, 1997, and December 4, 1997, respectively. Signed by the Mayor on December 22, 1997, it was assigned Act No. 12-233 and transmitted to both Houses of Congress for its review. D.C. Law 12-114 became effective on May 22, 1998.

CHAPTER 18. GENERAL OFFENSES.

Sec.	Sec.
22-1801. "Writing" and "paper" defined.	22-1805a. Conspiracy to commit crime.
22-1802. "Anything of value" defined.	22-1806. Accessories after the fact.
22-1803. Attempts to commit crime.	22-1807. Punishment for offenses not covered by provisions of Code.
22-1804. Second conviction.	22-1808. Offenses committed beyond District.
22-1804a. Penalty for felony after at least 2 prior felony convictions.	22-1809. Prosecutions.
22-1805. Persons advising, inciting, or conniving at criminal offense to be charged as principals.	22-1810. Threatening to kidnap or injure a person or damage his property.

§ 22-1801. "Writing" and "paper" defined.

Except where otherwise provided for where such a construction would be unreasonable, the words "writing" and "paper," wherever mentioned in this title, are to be taken to include instruments wholly in writing or wholly printed, or partly printed and partly in writing.

(Mar. 3, 1901, 31 Stat. 1336, ch. 854, § 904; Dec. 1, 1982, D.C. Law 4-164, § 601(b), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-101. 1973 Ed., § 22-101.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

CASE NOTES

In general.

Defendants, who were arrested after refusing to move out of corridor in House wing of Capitol building when ordered to do so by Capitol police, were entitled to know with certainty offense with which they were charged and possible penalty threatened and were entitled to definite reference to the law which they had allegedly violated, and thus where, notwithstanding request of defense, no one had given

citation of statute under which prosecution was being had, other than statement of prosecutor that two sections were involved, convictions under section carrying lighter sentence, as requested by prosecutor, were required to be set aside. D.C. Code §§ 22-101 et seq., 22-109, 22-1107, 22-1121, 22-3102, 22-3111; 40 U.S.C. § 101. *Smith v. District of Columbia*, 387 F.2d 233, 1967 U.S. App. LEXIS 5491 (C.A.D.C. 1967).

§ 22-1802. "Anything of value" defined.

The words "anything of value," wherever they occur in this title and the District of Columbia Theft and White Collar Crimes Act of 1982, shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value.

(Mar. 3, 1901, 31 Stat. 1336, ch. 854, § 905; Dec. 1, 1982, D.C. Law 4-164, § 601(c), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-102. 1973 Ed., § 22-102.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-1801.

References in text. — The “District of Columbia Theft and White Collar Crimes Act of 1982”, referred to in this section, is D.C. Law 4-164, codified primarily at § 22-3201 et seq.

CASE NOTES

Representations of value.

In trials where illegal taking or possession of piece of property is an issue, to establish “value,” the Government need not prove item’s specific monetary worth; rather, it only need show that item had some value—any value at all, although less than the smallest coin. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Even if checking account lacked sufficient funds to cover check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, check would still have had “value,” within meaning of statute making it crime to take property without right; defendant could have endorsed check and passed it to third party in exchange for cash, goods, or services, or, if check was dishonored, defendant could have sued drawer for the face amount of the check. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Fact that defendant never received cash equivalent for check, which was given to defen-

dant after defendant pretended he owned parked vehicle damaged by drawer in accident, because of stop-payment order did not affect conclusion that check had “value,” within meaning of statute making it crime to take property without right; value of property is determined at time crime through which it is acquired occurs, and defendant committed crime of taking property without right at instant he tricked drawer into delivering check to him. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Direct evidence showing balance in checking account at time check was drawn was not required to establish that check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, had “value,” within meaning of statute making it crime to take property without right; when defendant received check, its useful functional purpose was to enable defendant to acquire amount for which it was drawn. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

§ 22-1803. Attempts to commit crime.

Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not exceeding \$1,000 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not exceeding \$5,000 or by imprisonment for not more than 5 years, or both.

(Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 906; Aug. 20, 1994, D.C. Law 10-151, § 105(a), 41 DCR 2608.)

Prior Codifications. — 1981 Ed., § 22-103. 1973 Ed., § 22-103.

Emergency legislation. — For temporary amendment of section, see § 105(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The

Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

References in text. — “Chapter 19 of an Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321),” referred to in this section, consists of §§ 798 to 910 of the act of March 3, 1901, the

provisions of which are codified throughout this title as well as in §§ 36-101, 36-102, 36-151 to 36-157, 50-2203.01 to 50-2203.03. For the com-

plete codification of Chapter 19 of the March 3, 1901 act, please consult the Disposition Tables appearing the Tables Volume.

CASE NOTES

ANALYSIS

Actions and proceedings generally.

Admissibility of evidence.

Burglary, generally.

Completion of crime.

Construction and application.

Double jeopardy.

Elements generally.

False pretenses, generally.

Impossibility.

Indictment and information.

Instructions.

Intent.

Joinder and severance.

Larceny and related offenses, generally.

Lesser included offenses.

Merger of offenses.

Offenses attempted generally.

Punishment.

Review.

Right to jury trial.

Search and seizure.

Sex offenses, generally.

Sufficiency of evidence.

—Burglary.

—Child cruelty, sufficiency of evidence.

—Dangerous weapon, sufficiency of evidence.

—False pretenses, sufficiency of evidence.

—Larceny and related offenses, sufficiency of evidence.

—Sex offenses, sufficiency of evidence.

Threats.

Verdicts.

Witnesses.

Actions and proceedings generally.

Federal murder-for-hire statute did not vest district court with jurisdiction over defendants charged jointly under local District of Columbia criminal code provisions with conspiracy and attempted first-degree murder, where defendants' alleged actions concerned a single, isolated criminal venture, involving a \$200 contract to kill which had no connection with organized crime activity. 18 U.S.C. § 1952A; D.C. Code 1981, §§ 22-103, 22-2401. *United States v. Dickson*, 645 F. Supp. 727, 1986 U.S. Dist. LEXIS 19445 (1986), reversed by 816 F.2d 751, 259 U.S. App. D.C. 447, 1987 U.S. App. LEXIS 5054 (1987).

Right to a jury trial for an attempted offense is determined by the maximum imprisonment which could actually be imposed for the completed offense. *United States v. Evans*, 112 WLR 1721 (Super. Ct. 1984).

Admissibility of evidence.

Testimony as to ownership of damaged vend-

ing machine, purportedly based on witness' own knowledge, was not hearsay and was sufficient to prove ownership as alleged in information charging malicious injuring of property and attempted petit larceny. D.C. Code §§ 22-103, 22-403, 22-2202. *Killens v. United States*, 263 A.2d 44, 1970 D.C. App. LEXIS 236 (App. 1970).

Burglary, generally.

Damage to property is not element of burglary or attempted burglary. D.C. Code 1981, §§ 22-103, 22-1801(b). *Freeman v. United States*, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

Completion of crime.

While the overt act necessary for proof of an attempted offense does not require that the defendant have begun the last act sufficient to produce the intended crime, the act must come within dangerous proximity of completion. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Every completed criminal offense necessarily includes an attempt to commit that offense. *Lee v. United States*, 831 A.2d 378, 2003 D.C. App. LEXIS 547 (2003).

Every completed criminal offense necessarily includes an attempt to commit that offense. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

A person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

If an information admits of conviction of attempt to commit a felony, an accused may be found guilty of the attempt, though the evidence shows a completed offense. D.C. Code 1961, § 22-103. *United States v. Fleming*, 215 A.2d 839, 1966 D.C. App. LEXIS 127 (App. 1966).

The government's proof at trial that a completed act of sodomy has taken place will not entitle defendant to an acquittal on the only charge against him, an attempt to commit sodomy. D.C. Code 1961, §§ 22-103, 22-3502. *United States v. Fleming*, 215 A.2d 839, 1966 D.C. App. LEXIS 127 (App. 1966).

Construction and application.

Chapter 19 referred to in this section—the "general attempts" statute—was actually Chapter 19 of the 1901 District of Columbia Code, which chapter is only a portion of the present

Title 22 (and is a portion that does not and did not include § 22-3427 or any of its predecessors). Thus, this section does not apply to § 22-3427, and the crime of “attempted breaking and entering-vending machine” therefore does not exist in the District of Columbia. *United States v. Hughes*, 115 WLR 1077 (Super. Ct. 1987).

The attempts statute applies to offenses created after enactment of the attempts statute. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Double jeopardy.

Under principle of collateral estoppel, defendant’s acquittal of second-degree murder as lesser included offense of felony-murder barred second prosecution for second-degree murder as lesser included offense of premeditated murder, at least where second trial would involve same issues, and no more, that were presented to jury in first trial, that is, that acts of defendant caused death of victim and that defendant acted with malice and not in heat of passion. D.C. Code 1973, §§ 22-103, 22-2401, 22-2403, 22-3202; U.S. Const. Amend. 5. *Turner v. United States*, 459 A.2d 1054, 1983 D.C. App. LEXIS 355 (1983).

Elements generally.

To prove an attempt to commit an offense, government is required to prove that defendant intended to commit a particular crime, did some act towards its commission, but failed to consummate the crime. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Whether the line between preparation and an attempt has been crossed is a question of degree which can only be resolved on the basis of the facts in each individual case. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

Mere preparation is not an attempt, but preparation may progress to the point of attempt. *Frye v. United States*, 926 A.2d 1085, 2005 D.C. App. LEXIS 532 (2005).

To prove attempt, the government must show the intent to commit a crime and the doing of some act toward its commission that goes beyond mere preparation. *Stroman v. United States*, 878 A.2d 1241, 2005 D.C. App. LEXIS 376 (2005).

To prove an “attempt,” the government is not required to prove more than an overt act done with the intent to commit a crime, which, except for some interference, would have resulted in the commission of the crime. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Specific intent to injure the child was not element of attempted second-degree cruelty to child; the government needed to prove that the defendant intended to commit the acts which

resulted in the injury or the grave risk of injury to the child. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

To prove an attempt, the government is not required to prove more than an overt act done with the intent to commit a crime, which, except for some interference, would have resulted in the commission of the crime. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Failure is not an essential element of criminal attempt. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

To show attempt, Government need only prove overt act done with intent to commit crime and which, except for some interference, would have resulted in commission of crime. *Wormsley v. United States*, 526 A.2d 1373, 1987 D.C. App. LEXIS 369 (1987).

Elements of an attempt to commit a crime are an intent to commit it, the doing of some act towards its commission, and the failure to consummate its commission. D.C. Code, 1967, § 22-103. *Marganella v. United States*, 268 A.2d 803, 1970 D.C. App. LEXIS 331 (App. 1970).

Mere preparation is not an attempt, but preparation may progress to the point of attempt, and question whether it has is one of degree which can be resolved only on basis of facts of each case. D.C. Code 1951, § 22-103. *Sellers v. U.S.*, 131 A.2d 300, 1957 D.C. App. LEXIS 219 (Cr.App. 1957).

False pretenses, generally.

To prove crime of attempted false pretenses, government must prove, as in any other attempt case, that defendant had intent to commit the crime and that he performed some act towards its commission. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

In prosecution for attempted false pretenses, government was not required to prove crime of false pretenses, but, rather, an intent to commit it, doing of some act toward its commission, and failure to consummate its commission. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Whether service station attendant relied on defendant’s representations to his detriment when defendant attempted to pay for gasoline with stolen credit card was immaterial in context of defendant’s attempted false pretense charge. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Where a false pretense charge stems from unauthorized use of a credit card, it is not necessarily significant that the card was presented immediately after rather than just prior to receipt of goods in what is virtually a simul-

taneous change. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

An initial implicit false promise of lawful payment coupled with presentation of stolen credit card, which occurred in a single and continuous transaction, can support a conviction for false pretenses or attempted false pretenses provided that together they induce or would have induced victim to surrender title to the property. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Impossibility.

Factual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense to a crime. In *re Doe*, 855 A.2d 1100, 2004 D.C. App. LEXIS 408 (2004).

Legal impossibility as a defense to an attempt offense arises only when the defendant's objective is to do something that is not a crime. In *re Doe*, 855 A.2d 1100, 2004 D.C. App. LEXIS 408 (2004).

Indictment and information.

Under indictment for sodomy, defendants may be convicted of attempt to commit sodomy. D.C. Code 1951, §§ 22-103, 22-3502. *U.S. v. Kelly*, 119 F.Supp. 217, 1954 U.S. Dist. LEXIS 4367 (D.D.C.1954).

Instructions.

Giving of instruction, in prosecution for attempted procuring involving contents of conversation that conceded took place between defendant and officer at street corner, that if witness testified falsely concerning any material fact, about which witness could not be reasonably mistaken, all testimony of such witness could be disregarded, except such parts as were corroborated by other testimony, was not plain error requiring reversal in absence of objection. D.C. Code §§ 22-103, 22-2707; D.C. Code General Sessions Court Rules, Criminal Division rules 30, 52(b). *Smith v. United States*, 269 A.2d 446, 1970 D.C. App. LEXIS 346 (App. 1970).

Instruction, in prosecution for attempted procuring, that jury must decide whether defendant had intent to procure female for immoral purposes, was proper when placed in context with entire charge as obviously referring to illegal sexual immoralities. D.C. Code §§ 22-103, 22-2707. *Langley v. United States*, 264 A.2d 503, 1970 D.C. App. LEXIS 276 (App. 1970).

Intent.

Specific intent instructions sometimes contain language requiring "purpose to disobey or disregard the law," but this language is based

on cases where intent to break law is critical; generally in cases of attempt or assault with intent to commit substantive crime, required specific intent is simply "an intent to commit a specific crime." *United States v. Bryant*, 420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

Sufficient evidence supported convictions of owner of gas station/mini-mart and his clerk for attempted possession of drug paraphernalia with intent to sell; undercover officer asked clerk for "an ink pen," clerk gave him a glass ink pen and a metal scouring pad, even though he did not request the latter, it could be inferred that despite fact that clerk had recently arrived in the United States, someone at store trained her to give a buyer both a glass ink pen and a copper scouring pad when buyer asked for an ink pen, and that she knew or reasonably should have known that the purchase was for the purpose of taking illegal drugs, and owner ordered, stored, and specifically intended to sell items that obviously could be used with illegal drugs. *Surur Fatumabahirtu v. United States*, 26 A.3d 322, 2011 D.C. App. LEXIS 497 (2011), writ of certiorari denied by 132 S. Ct. 1944, 182 L. Ed. 2d 799, 2012 U.S. LEXIS 2770, 80 U.S.L.W. 3581 (U.S. 2012), writ of certiorari denied by 132 S. Ct. 2706, 183 L. Ed. 2d 62, 2012 U.S. LEXIS 3976, 80 U.S.L.W. 3657 (U.S. 2012).

The only intent required to commit the crime of attempt is an intent to commit the offense allegedly attempted. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

When an attempt is proven by evidence that the defendant committed the crime alleged to have been attempted, the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

Joinder and severance.

Refusal to sever counts, in prosecution for second-degree burglary, grand larceny, and attempted burglary, was not an abuse of discretion where, inter alia, if there had been separate trials on each of the counts there would have been a substantial overlap of the evidence. D.C. Code §§ 22-103, 22-1801(b), 22-2201; D.C. Code SCR, Criminal Rules 8, 8(a), 14. *Coleman v. United States*, 298 A.2d 40, 1972 D.C. App. LEXIS 303 (1972), writ of certiorari denied by 413 U.S. 921, 93 S. Ct. 3070, 37 L. Ed. 2d 1043, 1973 U.S. LEXIS 1990 (1973).

Joinder of counts concerning second-degree burglary, grand larceny, and attempted burglary, was not improper. D.C. Code §§ 22-103, 22-1801(b), 22-2201; D.C. Code SCR, Criminal Rule 8(a). *Coleman v. United States*, 298 A.2d 40, 1972 D.C. App. LEXIS 303 (1972), writ of

certiorari denied by 413 U.S. 921, 93 S. Ct. 3070, 37 L. Ed. 2d 1043, 1973 U.S. LEXIS 1990 (1973).

Larceny and related offenses, generally.

Defendant, who received a television set, which in fact had not been stolen, after having been advised that the set was a stolen set, did not commit crime of attempted receiving stolen property, since an unsuccessful attempt to do that which is not a crime cannot be held to be an attempt to commit crime specified. D.C. Code §§ 22-103, 22-2205. *United States v. Hair*, 356 F. Supp. 339, 1973 U.S. Dist. LEXIS 14285 (1973).

It was not necessary, in order to convict of attempted taking of property without right, that Government show that defendant carried merchandise past cashier, or that she attempted to leave store with it. D.C. Code 1981, §§ 22-103, 22-3816. *Wormsley v. United States*, 526 A.2d 1373, 1987 D.C. App. LEXIS 369 (1987).

Any failure of prosecution to show who owned automobile involved in prosecution for attempted unauthorized use of motor vehicle did not preclude conviction where it was established that ownership was in some third party. D.C. Code 1961, §§ 22-103, 22-2204. *Dickson v. United States*, 226 A.2d 364, 1967 D.C. App. LEXIS 128 (App. 1967).

Attempted unauthorized use of a motor vehicle is a crime under statutes prohibiting the taking, use, operation, or removal of a vehicle without owner's consent and calling for punishment of whoever shall attempt to commit any crime, which attempt is not otherwise punishable. D.C. Code 1961, §§ 22-103, 22-2204. *Greenwood v. United States*, 225 A.2d 878, 1967 D.C. App. LEXIS 123 (App. 1967).

Lapse of five days between theft of automobile and arrest of defendant operating it did not insulate him from criminal liability for attempted unauthorized use of motor vehicle. D.C. Code 1961, §§ 22-103, 22-2204. *Greenwood v. United States*, 225 A.2d 878, 1967 D.C. App. LEXIS 123 (App. 1967).

The general attempt statute covers attempted petit larceny not expressly covered by any other statute. D.C. Code 1961, §§ 22-103, 22-2202. *United States v. Pearson*, 202 A.2d 392, 1964 D.C. App. LEXIS 254 (App. 1964).

Lesser included offenses.

Attempted petit larceny is not a lesser included offense under petit larceny statute. D.C. Code 1961, §§ 22-103, 22-2202. *United States v. Pearson*, 202 A.2d 392, 1964 D.C. App. LEXIS 254 (App. 1964).

Merger of offenses.

Defendant's conviction of uttering did not merge with his conviction of attempted second-degree theft, where each offense required proof

of element not required by the other; uttering required proof that defendant "issue[d], authenticate[d], transfer[red], publish[ed], s[old], deliver[ed], transmit[ted], present[ed], display[ed], use[d], or certifi[ed] [a forged written instrument,]" while attempted second-degree theft required proof that defendant acted with intent "[t]o deprive [victim] of a right to the property or a benefit of the property" or "[t]o appropriate the property to his own use or to the use of a third person." *Boyd v. United States*, 870 A.2d 70, 2005 D.C. App. LEXIS 40 (2005).

Since offense of attempted false pretenses is identical to offense of unemployment compensation fraud, the doctrine of merger was applicable on conviction of false pretenses and unemployment compensation fraud and, hence, conviction of unemployment compensation fraud was required to be vacated. D.C. Code §§ 22-103, 22-1301(a), 46-319(a). *Lewis v. United States*, 389 A.2d 306, 1978 D.C. App. LEXIS 486 (1978).

Offenses attempted generally.

Defendant who arranged performances in tumbling, body-supporting and pyramids and included two children under 14 years of age was not guilty of attempting to use children under 14 years of age in acrobatics, in absence of evidence that there were any acts of recklessness which might endanger life or limb. D.C. Code 1961, §§ 22-103, 22-901. *Nesbitt v. United States*, 205 A.2d 595, 1964 D.C. App. LEXIS 170 (App. 1964).

Defendant accused of attempting without justifiable and excusable cause to impede, interfere with, or resist police officer performing official duties should have been charged under statute providing punishment for unjustifiably impeding police officer performing official duties, not statute providing punishment for attempt to commit any crime. D.C. Code 1961, §§ 22-103, 22-505. *United States v. Caviness*, 192 A.2d 288, 1963 D.C. App. LEXIS 251 (App. 1963).

Punishment.

Statutory provision for two-year mandatory minimum sentence for burglary did not operate to prevent prosecution and sentencing for lesser misdemeanors of attempted burglary in second degree, destroying private property, and petit larceny, for which offenses defendant was actually sentenced for one-half year more than two-year felony minimum. D.C. Code §§ 22-103, 22-403, 22-1801(b), 22-2202; D.C. Code General Sessions Court Rules, Criminal Division rule 7(e). *King v. United States*, 271 A.2d 556, 1970 D.C. App. LEXIS 365 (App. 1970).

The fact that the fine was greater under general attempt statute than for completed offense of petit larceny did not mean that

Congress intended to exclude attempted petit larceny from scope of the general attempt statute. D.C. Code 1961, §§ 22-103, 22-2202. *United States v. Pearson*, 202 A.2d 392, 1964 D.C. App. LEXIS 254 (App. 1964).

The maximum penalty for attempted petit larceny can be no greater than the maximum penalty for the completed offense. D.C. Code 1961, §§ 22-103, 22-2202. *United States v. Pearson*, 202 A.2d 392, 1964 D.C. App. LEXIS 254 (App. 1964).

The general attempt statute is not invalid as applied to attempted petit larceny on theory that it authorizes greater penalty than authorized for completed offense. D.C. Code 1961, §§ 22-103, 22-2202. *United States v. Pearson*, 202 A.2d 392, 1964 D.C. App. LEXIS 254 (App. 1964).

The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Review.

Although indictment contained miscitation of penal code provision, facts stated in fifth count of indictment, coupled with reference to penal code provision citing unlawful possession and distribution of controlled substance gave defendants clear notice that they were being charged with attempted distribution of controlled substance rather than general criminal attempt provision permitting maximum imprisonment of only one year, and thus, absent objection to indictment by defendants at trial, defendants were deemed to have waived miscitation argument on appeal. D.C. Code 1981, §§ 22-103, 33-541(a)(1), 33-549; Criminal Rule 7(c). *Belton v. United States*, 581 A.2d 1205, 1990 D.C. App. LEXIS 220 (1990).

If any defendant had thought that miscitation in indictment referred to general criminal attempt provision permitting maximum imprisonment of one year rather than more specific attempt in conspiracy to distribute controlled substance provision permitting longer prison sentence or had any other doubt about charge and related punishment, defendant could have filed motion for bill of particulars, and defendant's failure to do so constituted waiver of error with respect to miscitation. D.C. Code 1981, §§ 22-103, 33-541(a)(1), 33-549; Criminal Rule 7(c). *Belton v. United States*, 581 A.2d 1205, 1990 D.C. App. LEXIS 220 (1990).

Where, absent improper convictions for forgery and uttering, sentencing judge might have imposed lesser period of probation, reviewing court vacated convictions of forgery and uttering, affirmed conviction of attempted false pretenses and remanded case for resentencing. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-

1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

Where jury had convicted defendant of more serious crime of attempted burglary, any error in instruction on lesser included offense of unlawful entry was not prejudicial. D.C. Code §§ 22-103, 22-1801. *Hebble v. United States*, 257 A.2d 483, 1969 D.C. App. LEXIS 332 (App. 1969).

Defendant could not be heard to complain on appeal of conviction for attempted unauthorized use of motor vehicle in view of proof of completion of offense of unauthorized use of the vehicle. D.C. Code 1961, §§ 22-103, 22-2204. *Greenwood v. United States*, 225 A.2d 878, 1967 D.C. App. LEXIS 123 (App. 1967).

Right to jury trial.

Defendant's statutory right to trial by jury was not violated by prosecutor's decision to prosecute for attempted threats, rather than for threats, even though defendant would have enjoyed right to be tried by jury had he been prosecuted for threats; existence of right to jury trial depended on maximum punishment for offense that was charged, not on maximum punishment for offense that could have been charged but was not. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Search and seizure.

Even assuming a reasonable expectation of privacy by shopper as to a "live" merchandise tag in her possession belonging to the store and still attached to merchandise after shopper passed cash register, the search in question by a sensormatic device, which reacts to live tags, was so limited as to be reasonable and not violative of the Fourth Amendment; the unusually limited nature of the intrusion, weighed against the nature of the threat and the failure experienced in combating it by use of the usual security or investigative countermeasures, rendered the search reasonable. D.C. Code §§ 22-103, 22-2202, 23-581, 23-582; U.S. Const. Amend. 4. *Lucas v. United States*, 411 A.2d 360, 1980 D.C. App. LEXIS 224 (1980).

Where officer observed accused looking or searching behind desk in room of office building and observed him depart as soon as officer's presence became known and accused answered "Nothing" when officer addressed defendant outside building and asked him what he had been doing in the office, officer had probable cause to arrest accused and fruits of larcenies seized from accused's person incident to the arrest were admissible. D.C. Code §§ 22-103, 22-2201, 22-2202, 23-581(a)(1)(B). *Arrington v. United States*, 311 A.2d 838, 1973 D.C. App. LEXIS 389 (1973).

Sex offenses, generally.

Given the nature of the common law offense of solicitation, the "sexual proposal" clause of

statute making it unlawful for any person to make lewd, obscene or indecent sexual proposal, should be limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime. *Pinckney v. United States*, 906 A.2d 301, 2006 D.C. App. LEXIS 496 (2006).

The general attempt statute permits one to be convicted of an attempt to commit sodomy. D.C. Code 1961, §§ 22-103, 22-3502. *United States v. Fleming*, 215 A.2d 839, 1966 D.C. App. LEXIS 127 (App. 1966).

Where defendant, upon obtaining affirmative reply to his question whether police officers were looking for girls, inquired what type they wanted, priced the girls at \$10 each, and revealed, in answer to question put by one officer, that defendant's fee was \$2, fact that defendant's actions never progressed beyond stage of conversation and that no money was received was not fatal to a conviction for an attempt to receive money for arranging for a female to have sexual intercourse, and, had the money passed, the principal crime itself would have been consummated. D.C. Code 1951, §§ 22-103, 22-2707. *Sellers v. U.S.*, 131 A.2d 300, 1957 D.C. App. LEXIS 219 (Cr.App. 1957).

Sufficiency of evidence.

— Burglary.

Evidence that defendant had been seen trying to break into a parking meter was insufficient to support conviction for attempted breaking and entering of a parking meter, absent evidence that defendant lacked authority to open the meter. D.C. Code 1981, §§ 22-103, 22-3427. *Bolan v. United States*, 587 A.2d 458, 1991 D.C. App. LEXIS 50 (1991).

In prosecution for attempted second-degree burglary, evidence that defendants for over an hour cased a store which carried valuable stereo components, attempted to loosen security grating, cut telephone cables behind building, broke window at front of store, and walked quickly away when alarm began to sound was sufficient to show both that defendants were not the owners of the store and did not have right to break and enter in the middle of the night, and to show intent to steal. D.C. Code 1981, §§ 22-103, 22-1801(b). *Douglas v. United States*, 570 A.2d 772, 1990 D.C. App. LEXIS 34 (1990).

Testimony of police officer and witness that they saw and heard defendant in the act of trying to break into house was sufficient to sustain conviction for attempted second-degree burglary. D.C. Code 1981, §§ 22-103, 22-1801(b). *Freeman v. United States*, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

Evidence consisting of defendant's confessions and corroborative evidence was sufficient to sustain convictions of second-degree bur-

glary, attempted second-degree burglary, and two counts of petit larceny. D.C. Code 1973, §§ 22-103, 22-1801(b), 22-2202; U.S. Const. Amend. 4. *Wilkerson v. United States*, 432 A.2d 730, 1981 D.C. App. LEXIS 316 (1981), writ of certiorari denied by 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628, 1981 U.S. LEXIS 4758, 50 U.S.L.W. 3447 (1981).

Evidence that defendant was standing in front of a broken window of store that was being burglarized by two other men, one of whom had a casual acquaintance with defendant, while perhaps raising a possibility or even strong suspicion of participation in criminal activity, was not sufficient to find defendant guilty beyond a reasonable doubt of attempted burglary in the second degree and of attempted petit larceny. D.C. Code §§ 22-103, 22-1801(b), 22-2202. *Perry v. United States*, 276 A.2d 719, 1971 D.C. App. LEXIS 312 (1971).

Evidence that defendant and his companion were the only people in hall near apartment when witness alighted from elevator after hearing suspicious noises, that door to witness' apartment had large hole in it and that defendant's companion dropped screwdriver while being followed was sufficient to support conclusion of guilt beyond reasonable doubt of attempted burglary II and destruction of property. D.C. Code §§ 22-103, 22-403, 22-1801(b). *Hopkins v. United States*, 274 A.2d 418, 1971 D.C. App. LEXIS 281 (1971).

Evidence including testimony identifying defendant as one of two men attempting to pry open window with crowbar was sufficient to sustain convictions for attempted second-degree burglary, destroying property and attempted petit larceny. D.C. Code §§ 22-103, 22-403, 22-1801(b). *Manning v. United States*, 270 A.2d 504, 1970 D.C. App. LEXIS 357 (App. 1970).

Evidence in prosecution for attempted burglary was sufficient to permit inference of intent to commit crime by defendant who was found in warehouse amongst scattered papers, opened desk drawers and office machinery which had been moved into hall. D.C. Code §§ 22-103, 22-1801. *Hebble v. United States*, 257 A.2d 483, 1969 D.C. App. LEXIS 332 (App. 1969).

Evidence that defendant's fingerprints were on top of paper bag which contained burglary tools and which was found beside broken skylight over store, that area was generally inaccessible to public, and that bag was dry although roof was damp warranted conviction for attempted store breaking. D.C. Code § 22-103. *Patten v. U.S.*, 248 A.2d 182, 1968 D.C. App. LEXIS 223 (App. 1968).

Evidence that tenant of apartment heard what sounded like someone attempting to enter vacant apartment and that defendant and companion were seen leaving building and fled

when pursued by officer was sufficient to sustain conviction of attempted housebreaking. D.C. Code §§ 22-103, 22-1801. *Adams v. United States*, 245 A.2d 640, 1968 D.C. App. LEXIS 205 (App. 1968).

Evidence that fingerprints of defendant appeared on glass surface, which had once been outside surface of drugstore entrance was insufficient to sustain conviction of attempted housebreaking, destroying property, and petit larceny. D.C. Code §§ 22-103, 22-403, 22-2202. *Townsley v. United States*, 236 A.2d 63, 1967 D.C. App. LEXIS 212 (App. 1967).

Evidence of defendants' physical and chronological proximity to scene of housebreaking, and their leaving at a trot, was insufficient to sustain conviction for attempted housebreaking and petit larceny. D.C. Code 1961, §§ 22-103, 22-2202. *Davis v. United States*, 230 A.2d 485, 1967 D.C. App. LEXIS 168 (App. 1967).

Cigarettes found in defendants' possession, with same "wholesale numbers" as cigarettes left in store, but not otherwise identified as having come from store, had little, if any, probative value. D.C. Code 1961, § 22-103. *Davis v. United States*, 230 A.2d 485, 1967 D.C. App. LEXIS 168 (App. 1967).

Evidence was sufficient to sustain conviction for attempted housebreaking. D.C. Code 1961, §§ 22-103, 22-1801. *Hart v. United States*, 187 A.2d 329, 1963 D.C. App. LEXIS 175 (App. 1963).

— Child cruelty, sufficiency of evidence.

Proof of second-degree cruelty to children was sufficient to convict defendant of attempted second-degree cruelty to children. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

Evidence that defendant tossed young child in the air while he was both intoxicated and in a heated argument with the child's mother would have supported a conviction for second-degree cruelty to child and, therefore, supported conviction for attempted second-degree cruelty to child. *Smith v. United States*, 813 A.2d 216, 2002 D.C. App. LEXIS 738 (2002).

— Dangerous weapon, sufficiency of evidence.

Evidence in prosecution for attempted carrying of dangerous or deadly weapon supported finding that defendant carried concealed knife for use as "dangerous weapon"; defendant was attempting to enter government building with knife, explanation he gave for his presence was highly dubious, knife was nearly nine inches long when opened, it could not be described as "friendly-looking instrument," and defendant offered no innocent explanation regarding reason he was carrying it. *Lewis v. United States*, 767 A.2d 219, 2001 D.C. App. LEXIS 27 (2001).

— False pretenses, sufficiency of evidence.

In prosecution for false pretenses and receiv-

ing stolen property arising from defendant's attempted use of stolen credit card, there was sufficient proof to permit jury to infer defendant's guilty knowledge that the card was stolen as well as his fraudulent intent to use the card. D.C. Code 1981, §§ 22-103, 22-1301, 22-2205. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Evidence permitted jury to find that defendant by presenting duplicate public assistance check for payment impliedly represented its validity and his ability to assign right to present it for payment and impliedly represented that he was entitled to receive proceeds and that, because he had already entered into a reimbursement agreement and had already cashed original check, such representations were false. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

Evidence sustained conviction for attempted false pretenses involving misuse of a credit card. D.C. Code §§ 22-103, 22-1301. *Marganella v. United States*, 268 A.2d 803, 1970 D.C. App. LEXIS 331 (App. 1970).

Necessity of producing motel desk clerk, in prosecution for attempted false pretenses involving misuse of credit card in connection with motel registration was obviated by introduction of motel's records. D.C. Code, 1967, §§ 22-103, 22-1301. *Marganella v. United States*, 268 A.2d 803, 1970 D.C. App. LEXIS 331 (App. 1970).

In prosecution for attempting by false pretenses to obtain money from an insurance company on a fraudulent claim for stolen furs evidence of defendants' guilt was sufficient for the jury. D.C. Code 1951, §§ 11-776(b), 22-103, 22-1301. *Cooper v. U.S.*, 123 A.2d 918, 1956 D.C. App. LEXIS 207 (Cr.App. 1956).

— Larceny and related offenses, sufficiency of evidence.

Defendant's apparent dissemblance in folding blue dress and concealing it inside her sweater, as well as defendant's change in story about what she had done with dress was sufficient for court to have found, beyond reasonable doubt, that defendant attempted to take dress and carry it away from store, for purpose of supporting conviction of attempted taking of property without right. D.C. Code 1981, §§ 22-103, 22-3816. *Wormsley v. United States*, 526 A.2d 1373, 1987 D.C. App. LEXIS 369 (1987).

In prosecution for attempted burglary in the second degree and attempted petit larceny, evidence, both direct and circumstantial, was sufficient to sustain convictions. D.C. Code 1981, §§ 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

Where the Government, in prosecution for attempted petit larceny, alleged the complainant's corporate status in the information and

offered evidence that the complainant was licensed to do business in the District of Columbia, and where such facts were also of general knowledge, the evidence adduced was sufficient to establish that the complainant had a greater possessory interest in its merchandise than did the defendant, and as the Government thus put some evidence of complainant's corporate status in the record, it met its burden of proving the complainant's possession as an element of the offense. D.C. Code §§ 22-103, 22-2202. *Moss v. United States*, 368 A.2d 1131, 1977 D.C. App. LEXIS 416 (1977).

Jury finding in trial for attempted unauthorized use of a vehicle that automobile left by owner in parking garage and the automobile driven onto parking lot by defendant were the same automobile was sufficiently supported by the evidence. D.C. Code §§ 22-103, 22-2204. *Wesley v. United States*, 233 A.2d 514, 1967 D.C. App. LEXIS 194 (App. 1967).

Evidence supported conviction for attempted unauthorized use of automobile. D.C. Code 1961, §§ 22-103, 22-2204. *Dickson v. United States*, 226 A.2d 364, 1967 D.C. App. LEXIS 128 (App. 1967).

Evidence supported conviction for attempted unauthorized use of motor vehicle. D.C. Code 1961, §§ 22-103, 22-2204. *Greenwood v. United States*, 225 A.2d 878, 1967 D.C. App. LEXIS 123 (App. 1967).

— Sex offenses, sufficiency of evidence.

In prosecution for sodomy, evidence justified conviction of attempted sodomy, so as to require denial of defendants' motion for judgment of acquittal after conviction of crime charged. D.C. Code 1951, §§ 22-103, 22-3502. *U.S. v. Kelly*, 119 F.Supp. 217, 1954 U.S. Dist. LEXIS 4367 (D.D.C.1954).

In prosecution for attempted carnal knowledge of female child under 16 years of age, determination that charged offense had actually been committed was supported by numerous circumstantial details in addition to complainant's testimony, including cuts on complainant's foot and hand, disheveled appearance, prompt report to police, complainant's ability to point out light string in room where incident allegedly took place and discovery in that room of girdle which complainant had left behind after incident. D.C. Code §§ 22-103, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

Medical evidence of sexual intercourse was not required to sustain conviction of attempted carnal knowledge of female child under 16 years of age. D.C. Code §§ 22-103, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

In prosecution for attempted carnal knowledge of female child under 16 years of age, complainant's identification of defendants was

amply corroborated by testimony establishing that she had an adequate opportunity to observe her assailants. D.C. Code §§ 22-103, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

Evidence sustained convictions for attempted procuring. D.C. Code §§ 22-103, 22-2707. *Langle v. United States*, 264 A.2d 503, 1970 D.C. App. LEXIS 276 (App. 1970).

Evidence that defendant and complaining witness bargained until they had agreed upon exchange of money, although uncertain in amount, for services of prostitute, and that immediately thereafter defendant led complaining witness a considerable distance to hotel unknown to witness where prostitute was supposedly waiting was sufficient to sustain conviction for attempted procuring. D.C. Code §§ 22-103, 22-2707. *Walker v. United States*, 248 A.2d 187, 1968 D.C. App. LEXIS 226 (App. 1968).

Evidence sustained conviction for attempt to receive money for arranging for a female to have sexual intercourse. D.C. Code 1951, §§ 22-103, 22-2707. *Sellers v. U.S.*, 131 A.2d 300, 1957 D.C. App. LEXIS 219 (Cr.App. 1957).

Threats.

Attempted threats was criminal offense, even though threats were not crime at common law, and even though general attempts statute was enacted before statute proscribing threats. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Evidence supported conviction for attempted threats; two police officers testified that they heard and saw defendant threaten to kill witness as defendant walked past officers in courtroom. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Government was permitted to charge defendant with attempted threats even though it could prove completed offense. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

"Attempted threats" is a valid statutory offense; if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense. *Evans v. United States*, 779 A.2d 891, 2001 D.C. App. LEXIS 169 (2001).

Verdicts.

Conviction of second-degree burglary was permissible, even if inconsistent with verdict acquitting defendant on charge of destruction of property arising out of same incident. D.C. Code 1981, §§ 22-103, 22-403, 22-1801(b). *Freeman v. United States*, 495 A.2d 1183, 1985 D.C. App. LEXIS 442 (1985).

Trier of fact could have found defendant, who left apartment building carrying stolen goods which he later abandoned when he attempted

to flee, guilty of both attempted burglary and petit larceny charges on inference of guilt raised by defendant's unexplained possession of recently stolen property or could have had a reasonable doubt that defendant had necessary criminal intent upon entering apartment building to be convicted of attempted burglary, and thus verdicts of acquittal on attempted burglary charge and guilty on petit larceny charge were not necessarily irreconcilable. D.C. Code §§ 22-103, 22-1801(b), 22-2202. *Barnes v. United States*, 254 A.2d 724, 1969 D.C. App. LEXIS 258 (App. 1969).

Witnesses.

In prosecution for attempted burglary in the second degree and attempted petit larceny, prosecutor's impeachment of defendant with a prior conviction for larceny at the outset of defendant's cross-examination was proper. D.C. Code 1981, §§ 14-305, 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

In prosecution for attempted burglary in the second degree and attempted petit larceny, prosecutor's impeachment of defendant with a prior conviction of attempted petit larceny following several questions about the details of the offense was proper, in that the prosecutor's impeachment did not immediately follow defendant's general denial of the charged crime and there was no sequence of questioning concerning a key element of a charged offense intermingled with repeated impeachment by previous convictions of similar offenses. D.C. Code 1981, §§ 14-305, 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

In prosecution for attempted burglary in the second degree and attempted petit larceny, prosecutor's impeachment of defendant with a prior attempted robbery conviction following prosecutor's questioning defendant concerning defendant's alleged car breakdown, possession of pliers and wire cutters, and his discovery of a hole in the fence to the train yard in which the offenses occurred was proper. D.C. Code 1981, §§ 14-305, 22-103, 22-1801(b), 22-2202. *Baptist v. United States*, 466 A.2d 452, 1983 D.C. App. LEXIS 471 (1983).

Since store manager, the only witness to observe defendant's actions, previously gave an allegedly inconsistent account of the facts, and since his credibility was crucial to the issue of defendant's guilt of attempted petit larceny, defense counsel should have been allowed to cross-examine him concerning that prior account; furthermore, the trial court also erred in excluding defense testimony concerning the allegedly inconsistent prior account on the ground that the testimony concerned a collateral issue. D.C. Code §§ 22-103, 22-2202. *Moss v. United States*, 368 A.2d 1131, 1977 D.C. App. LEXIS 416 (1977).

Failure of prosecution to produce second officer who as a corroborating witness could only have testified to time and place of defendant's arrest for attempted procuring because he did not hear conversation between arresting officer and defendant was not error in view of prosecution's effort to secure a continuance because second officer was in another court and defendant's then counsel's willingness to proceed to trial in second officer's absence. D.C. Code 1961, §§ 22-103, 22-2707. *Blakney v. United States*, 225 A.2d 654, 1967 D.C. App. LEXIS 121 (App. 1967).

§ 22-1804. Second conviction.

(a) If any person: (1) is convicted of a criminal offense (other than a non-moving traffic offense) under a law applicable exclusively to the District of Columbia; and (2) was previously convicted of a criminal offense under any law of the United States or of a state or territory of the United States which offense, at the time of the conviction referred to in clause (1) of this subsection, is the same as, constitutes, or necessarily includes, the offense referred to in that clause, such person may be sentenced to pay a fine in an amount not more than one and one-half times the maximum fine prescribed for the conviction referred to in clause (1) of this subsection and sentenced to imprisonment for a term not more than one and one-half times the maximum term of imprisonment prescribed for that conviction. If such person was previously convicted more than once of an offense described in clause (2) of this subsection, such person may be sentenced to pay a fine in an amount not more than 3 times the maximum fine prescribed for the conviction referred to in clause (1) of this subsection and sentenced to imprisonment for a term not more than 3 times the maximum term of imprisonment prescribed for that conviction. No

conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section.

(b) This section shall not apply in the event of conflict with any other provision of law which provides an increased penalty for a specific offense by reason of a prior conviction of the same or any other offense.

(Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 907; July 29, 1970, 84 Stat. 598, Pub. L. 91-358, title II, § 201(a); May 21, 1994, D.C. Law 10-119, § 2(a), 41 DCR 1639.)

Cross references. — Proceedings to establish previous convictions, see § 23-111.

Prior Codifications. — 1981 Ed., § 22-104. 1973 Ed., § 22-104.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned

Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

CASE NOTES

ANALYSIS

Assistance of counsel.
Chemical dependents.
Construction with other statutes.
Double jeopardy.
Indictment and information.
Jurisdiction.
Review.
Right to trial by jury.
Validity.

Assistance of counsel.

Defense counsel’s alleged failure to raise issue of “double enhancement,” was not ineffective assistance, in prosecution for robbery of a senior citizen, given that defendant had five previous convictions for burglary. *Forté v. United States*, 856 A.2d 567, 2004 D.C. App. LEXIS 398 (2004), writ of certiorari denied by 543 U.S. 1174, 125 S. Ct. 1368, 161 L. Ed. 2d 155, 2005 U.S. LEXIS 1862, 73 U.S.L.W. 3496 (2005).

Chemical dependents.

Drug addict convicted of distributing heroin was not eligible for sentencing under addict exception to mandatory minimum sentencing provision, where defendant drug addict had prior conviction for distributing heroin, so statute excluded him from such consideration, even though government had not filed information alleging the prior conviction. *D.C. Code 1981, §§ 33-541(a)(1), (c)(1, 2). Finney v. United States*, 527 A.2d 733, 1987 D.C. App. LEXIS 380 (1987).

Fact that government did not file information setting forth defendant drug addict’s prior conviction was irrelevant to issue of whether prior conviction disqualified defendant from drug ad-

dict exception to mandatory minimum sentencing provision; enhanced penalty was not involved in sentencing determination, and government was thus not required to file information alleging prior conviction to disqualify defendant from drug addict sentencing exception. *D.C. Code 1981, § 33-541(c)(2). Finney v. United States*, 527 A.2d 733, 1987 D.C. App. LEXIS 380 (1987).

Court is not precluded from sentencing under drug addict exception to mandatory minimum sentencing provision by government’s failure to file information indicating defendant drug addict’s eligibility for such sentencing, provided that defendant proves his eligibility for such sentencing. *D.C. Code 1981, § 33-541(c)(2). Finney v. United States*, 527 A.2d 733, 1987 D.C. App. LEXIS 380 (1987).

If possible existence of conviction disqualifying drug addict defendant from drug addict exception to mandatory minimum sentencing provision is made known to sentencing judge from any source, judge cannot ignore possible existence of disqualifying conviction, but rather, must advise defendant that such information has come to court’s attention and give defendant opportunity to proffer prima facie evidence of his eligibility for sentencing under addict exception, that is, evidence that defendant has no disqualifying convictions. *D.C. Code 1981, § 33-541(c)(2). Finney v. United States*, 527 A.2d 733, 1987 D.C. App. LEXIS 380 (1987).

Construction with other statutes.

Statute under which mandatory minimum sentence increases according to defendant’s prior drug convictions did not irreconcilably conflict with statute prohibiting increasing de-

defendant's punishment based on convictions not included in United States Attorney's pretrial information and, thus, there was no implied repeal of statute prohibiting increased punishment. D.C. Code 1981, §§ 23-111, 33-541(c)(1)(A-1). *Lucas v. United States*, 602 A.2d 1107, 1992 D.C. App. LEXIS 35 (1992).

Double jeopardy.

If Congress intended to impose multiple punishments when more than one statutory violation arises from single act, imposition of multiple punishments does not violate double jeopardy clause. U.S. Const. Amend. 5. *Wilson v. United States*, 528 A.2d 876, 1987 D.C. App. LEXIS 392 (1987).

Double jeopardy clause does not insulate defendant from standing trial again after he has successfully invoked statutory right of appeal to upset his first conviction, on any ground other than insufficiency of evidence to support the verdict, and criminal defendant who was successful in having his conviction set aside on grounds of trial error, though he had served sentence imposed, was not placed in double jeopardy by second trial on same indictment. U.S. Const. Amends. 5, 6; D.C. Code 1981, §§ 14-305, 22-104, 22-104(a), 22-501, 22-3202(a)(2), 22-3203(a)(2), 22-3501(a, b), 23-1322(a)(1, 2), 23-1331(3)(D), (4), 24-203(b). *Fitzgerald v. United States*, 472 A.2d 52, 1984 D.C. App. LEXIS 314 (1984).

Indictment and information.

As to crime of assault with intent to commit sodomy and sodomy, "necessarily includes" in D.C. Code § 22-104, governing imposition of longer sentences for persons convicted in past of any felony, may be construed by reference to fact of previous crime, not merely to statutory elements of that crime; more specifically, if and only if prior sodomy conviction is based solely on record of force or violence, that is, if there is no evidence that sodomy was consensual, then that sodomy conviction may be deemed to include assault for purpose of applying D.C. Code § 22-104 and finding assault with intent crime "necessarily included" within it. D.C. Code 1981, §§ 22-104(a), 22-503, 22-3502. *Brake v. United States*, 494 A.2d 646, 1985 D.C. App. LEXIS 405 (1985).

Had defendant, charged with misdemeanor of petit larceny, been entitled to have prosecution commenced by way of indictment, because of possible imposition of more than one year sentence under recidivist statute, failure to so prosecute would have constituted plain error requiring reversal, in absence of waiver. U.S. Const. Amend. 5; D.C. Code SCR, Criminal Rule 7(a, b). *Smith v. United States*, 304 A.2d 28, 1973 D.C. App. LEXIS 268 (1973), writ of certiorari denied by 414 U.S. 1114, 94 S. Ct.

846, 38 L. Ed. 2d 741, 1973 U.S. LEXIS 1888 (1973).

A sentence under the recidivist statute is not a part of the offense itself; it is the possible punishment for the latter which determines whether the prosecution must be by indictment; recidivist statute comes into play after the trial and after accused has been found guilty and proceedings thereunder do not involve inquiry into guilt or innocence. D.C. Code § 23-111, U.S. Const. Amend. 5. *Smith v. United States*, 304 A.2d 28, 1973 D.C. App. LEXIS 268 (1973), writ of certiorari denied by 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741, 1973 U.S. LEXIS 1888 (1973).

Accused is entitled to be clearly informed of charge he is called upon to meet, and likewise is entitled to notice that prosecution intends to prove additional fact essential to warrant punishment which may be imposed. *Brandon v. United States*, 239 A.2d 159, 1968 D.C. App. LEXIS 135 (App. 1968).

Jurisdiction.

In view of statutes proscribing the carrying of a dangerous weapon and possession of prohibited weapon, prosecution had no authority to charge defendant as a "general" repeat offender for carrying a dangerous weapon and possessing a prohibited weapon, and as defendant received no proper and timely notice that he was subject to as much as ten years' imprisonment under the statutes specifically covering the offenses, defendant in effect was merely tried as a first offender on a misdemeanor and the District of Columbia Court of General Sessions did not lack jurisdiction on theory that defendant faced possibility of being sentenced to up to ten years in prison. D.C. Code §§ 11-963(a)(1), 22-104, 22-3204, 22-3214. *Martin v. United States*, 283 A.2d 448, 1971 D.C. App. LEXIS 231 (1971).

Authority of trial court to try an offense is founded not upon the penalty imposed after conviction, but upon penalty prescribed by statute for that particular offense. D.C. Code 1961, §§ 11-963(a), 22-104. *Lawrence v. United States*, 224 A.2d 306, 1966 D.C. App. LEXIS 247 (App. 1966).

Where statute gave Court of General Sessions jurisdiction to try all offenses committed in the District of Columbia for which punishment is by imprisonment for one year or less, Court of General Sessions had jurisdiction to try offense of petit larceny, for which maximum imprisonment was one year, notwithstanding fact that defendant, as second offender, was subject to a possible additional penalty over and above the basic one-year maximum. D.C. Code 1961, §§ 11-963(a), 22-104. *Lawrence v. United States*, 224 A.2d 306, 1966 D.C. App. LEXIS 247 (App. 1966).

Review.

That defendant had served his sentence did

not render case moot in view of effect of felony conviction on civil rights and punishment upon subsequent conviction. D.C. Code 1961, §§ 1-1102(2)(c), 22-104, 22-505(a). *Dancy v. United States*, 361 F.2d 75, 1965 U.S. App. LEXIS 4299 (C.A.D.C. 1965).

Right to trial by jury.

Defendant's eligibility for recidivist penalties did not defeat presumption that charge of cocaine possession, with 180-day maximum potential prison term, was petty offense which did not trigger Sixth Amendment jury right. U.S. Const. Amend. 6; D.C. Code 1981, § 33-541(d). *Brown v. United States*, 675 A.2d 953, 1996 D.C. App. LEXIS 82 (1996).

Fact that present charge of cocaine possession triggered revocation of probation for prior offense and reimposition of suspended sentence did not make additional prison time part of punishment for current offense and, thus, did not rebut presumption that current charge of cocaine possession, with 180-day maximum potential prison term, was petty offense and not sufficiently serious to invoke Sixth Amendment jury right. U.S. Const. Amend. 6; D.C. Code 1981, § 33-541(d). *Brown v. United States*, 675 A.2d 953, 1996 D.C. App. LEXIS 82 (1996).

Defendant who was charged with two drug-related misdemeanors, neither of which carried a maximum prison term exceeding 180 days, was not entitled to a jury trial on the basis that the severe penalties for recidivist offenders such as he rendered his offenses "serious" rather than "petty," where he was not charged in present case as a recidivist. U.S.C. Const. Amend. 6; D.C. Code 1981, §§ 22-104, 33-541(d), 33-603(a). *Foot v. United States*, 670 A.2d 366, 1996 D.C. App. LEXIS 4 (1996).

Sentence under recidivist statute is only indirectly related to the offense itself; it is the statutorily prescribed punishment for the offense being tried which determines the number of peremptory challenges available to a defendant. D.C. Code SCR, Criminal Rule 24(b); D.C. Code § 22-104(a). *Tatum v. United States*, 330 A.2d 522, 1974 D.C. App. LEXIS 337 (1974).

Defendant who was charged with petit larceny, a misdemeanor for which maximum punishment was one year, was entitled to only the three peremptory challenges available to defendant charged with such an offense notwithstanding fact that Government had filed notice that, if convicted, defendant would be subjected to additional penalties of the third offender statute. D.C. Code §§ 22-104(a), 22-2202; D.C. Code SCR, Criminal Rule 24(b). *Tatum v. United States*, 330 A.2d 522, 1974 D.C. App. LEXIS 337 (1974).

Defendant must have knowledge of penalty he may receive inasmuch as his right to jury trial depends on severity of punishment. D.C. Code 1961, § 11-715a. *Dobkin v. District of Columbia*, 194 A.2d 657, 1963 D.C. App. LEXIS 303 (App. 1963).

Validity.

Repeat offender sentencing statute was not an unconstitutional ex post facto law as applied in the circumstances of the instant case, even though defendant committed the offense which formed the basis for the enhanced penalty after the crime for which he received the enhanced sentence. D.C. Code 1973, § 22-104(a); U.S.C. Const. Art. 1, § 9, cl. 3. *Cornwell v. United States*, 451 A.2d 628, 1982 D.C. App. LEXIS 458 (1982).

§ 22-1804a. Penalty for felony after at least 2 prior felony convictions.

(a)(1) If a person is convicted in the District of Columbia of a felony, having previously been convicted of 2 prior felonies not committed on the same occasion, the court may, in lieu of any sentence authorized, impose such greater term of imprisonment as it deems necessary, up to, and including, 30 years.

(2) If a person is convicted in the District of Columbia of a crime of violence as defined by § 22-4501, having previously been convicted of 2 prior crimes of violence not committed on the same occasion, the court, in lieu of the term of imprisonment authorized, shall impose a term of imprisonment of not less than 15 years and may impose such greater term of imprisonment as it deems necessary up to, and including, life without possibility of release.

(3) For purposes of imprisonment following revocation of release authorized by § 24-403.01, the third or subsequent felony committed by a person who had previously been convicted of 2 prior felonies not committed on the same occasion and the third or subsequent crime of violence committed by a

person who had previously been convicted of 2 prior crimes of violence not committed on the same occasion are Class A felonies.

(b) For the purposes of this section:

(1) A person shall be considered as having been convicted of a felony if the person was convicted of a felony by a court of the District of Columbia, any state, or the United States or its territories; and

(2) A person shall be considered as having been convicted of a crime of violence if the person was convicted of a crime of violence as defined by § 22-4501, by a court of the District of Columbia, any state, or the United States or its territories.

(c)(1) A person shall be considered as having been convicted of 2 felonies if the person has been convicted of a felony twice before on separate occasions by courts of the District of Columbia, any state, or the United States or its territories.

(2) A person shall be considered as having been convicted of 2 crimes of violence if the person has twice before on separate occasions been convicted of a crime of violence as defined by § 22-4501, by courts of the District of Columbia, any states, or the United States or its territories.

(d) No conviction or plea of guilty with respect to which a person has been pardoned shall be taken into account in applying this section.

(Mar. 3, 1901, ch. 854, § 907a; July 29, 1970, 84 Stat. 599, Pub. L. 91-358, title II, § 201(b); May 21, 1994, D.C. Law 10-119, § 2(b), 41 DCR 1639; Oct. 7, 1994, D.C. Law 10-194, § 2, 41 DCR 4283; May 16, 1995, D.C. Law 10-255, § 15, 41 DCR 5193; June 3, 1997, D.C. Law 11-275, § 2, 44 DCR 1408; June 8, 2001, D.C. Law 13-302, § 4(h), 47 DCR 7249; Dec. 10, 2009, D.C. Law 18-88, § 208, 56 DCR 7413.)

Cross references. — Proceedings to establish previous convictions, see § 23-111.

Section references. — This section is referred to in § 16-710.

Prior Codifications. — 1981 Ed., § 22-104a.

1973 Ed., § 22-104a.

Effect of amendments. — D.C. Law 13-302, in subsec. (a), in par. (1), substituted “30 years” for “life”; in par. (2), substituted “such greater term of imprisonment as it deems necessary up to, and including, life without possibility of release” for “a term of imprisonment of life without possibility of parole”; and added par. (3).

D.C. Law 18-88, in subsec. (a)(2), substituted “the court, in lieu of the term of imprisonment authorized, shall impose a term of imprisonment of not less than 15 years and may impose” for “the court may in lieu of any sentence authorized, impose”.

Emergency legislation. — For temporary (90-day) amendment of section, see § 4(h) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90-day) amendment of section, see § 4(h) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 4(h) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(h) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

For temporary (90 day) amendment of section, see § 202 of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1804.

Legislative history of Law 10-194. — Law 10-194, the “Repeat Offender Life Without Parole Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-478, which

was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 7, 1994, and June 21, 1994, respectively. Signed by the Mayor on June 21, 1994, it was assigned Act No. 10-254 and transmitted to both Houses of Congress for its review. D.C. Law 10-194 became effective on October 7, 1994.

Legislative history of Law 10-255. — Law 10-255, the “Technical Amendments Act of 1994,” was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective May 16, 1995.

Legislative history of Law 11-275. — Law 11-275, the “Second Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-909, which was referred to the Committee of the Whole. The Bill was adopted in first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-520 and transmitted to both Houses of Congress for its review. D.C. Law 11-275 became effective on June 3, 1997.

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CASE NOTES

ANALYSIS

Constitutional rights.
Examination of witnesses.
Identification testimony.
Indictment and information.
Validity.

Constitutional rights.

In view of the potential harshness of the result of enhanced sentences, actual notice to the defendant of the prior convictions to be relied upon by the government is important. *Robinson v. United States*, 756 A.2d 448, 2000 D.C. App. LEXIS 178 (2000).

Fifth Amendment privilege against self-incrimination applies to sentence enhancement proceedings, because defendant at sentencing hearing is faced with substantial risk of incurring a heavier sentence. D.C. Code 1981, § 22-104a(b)(2); U.S. Const. Amend. 5. *Boswell v. United States*, 511 A.2d 29, 1986 D.C. App. LEXIS 360 (1986).

Trial judge violated defendant's Fifth Amendment rights by imposing enhanced sentence based on his refusal to testify under oath at sentencing hearing. D.C. Code 1981, § 22-104a(b)(2); U.S. Const. Amend. 5. *Boswell v. United States*, 511 A.2d 29, 1986 D.C. App. LEXIS 360 (1986).

Examination of witnesses.

There is no statutory requirement in sentence enhancement proceedings that defendant be placed under oath to raise issues of proof, nor is there any statutory requirement that any inquiry of any sort be made of defendant during hearing phase of recidivist sentencing process. D.C. Code 1981, §§ 22-104a(b)(2), 23-111(c)(1). *Boswell v. United States*, 511 A.2d 29, 1986 D.C. App. LEXIS 360 (1986).

In 1976 prosecution for armed robbery, defendant's robbery convictions from 1963 and 1952 were admissible for impeachment purposes, since minimum sentence imposed following 1963 conviction expired within ten years of trial. D.C. Code §§ 14-305, 14-305(b), (b)(2)(B). *Glass v. United States*, 395 A.2d 796, 1978 D.C. App. LEXIS 369 (1978).

Identification testimony.

Time, place, and circumstances decide weight to be given evidence of identity of name in deciding issue of identity of person at sentence enhancement hearings. D.C. Code 1981, § 22-104a(b)(2). *Boswell v. United States*, 511 A.2d 29, 1986 D.C. App. LEXIS 360 (1986).

Indictment and information.

A sentence under the recidivist statute is not a part of the offense itself; it is the possible punishment for the latter which determines whether the prosecution must be by indictment; recidivist statute comes into play after the trial and after accused has been found guilty and proceedings thereunder do not involve inquiry into guilt or innocence. D.C. Code § 23-111, U.S. Const. Amend. 5. *Smith v. United States*, 304 A.2d 28, 1973 D.C. App. LEXIS 268 (1973), writ of certiorari denied by 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741, 1973 U.S. LEXIS 1888 (1973).

Validity.

Repeat offender sentencing statute was not an unconstitutional ex post facto law as applied in the circumstances of the instant case, even though defendant committed the offense which formed the basis for the enhanced penalty after the crime for which he received the enhanced sentence. D.C. Code 1973, § 22-104(a); U.S.C. Const. Art. 1, § 9, cl. 3. *Cornwell v. United*

States, 451 A.2d 628, 1982 D.C. App. LEXIS 458 (1982).

§ 22-1805. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

(Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 908.)

Prior Codifications. — 1981 Ed., § 22-105. 1973 Ed., § 22-105.

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Admissibility of evidence.

In prosecution of Puerto Rican defendant, whose companion shot and killed guard in front of dwelling of President of the United States, for first-degree murder, wherein defendant interposed defense that he and companion had no intent to kill anyone but merely wished to create an incident in order to bring to the attention of the American people conditions in Puerto Rico, defendant was properly allowed to testify as to his own intent. D.C. Code 1940, §§ 22-105, 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

To be admissible as non-hearsay evidence, coconspirator's out-of-court statements must

satisfy both the “in the course of” and the “in furtherance of” requirements. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Statements made after conspiracy has ended are not admissible as non-hearsay statements of coconspirator. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Some acts of concealment may be “in furtherance of” conspiracy, as is required to admit out-of-court statement as a nonhearsay statement of coconspirator. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Statements that codefendant made to Government witness and to another Government witness in letters after main conspiracy to kill victim was accomplished two years earlier were not made “in furtherance of” conspiracy, and therefore not admissible in joint trial as non-hearsay statements of co-conspirator, where there was no evidence of an express agreement to continue to act in concert to conceal the crime, particularly two years after its commission. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L.

Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Witness's reference to prior drug dealings with defendant was admissible to show defendant's motive for committing the crimes, his intent in entering house, and his knowledge of where to find the hidden safe, in prosecution arising from double murder during a residential robbery. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Defenses.

Where prosecutor reindicted 17 defendants under a 26-count indictment, after defendants, eight of whom were charged under a 15-count indictment, and nine of whom were charged under an 11-count indictment, made motion to join all 17 defendants to be tried together, such action resulted in the appearance of vindictiveness on the part of the government, and the burden was on the government to dispel that appearance. (Per Pratt, J., with one Judge concurring.) D.C. Code §§ 22-105, 22-505(a, b), 22-1122(b). *United States v. Schiller*, 424 A.2d 51, 1980 D.C. App. LEXIS 395 (1980), writ of certiorari denied by 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341, 1981 U.S. LEXIS 1897, 49 U.S.L.W. 3807 (1981).

Claim of defendant that it was not he but one of his coescapers who held knife used to rob victim fell short of complete defense to charge of armed robbery, since, even assuming defendant used no weapon, the acts of his accomplice in crime could be imputed to him thus making him chargeable as a principal. D.C. Code § 22-105. *Jordan v. United States*, 350 A.2d 735, 1976 D.C. App. LEXIS 459 (1976).

Drug offenses, weight and sufficiency of evidence.

Sufficient evidence supported conviction of defendant for possession of cocaine with intent to distribute on aiding and abetting theory; defendant not only resided at residence from which drug dealer was selling drugs, but he also owned it, defendant admitted that he knew dealer was engaging in drug transactions at residence, and that he was a “go between” for such transactions, and defendant testified that he regularly used the only working bathroom in basement of residence, where empty plastic bags, razor blades, and two plates coated with white powder residue were located on top of bar. *Trapps v. United States*, 887 A.2d 484, 2005 D.C. App. LEXIS 635 (2005).

Indictment and information.

Indictment need not include a charge of aid-

ing and abetting in order for the theory to be presented to the jury. *Price v. United States*, 813 A.2d 169, 2002 D.C. App. LEXIS 723 (2002).

Allowing defendant to plead guilty as an aider and abettor, rather than as a principal, to charge of first-degree burglary while armed was not a constructive amendment of indictment; charge would have read the same regardless of whether defendant was charged as a principal or as an aider and abettor. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Conviction of armed robbery defendant as aider and abettor did not constitute constructive amendment or variance of indictment, which charged him as principal. D.C. Code 1981, § 22-105. *Ingram v. United States*, 592 A.2d 992, 1991 D.C. App. LEXIS 156 (1991), writ of certiorari denied by 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757, 1991 U.S. LEXIS 7189, 60 U.S.L.W. 3435 (1991).

Ruling by trial court that action of prosecutor in reindicting 17 defendants under a single 26-count indictment, after defendants, who were charged under one of two indictments with 11 and 15 counts, respectively, made a motion to be tried together, was motivated by vindictiveness in seeking the new indictment was without support in the record. (Per Pratt, J., with one Judge concurring.) D.C. Code §§ 22-105, 22-505(a, b), 22-1122(b). *United States v. Schiller*, 424 A.2d 51, 1980 D.C. App. LEXIS 395 (1980), writ of certiorari denied by 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341, 1981 U.S. LEXIS 1897, 49 U.S.L.W. 3807 (1981).

No variance existed between indictment charging defendant with assault with a dangerous weapon and evidence presented at trial as result of Government's evidence that defendant acted as a principal by threatening victim with a pistol and that defendant also acted as an aider and abettor when he passed pistol to companion who shot victim, in view of fact that state's evidence at trial was based on same set of factual circumstances as was presented to grand jury at time of indictment. D.C. Code §§ 22-105, 22-502. *Barker v. United States*, 373 A.2d 1215, 1977 D.C. App. LEXIS 326 (1977).

Indictment charging defendant with assault with a deadly weapon was not constructively amended by prosecution when it presented evidence that defendant acted as a principal by threatening victim with a pistol and that defendant also acted as an aider and abettor when he passed pistol to companion who shot victim, and such indictment was not constructively amended by trial court when it instructed jury that defendant could be found guilty of such

crime either as a principal or as an aider and abettor. D.C.C.E §§ 22-105, 22-502. *Barker v. United States*, 373 A.2d 1215, 1977 D.C. App. LEXIS 326 (1977).

Defendant convicted of sale and delivery of drugs in violation of Federal Drug Act was not prejudiced by informations charging him alone as principal where there was adequate evidence to establish that principal offender committed violations charged, evidence was sufficient to prove that defendant aided and abetted principal, and statute provided that all persons aiding or abetting principal were to be charged as principals and not as accessories. D.C. Code §§ 22-105. *Mason v. United States*, 256 A.2d 565, 1969 D.C. App. LEXIS 305 (App. 1969).

Under statute, although one may not be the principal actor, he may be charged as a principal under the same information in conjunction with principal offender for acts of aiding and abetting. D.C. Code 1951, § 22-105. *Jack Berman, Inc. v. District of Columbia*, 132 A.2d 147, 1957 D.C. App. LEXIS 235 (Cr.App. 1957).

Instructions.

Felony-murder instruction which has been used in the District of Columbia jurisdiction, as well as the one proposed for use by the Junior Bar Association, reflects an understanding that the statute embraces occasions when the jury may properly be urged to find that the homicidal act fell outside the scope of the felonious crime which the parties undertook to commit; accordingly, it was error for the trial court to forbid defense counsel to argue to the jury that the fatal stabbing of the victim by one of the defendants was an unexpected response to his being slapped in the face by the victim, was independent of any common purpose to rape, and was without the scope of the felonious crime which the three defendants undertook to commit. D.C. Code §§ 22-105, 22-2401. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Instruction, in prosecution for burglary and petty larceny, pursuant to request for clarification of aiding and abetting that if B came out of bank and said "I have just robbed it, I have the sack full of money, let's go," and then B got into A's automobile and A took off and ran knowing that crime had been committed, and helped in the escape, he could be liable was reversibly erroneous where indictment did not charge defendant with being accessory after the fact and where jury returned with guilty verdict less than fifteen minutes after being given such instruction. Fed. Rules Crim. Proc. rule 52(a), 18 U.S.C.; D.C. Code §§ 22-105, 22-106. *United States v. Irving*, 437 F.2d 649, 1970 U.S. App. LEXIS 7012 (C.A.D.C. 1970).

In prosecution of Puerto Rican defendant, whose companion shot and killed guard in front

of dwelling of President of the United States, for first degree murder, wherein defendant interposed defense that he and companion, though armed with pistols, had no intent to kill anyone but merely wished to create an incident in order to bring to the attention of American people conditions in Puerto Rico, court properly charged jury that defendant's testimony as to conditions in Puerto Rico had nothing to do with the case, over objection of defendant that such conditions were relevant and material to issue of his intent and materially responsive to prosecutor's claim of motive. D.C. Code 1940, §§ 22-105, 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

Fact that there was evidence that one of the three defendants jointly indicted on charge of murder in perpetration of robbery threw away the gun and bullets after the murder did not require an instruction that jury could find such defendant guilty as accessory after the fact, where such defendant's testimony and other circumstances stamped him as an accessory before the fact and therefore guilty as a principal. D.C. Code 1940, §§ 22-105, 22-2401. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

Non-structural defect case involving clearly erroneous aiding and abetting instruction did not fall within that special category of errors that could be corrected regardless of their effect on the outcome, or which should be presumed prejudicial if the defendant cannot make a specific showing of prejudice; instead, this case would be decided under normal plain error rule where defendant, rather than government, bore burden of persuasion with respect to prejudice, and to show that the non-structural error affected his substantial rights, defendant had to show reasonable probability that the aiding and abetting instruction had prejudicial effect on outcome of his trial. *Kidd v. United States*, 940 A.2d 118, 2007 D.C. App. LEXIS 683 (2007).

Aiding and abetting instruction that defendants could be guilty for acts of others that were "natural and probable consequence of a crime in which they intentionally took part," which did not instruct jury that it had to find that defendants had specific intent to commit crime, was not plain error; testimony of co-conspirator established without question that each defendant had requisite intent, beginning with joint resolve to "go rob someone," one defendant had driven car that facilitated crime spree while other defendant carried shotgun in front seat and pointed out first victim, and defendants were both charged with conspiracy, pursuant to which they could be convicted of substantive crimes even if they did not take part directly, so long as co-conspirator committed crime in furtherance of, and as natural consequence, of conspiracy. *Kidd v. United*

States, 940 A.2d 118, 2007 D.C. App. LEXIS 683 (2007).

Error in trial court's jury instruction in trial for first-degree premeditated murder that an aider and abettor is legally responsible for the acts of other persons "that are the natural and probable consequences of the crime or criminal venture in which she intentionally participates," which allowed conviction on theory of aiding and abetting without proof of mens rea required for offense, was of constitutional magnitude and, thus, under Chapman standard, required reversal unless harmless beyond a reasonable doubt. *Wilson-Bey v. United States*, 903 A.2d 818, 2006 D.C. App. LEXIS 424 (2006), writ of certiorari denied by 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089, 2007 U.S. LEXIS 5173, 75 U.S.L.W. 3607 (2007).

Instruction on aiding and abetting that included statement "you must find that the [the defendant] knowingly associated himself with the person who committed the crime," was proper statement of law, in prosecution for possession of cocaine with intent to distribute, as statement was consistent with statute, which focused on "aiding or abetting the principal offender," and statement was consistent with elements of an aiding and abetting case. *Trapps v. United States*, 887 A.2d 484, 2005 D.C. App. LEXIS 635 (2005).

Court of Appeals would review for plain error issue of whether trial court gave improper aiding and abetting instruction, in prosecution for possession of cocaine with intent to distribute, as defendant failed to object to instruction with specificity before jury began its deliberations, as required by rule, despite having had ample opportunity to do so before trial court instructed jury, and even after instruction was complete but before jury retired to deliberate. *Trapps v. United States*, 887 A.2d 484, 2005 D.C. App. LEXIS 635 (2005).

Instruction on aiding and abetting was permissible in armed robbery prosecution against unarmed defendant; evidence of participation by three persons indicated that someone other than defendant was the principal, and evidentiary predicate thus existed. *Hawthorne v. United States*, 829 A.2d 948, 2003 D.C. App. LEXIS 532 (2003).

Whether to give an aiding and abetting instruction is a matter within the sound discretion of the trial court. *Hawthorne v. United States*, 829 A.2d 948, 2003 D.C. App. LEXIS 532 (2003).

Whether to give an aiding and abetting instruction is left to the sound discretion of the trial court. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Instruction on aiding and abetting was supported, in second-degree murder prosecution arising from death of defendant's infant daughter from scalding bath, by evidence that defen-

dant's wife or older daughter may have placed victim and her twin sister in tub and that defendant hit infants on head with empty plastic soft-drink bottle in order to keep them in tub, as well as by defense arguments that continually attempted to shift blame for victim's scalding from defendant to his wife. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

No special unanimity instruction was necessary, despite defendant's claim that some jurors may have found him guilty of aiding and abetting, while others may have convicted him as principal; there was only one course of conduct and all jurors agreed that defendant participated in offense, whether as aider or principal. D.C. Code 1981, § 22-105. *Simms v. United States*, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

In prosecution for, *inter alia*, burglary, there was no evidentiary basis for instructing jury that defendant may have been aider or abettor; while there was evidence from which one could reasonably infer that other person, who was found outside building near alleged burglar's tools, might have aided and abetted defendant, who was allegedly seen inside building and apprehended after fleeing from it to avoid apprehension, there was no evidence from which to conclude that other person was principal. D.C. Code 1981, § 22-105. *Brooks v. United States*, 599 A.2d 1094, 1991 D.C. App. LEXIS 304 (1991).

Defendant's suggestion as *pro se* counsel that there might have been third party who burglarized restaurant could not support aiding and abetting instruction; only evidence against defendant was that he was identified as burglar inside restaurant and apprehended as he left it, and thus, defendant was either principal or nonparticipant. D.C. Code 1981, § 22-105. *Brooks v. United States*, 599 A.2d 1094, 1991 D.C. App. LEXIS 304 (1991).

In prosecution for, *inter alia*, burglary, court committed reversible error when, after commencement of jury deliberations, it instructed jury on law of aiding and abetting in absence of evidentiary support for such instruction; since aiding and abetting instruction permitted jury to convict defendant even if he were never in building, error undercut assumption on which his defense was predicated, *i.e.*, that there might have been third party who burglarized building, and no remedial steps were taken, for there was no further closing argument at which defendant could attempt to refute aiding and abetting theory. D.C. Code 1981, § 22-105. *Brooks v. United States*, 599 A.2d 1094, 1991 D.C. App. LEXIS 304 (1991).

Defendant in second-degree burglary prosecution could not have been prejudiced by court's response to jury's question that aiding and abetting instruction applied to second-de-

gree burglary, in that it was unnecessary for jury to agree on whether he was inside shoe store; one who aids and abets principal in committing crime is charged as principal. D.C. Code 1981, §§ 22-105, 22-1801(b). *Tyler v. United States*, 495 A.2d 1180, 1985 D.C. App. LEXIS 444 (1985).

Trial court did not abuse its discretion in responding to jury's note, after discussing note with counsel, that aiding and abetting instruction which had been given only on count of destruction of property also applied to second-degree burglary charge. D.C. Code 1981, § 22-105; Criminal Rule 30. *Tyler v. United States*, 495 A.2d 1180, 1985 D.C. App. LEXIS 444 (1985).

In prosecution for aiding and abetting another in practice of healing art without a license, trial court did not commit reversible error in using descriptive language "other criminal acts or other bad acts" in its jury instruction on proper consideration of certain evidence since, in context of instructions as whole, there was little prejudicial impact. D.C. Code 1973, §§ 2-102, 22-105. *Jacobs v. United States*, 436 A.2d 1286, 1981 D.C. App. LEXIS 390 (1981).

In prosecution for aiding and abetting another in practice of healing art without license, trial court's instructions on aiding and abetting did not constitute reversible error, especially where defendant did not object to instructions at trial. D.C. Code 1973, §§ 2-102, 22-105. *Jacobs v. United States*, 436 A.2d 1286, 1981 D.C. App. LEXIS 390 (1981).

Although the trial court, which instructed the jury that it could convict defendants of felony-murder if it found that the killings occurred "in the course of the felony," should have included the phrase "in furtherance of the common purpose to commit the felony" in its instruction, no reversible error occurred since the instructions actually given informed the jury of the applicable legal principles; by instructing that the killing must occur in "the course of a felony," the court informed the jury that the connection between the felony and homicide must be more than a coincidence of time and place, and defense counsel was not prevented from arguing to the jury that the killings were outside the scope of, and foreign to, the original plan or design. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

In proceeding in which defendant was convicted of two counts of first-degree murder, instruction, which tracked language of the standard jury instruction on aiding and abetting, did not impose a greater or different responsibility than was justified by the law and the evidence in the case; such instruction was not prejudicial, though it may have been both

vague and superfluous in the first-degree murder context. D.C. Code §§ 22-105, 22-2401. *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

Instructions relating to aiding and abetting with respect to charge of robbery, read in their entirety rather than in segments, did not warrant reversal, despite contention that instruction failed to require finding of intent to support robbery conviction. D.C. Code § 22-105. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

Where no evidence was adduced as to identity of forger, court erred in giving aiding and abetting instruction. D.C. Code § 22-105. *Payton v. United States*, 305 A.2d 512, 1973 D.C. App. LEXIS 304 (1973).

Testimony of assault victim that defendant and two other men were "after" him authorized instruction to jury on theory of aiding and abetting even if defendant's actions did not assume proportions of assault. D.C. Code 1951, §§ 22-105, 22-504. *Rogers v. U.S.*, 174 A.2d 356, 1961 D.C. App. LEXIS 324 (Cr.App. 1961).

Defendants were not entitled to complain that the trial court erroneously failed to tell the jury that a defendant was an accomplice rather than a principal where the trial judge gave instructions which were full and correct and reflected the statutory provision that all who aid or abet in the commission of a crime are charged as principals. D.C. Code 1951, § 22-105. *Cooper v. U.S.*, 123 A.2d 918, 1956 D.C. App. LEXIS 207 (Cr.App. 1956).

Jurisdiction and venue.

In prosecution for the unauthorized use of a vehicle and larceny of other property in District of Columbia, evidence on issue of whether defendant had aided and abetted those who took the property and whether the planning and the taking were within the District sustained conviction, even though it was not shown that defendant was present at the taking or had used the automobile in the District. D.C. Code 1951, §§ 22-105, 22-2201, 22-2204; 18 U.S.C. § 2. *Williams v. U.S.*, 215 F.2d 35, 1954 U.S. App. LEXIS 2807 (C.A.D.C. 1954).

Even if defendant had taken money from robbery victim prior to time automobile entered District of Columbia, such a defense would not preclude conviction for robbery in District of Columbia, since robbery was not finished until robbers had accomplished by force of arms their getaway with the loot which occurred in the District of Columbia. D.C. Code §§ 11-923(b)(1), 22-105; D.C. Code SCR, Criminal

Rule 32(d). *Jordan v. United States*, 350 A.2d 735, 1976 D.C. App. LEXIS 459 (1976).

Parties to offense.

— Accessories after the fact, parties to offense.

Defendant could be convicted as accessory after fact, even though he was present before, during and after crime. D.C. Code 1961, §§ 22-105, 22-106; 18 U.S.C. § 3. *Smith v. U.S.*, 306 F.2d 286, 1962 U.S. App. LEXIS 4395 (C.A.D.C. 1962).

— Accessories before the fact, parties to offense.

Common-law accessory before the fact is treated as aider and abettor and is deemed responsible for reasonable and probable results of his acts. D.C. Code 1981, § 22-105. *Murchison v. United States*, 486 A.2d 77, 1984 D.C. App. LEXIS 575 (1984).

— Community of unlawful interest, parties to offense.

Accomplice who aids and abets the commission of a felony is legally responsible as a principal for all acts of another person which are in furtherance of the common purpose, if the act done either is within the scope of that purpose or is the natural or probable consequence of the act intended. D.C. Code § 22-105. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

Though there must exist a community of unlawful intent between accessory and perpetrator of the crime, accessory need not necessarily have intended the particular crime committed by the principal. D.C. Code § 22-105. *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

— In general.

Under record, trial court's finding that juvenile was an aider and abettor in assault and robbery, and hence a delinquent, was not plainly wrong. D.C. Code §§ 22-105, 22-502, 22-2901. *In re W.*, 294 A.2d 174, 1972 D.C. App. LEXIS 237 (1972).

— Incitement to offense, parties to offense.

On who procures, commands, advises, instigates or incites the commission of an offense, though not personally present at its commission is by the common law an accessory before the fact, and by statute all such persons are made principals. D.C. Code 1940, § 22-105.

Ladrey v. U.S., 155 F.2d 417, 1946 U.S. App. LEXIS 2214 (1946).

— **Knowledge and intent, parties to offense.**

Having knowledge of the offenses and failing to withdraw can be sufficient to establish implied approval, and hence aiding and abetting. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Aider and abettor need not have same criminal intent as the principal. D.C. Code 1981, § 22-105. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Person aids and abets principal in committing criminal offense if he knowingly associates himself in some way with criminal venture with intent to commit crime. D.C. Code 1981, § 22-105. *Murchison v. United States*, 486 A.2d 77, 1984 D.C. App. LEXIS 575 (1984).

Aiding and abetting is established if accused associated himself with the venture, participated in it as in something that he wished to bring about and sought by his action to make it succeed. D.C. Code § 22-105. *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

One who knowingly participates in the commission of a criminal act by assisting principal is equally liable. D.C. Code § 22-105. *Montgomery v. United States*, 384 A.2d 655, 1978 D.C. App. LEXIS 456 (1978).

There is no requirement that defendant have identical intent of principal at time and place of offense in order to be convicted as aider and abettor. D.C. Code § 22-105. *Allen v. United States*, 383 A.2d 363, 1978 D.C. App. LEXIS 429 (1978).

An individual who knowingly participates in the commission of a criminal act by assisting the principal is equally liable; and in this connection, the Government need only establish that an offense was committed by someone, that the accused assisted or participated in its commission, and that he or she did so with guilty knowledge. D.C. Code § 22-105. *Graham v. United States*, 377 A.2d 1138, 1977 D.C. App. LEXIS 386 (1977), writ of certiorari denied by 434 U.S. 1022, 98 S. Ct. 748, 54 L. Ed. 2d 770, 1978 U.S. LEXIS 400 (1978).

Individual who knowingly participates in commission of criminal act by assisting principal is equally liable. D.C. Code § 22-105. *Byrd v. United States*, 364 A.2d 1215, 1976 D.C. App. LEXIS 394 (1976).

— **Presence at crime, parties to offense.**

Culpable aider and abettor need not perform substantive offense, need not know its details and need not even be present so long as offense committed by principal was in furtherance of

common design. 18 U.S.C. § 2; D.C. Code § 22-105. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Mere presence at scene of crime is not sufficient to convict one of aiding and abetting; what is required is evidence that the accused knowingly associated himself in some way with the criminal venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed. D.C. Code § 22-105. *United States v. Lumpkin*, 448 F.2d 1085, 1971 U.S. App. LEXIS 9452 (C.A.D.C. 1971).

Mere presence or awareness is insufficient to make out a conviction for either aiding and abetting or conspiracy. *McCoy v. United States*, 890 A.2d 204, 2006 D.C. App. LEXIS 7 (2006).

Mere presence at the scene of the crime, without more, is generally insufficient to prove involvement in the crime but it will be deemed enough if it is intended to aid and does aid the primary actors; presence is thus equated to aiding and abetting when it is shown that it designedly encourages the perpetrator, facilitates the unlawful deed, such as when the accused acts as a lookout, or where it stimulates others to render assistance to the criminal act. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

The accused's presence will be equated with aiding and abetting when it is shown that it designedly encourages the perpetrator, facilitates the unlawful deed, or where it stimulates others to render assistance to the criminal act. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

To support an inference of guilty participation in the crime as an aider and abettor, an additional requirement, beyond mere presence, is that there be some proof of conduct which designedly encourages or facilitates the crime. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

While mere presence at the scene of a crime is insufficient to establish criminal participation in the offense, proof of presence at the scene of a crime plus conduct which designedly encourages or facilitates a crime will support an inference of guilty participation in the crime as an aider and abettor. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

A person need not be personally present during the commission of the offense to be found guilty of aiding and abetting. *Lyons v.*

U.S., 833 A.2d 481, 2003 D.C. App. LEXIS 618 (2003).

Proof of presence at scene of crime plus conduct which designedly encourages or facilitates a crime will support inference of guilty participation in the crime as aider and abettor. D.C. Code 1981, § 22-105. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Person need not be personally present during commission of offense to be found guilty of aiding and abetting; moreover, there is no prerequisite that the principal perpetrator of the offense also be convicted. D.C. Code 1981, § 22-105. *Murchison v. United States*, 486 A.2d 77, 1984 D.C. App. LEXIS 575 (1984).

Presence at scene of crime, even when coupled with knowledge that crime is being committed, is generally not enough to constitute aiding and abetting; however, an act of relatively slight moment, when coupled with knowledge, may warrant finding of participation in crime. D.C. Code § 22-105. *Montgomery v. United States*, 384 A.2d 655, 1978 D.C. App. LEXIS 456 (1978).

Presence at scene of crime, while insufficient without more to prove criminal complicity, will constitute aiding and abetting if it designedly encourages the perpetrator, facilitates the unlawful deed or stimulates others to render assistance to criminal act. D.C. Code § 22-105. *Creek v. United States*, 324 A.2d 688, 1974 D.C. App. LEXIS 268 (1974).

Proof of presence at scene of crime plus conduct which designedly encourages or facilitates a crime will support an inference of guilty participation in the crime as an aider and abettor. D.C. Code § 22-105. *Quarles v. United States*, 308 A.2d 773, 1973 D.C. App. LEXIS 333 (1973).

Proof of an accused's presence at the scene of a crime alone cannot support a conviction of aiding and abetting the commission of a crime. D.C. Code § 22-105. *Quarles v. United States*, 308 A.2d 773, 1973 D.C. App. LEXIS 333 (1973).

— Principals, aiders, abettors, and accomplices generally, parties to offense.

Criminal accountability does not depend inexorably upon personal performance of the acts comprising an offense; he who assists the perpetrator of a crime in its commission is as much answerable as if he had engaged in all of its essential aspects himself. 18 U.S.C. § 2(a); D.C. Code § 22-105. *United States v. Staten*, 581 F.2d 878, 1978 U.S. App. LEXIS 11271 (C.A.D.C. 1978).

Elements of the offense of aiding and abetting are guilty knowledge on part of accused, that an offense was committed by someone, and that the defendant assisted or participated in the commission of the offense. 18 U.S.C. § 2(a);

D.C. Code § 22-105. *United States v. Staten*, 581 F.2d 878, 1978 U.S. App. LEXIS 11271 (C.A.D.C. 1978).

There must be a guilty principal before there can be an aider and abettor. 18 U.S.C. § 2(a); D.C. Code § 22-105. *United States v. Staten*, 581 F.2d 878, 1978 U.S. App. LEXIS 11271 (C.A.D.C. 1978).

In order to aid and abet another to commit a crime it is necessary, under District of Columbia law, that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. D.C. Code § 22-105. *United States v. McCall*, 460 F.2d 952, 1972 U.S. App. LEXIS 10560 (C.A.D.C. 1972).

Where defendants are charged as principals under aiding and abetting statute, act of one defendant is act of each. D.C. Code 1961, § 22-105. *Turberville v. U.S.*, 303 F.2d 411, 1962 U.S. App. LEXIS 6036 (C.A.D.C. 1962).

Elements of aiding and abetting offense are that a crime was committed by someone, the accused assisted or participated in its commission, and the accused's participation was with guilty knowledge. *Trapps v. United States*, 887 A.2d 484, 2005 D.C. App. LEXIS 635 (2005).

One who aids and abets the principal in committing the crime is charged as a principal. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

The essential elements of aiding and abetting are: (1) that an offense was committed by someone; (2) that the accused participated in the commission; and (3) that he did so with guilty knowledge. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

While a defendant may be charged and convicted as the principal, even though the proof is that he was only an aider and abettor, there must be evidence that someone other than defendant was the principal whom the defendant aided and abetted. *Hawthorne v. United States*, 829 A.2d 948, 2003 D.C. App. LEXIS 532 (2003).

One who aids and abets another in a criminal offense can be charged as the principal for all acts committed in furtherance of the common purpose. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

To be an aider or abettor in the commission of a charged offense, the accused must be concerned in the commission of the specific crime with which the principal defendant is charged, he must be an associate in guilt of that crime, a participant in that offense as a principal or accessory. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

While there must be evidence that someone other than defendant was the principal whom he or she aided and abetted, it is not necessary for conviction that the principal's identity be established. *Price v. United States*, 813 A.2d 169, 2002 D.C. App. LEXIS 723 (2002).

One who aids and abets another in committing a criminal offense is chargeable as a principal for all acts committed in furtherance of the common purpose or is natural or probable consequence of the act intended. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

One who aids and abets another person in committing offense shares the liability of principal for all acts committed in furtherance of common purpose, if act done either is within scope of that purpose, or is natural or probable consequence of act intended. D.C. Code 1981, § 22-105. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

One who aids and abets principal in committing crime is charged as principal. D.C. Code 1981, § 22-105. *Guishard v. United States*, 669 A.2d 1306, 1995 D.C. App. LEXIS 273 (1995).

In order to aid or abet another to commit crime, it is necessary that defendant in some sort associate himself with venture, that he participate in it as in something that he wishes to bring about, and that he seek by his action to make it succeed. D.C. Code 1981, § 22-105. *Brooks v. United States*, 599 A.2d 1094, 1991 D.C. App. LEXIS 304 (1991).

To be aider and abettor, one must aid or abet or procure someone else to commit substantive offense; one cannot aid or abet himself. D.C. Code 1981, § 22-105. *Brooks v. United States*, 599 A.2d 1094, 1991 D.C. App. LEXIS 304 (1991).

Essential elements of aiding and abetting are that offense was committed by someone, that the accused participated in the commission, and that he did so with guilty knowledge. D.C. Code 1981, § 22-105. *Murchison v. United States*, 486 A.2d 77, 1984 D.C. App. LEXIS 575 (1984).

Elements to establish aiding and abetting are: that offense was committed by someone; that accused assisted or participated in its commission; and that he did so with guilty knowledge. D.C. Code § 22-105. *Byrd v. United*

States, 364 A.2d 1215, 1976 D.C. App. LEXIS 394 (1976).

Offense of aiding and abetting is predicated upon proper demonstration of all necessary elements of underlying criminal act. D.C. Code § 22-105. *In re J.W.Y.*, 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Given proof of underlying offense, conviction for aiding and abetting requires showing that accused had guilty knowledge of criminal transaction and that he assisted or participated in commission of offense. D.C. Code § 22-105. *In re J.W.Y.*, 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

The aiding and abetting statute does not alter common-law rule with respect to legal responsibility of joint principals for each other's acts; statute merely extended such doctrine of vicarious responsibility to additional classes of offenders by treating them as principals. D.C. Code § 22-105. *Hazel v. United States*, 353 A.2d 280, 1976 D.C. App. LEXIS 486 (1976).

Essential elements of aiding and abetting are: (1) that an offense was committed by someone, (2) that the accused assisted or participated in its commission and (3) that he did so with guilty knowledge; hallmark of an aider and abettor is that the accused in some sort associated himself with the venture, participated in it as in something that he wished to bring about and sought by his action to make it succeed. D.C. Code § 22-105. *Blango v. United States*, 335 A.2d 230, 1975 D.C. App. LEXIS 350 (1975).

Aiding and abetting a crime is established if the accused associated himself with the venture, participated in it as in something that he wished to bring about and sought by his action to make it succeed. D.C. Code § 22-105. *Creek v. United States*, 324 A.2d 688, 1974 D.C. App. LEXIS 268 (1974).

Defendant may be charged and convicted as principal even though proof is that he was only aider and abettor, but there must be evidence that someone other than defendant was principal whom defendant aided and abetted. D.C. Code § 22-105. *Payton v. United States*, 305 A.2d 512, 1973 D.C. App. LEXIS 304 (1973).

To sustain conviction of aider and abettor for commission of the crime, it is only necessary that the defendant was associated with the principal offender in the venture and made a conscious effort to help it succeed. D.C. Code § 22-105. *In re Reeder*, 264 A.2d 893, 1970 D.C. App. LEXIS 210 (App. 1970).

One who aids in commission of crime is as responsible for that act as if he committed it directly. D.C. Code 1961, § 22-105. *Williams v. United States*, 190 A.2d 269, 1963 D.C. App. LEXIS 222 (App. 1963).

Although an offense may be so defined by statute or regulation that it can only be committed by members of a certain class, one

outside the class may, by aiding or abetting another who is within the scope of the definition, render himself criminally liable for the offense. D.C. Code 1951, § 22-105. *Jack Berman, Inc. v. District of Columbia*, 132 A.2d 147, 1957 D.C. App. LEXIS 235 (Cr.App. 1957).

— Prosecution and punishment of principals and accessories, parties to offense.

Conviction of principal on charges covering episodes of receiving stolen property, in which defendant participated, was not a prerequisite to defendant's conviction of aiding and abetting. D.C. Code 1981, §§ 22-105, 22-3832(a), (c)(1). *United States v. Richardson*, 817 F.2d 886, 1987 U.S. App. LEXIS 5606 (C.A.D.C. 1987).

Conviction as an aider and abettor in receiving stolen property was not invalid for failure of evidence to support conviction of principal; testimony of codefendant plus corroborative evidence gave cause for jury to infer that codefendant was guilty as a principal in crime for which defendant was convicted as an aider and abettor. D.C. Code 1981, §§ 22-105, 22-3832(a), (c)(1). *United States v. Richardson*, 817 F.2d 886, 1987 U.S. App. LEXIS 5606 (C.A.D.C. 1987).

Under District of Columbia law, the conviction of the principal perpetrator of the offense is not a prerequisite to conviction of the aider and abettor. D.C. Code § 22-105. *United States v. McCall*, 460 F.2d 952, 1972 U.S. App. LEXIS 10560 (C.A.D.C. 1972).

To convict aider and abettor of armed offense which was committed only by principal, evidence must be sufficient to support inference that aider and abettor could reasonably foresee that principal was armed or that dangerous weapon was readily available. D.C. Code 1981, § 22-105. *Guishard v. United States*, 669 A.2d 1306, 1995 D.C. App. LEXIS 273 (1995).

While defendant may be charged and convicted as principal even though proof is that he was only aider and abettor, there must be evidence that someone other than defendant was principal whom defendant aided and abetted. D.C. Code 1981, § 22-105. *Brooks v. United States*, 599 A.2d 1094, 1991 D.C. App. LEXIS 304 (1991).

To convict on aiding and abetting theory, it is not essential that principal in operation be identified, but prosecution is still required to establish that someone has that status. D.C. Code 1981, § 22-105. *Brooks v. United States*, 599 A.2d 1094, 1991 D.C. App. LEXIS 304 (1991).

— Punishment generally, parties to offense.

In the District of Columbia, an aider and abettor is prosecuted as a principal, and conviction

of principal offender is not prerequisite to conviction. D.C. Code § 22-105. *Bailey v. United States*, 416 F.2d 1110, 1969 U.S. App. LEXIS 13359 (C.A.D.C. 1969).

Persons liable.

— Assault and battery, persons liable.

As an accessory to assault with a dangerous weapon, an automobile, defendant was liable for any criminal act which was the natural and probable consequence of initial encounter with police officer whether he did or did not intend the result accomplished. D.C. Code § 22-105. *Johnson v. United States*, 386 A.2d 710, 1978 D.C. App. LEXIS 382 (1978).

Aiding and abetting assault renders one guilty of crime even if he does not actively participate. D.C. Code 1951, §§ 22-105, 22-504. *Rogers v. U.S.*, 174 A.2d 356, 1961 D.C. App. LEXIS 324 (Cr.App. 1961).

— Bribery, persons liable.

In prosecution of doctor and his wife for attempted bribery of witness in abortion case against the doctor, where there was sufficient evidence to justify the jury's conclusion that doctor was an accessory before the fact to the attempt at bribery by his wife, he was properly found guilty as a principal. D.C. Code 1940, 22-105, 22-701. *Ladrey v. U.S.*, 155 F.2d 417, 1946 U.S. App. LEXIS 2214 (1946).

— Burglary, persons liable.

Evidence that defendant aided and abetted in commission of burglary justified charging defendant as principal in burglary. D.C. Code §§ 22-105, 22-1801(b), 22-2201. *In re R.D.J.*, 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

— Conspiracy, persons liable.

Once conspiracy and defendant's knowing participation in it have been established beyond reasonable doubt, defendant will be vicariously liable for substantive acts committed in furtherance of the conspiracy by his coconspirators. 18 U.S.C. § 2; D.C. Code § 22-105. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

— Homicide, persons liable.

District of Columbia law permitted the prosecution of defendant for aiding and abetting first-degree murder after the gunman had been acquitted of that offense. D.C. Code 1981, § 22-105. *United States v. Edmond*, 924 F.2d 261, 1991 U.S. App. LEXIS 805 (C.A.D.C. 1991), writ of certiorari denied by 502 U.S. 838, 112 S. Ct. 125, 116 L. Ed. 2d 92, 1991 U.S. LEXIS 5639, 60 U.S.L.W. 3260 (1991).

Where evidence established that particular defendants were members of conspiracy, object of which was deliberate and premeditated murder of former Chilean ambassador to United

States, and object was accomplished in manner agreed upon by the conspirators, guilt of such defendants on substantive murder counts could rest upon their participation in completed conspiracy or under federal and District of Columbia statutes declaring them punishable as principals for murders because they aided and abetted and counseled or advised commission of the offense. 18 U.S.C. §§ 2, 1111, 1116, 1117; D.C. Code §§ 22-105, 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Defendant who participated in robbery of cab driver which resulted in killing was guilty of murder in first degree even though defendant was accomplice of codefendant who did actual shooting. D.C. Code §§ 22-105, 22-2401. *United States v. Carter*, 445 F.2d 669, 1971 U.S. App. LEXIS 10458 (C.A.D.C. 1971), writ of certiorari denied by 405 U.S. 932, 92 S. Ct. 988, 30 L. Ed. 2d 806, 1972 U.S. LEXIS 3775 (1972).

Defendant's involvement in street shooting, even though his role was limited to that of getaway driver who never even got out of car, was sufficient to support conviction for first-degree murder as aider and abettor. D.C. Code 1981, §§ 22-105, 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

By its terms, the first-degree murder statute imposes felony-murder liability solely on the person who does the killing; other participants in a felony are exposed to first-degree murder liability only by virtue of the aiding and abetting statute. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

Felony-murder liability of an accomplice must be determined in accordance with common-law concepts of vicarious liability. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

If one of several confederates commits a homicide while engaged in the commission of a felony, all may be found guilty of felony-murder, even if the killing was unintentional, but the felony-murder liability of an accomplice is not unlimited; the principles of vicarious liability require that the connection between the felony and homicide be more than a mere coincidence of time and place; the relationship must be such that the killing can be said to have occurred in the execution of the common scheme or plot. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

There is no criminal responsibility on the part of an accomplice if the homicide is a fresh and independent product of the killer's mind, outside of, or foreign to, the common design; this limitation on the felony-murder liability of an accomplice is usually phrased in terms requiring that the killing be "in furtherance of the common design or plan." D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

The two elements requisite for conviction of felony-murder are that defendant or accomplice must have inflicted injury on decedent from which he died and that injury must have been inflicted in perpetration of specified felony, but no distinction is made between principals and aiders and abettors for purposes of felony-murder liability and only intent to commit underlying felony need be proved. D.C. Code §§ 22-105, 22-2401. *Waller v. United States*, 389 A.2d 801, 1978 D.C. App. LEXIS 482 (1978), writ of certiorari denied by 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253, 1980 U.S. LEXIS 2108 (1980).

To convict aider and abettor of first-degree felony-murder, Government was not required to prove that aider and abettor intended to commit the homicide. D.C. Code §§ 22-105, 22-2401. *Waller v. United States*, 389 A.2d 801, 1978 D.C. App. LEXIS 482 (1978), writ of certiorari denied by 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253, 1980 U.S. LEXIS 2108 (1980).

— In general.

Having knowledge of the offenses and failing to withdraw can be sufficient to establish implied approval, and hence aiding and abetting. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

One cannot aid or abet oneself. *Hawthorne v. United States*, 829 A.2d 948, 2003 D.C. App. LEXIS 532 (2003).

Physician who permitted qualified paramedic to examine and treat patients without consultation and with minimal supervision and to fill out and distribute drug prescriptions which had been presigned, and who did not require that paramedic seek his approval before prescribing drug was able to reasonably comprehend that his conduct was not accepted use of qualified paramedical personnel and thus was not exempt from statutory prohibition against aiding and abetting another in practice of healing art without a license. D.C. Code 1973, §§ 2-102, 22-105. *Jacobs v. United States*, 436 A.2d 1286, 1981 D.C. App. LEXIS 390 (1981).

Public utilities commission regulation, forbidding owner or operator of vehicle for hire to authorize any person to operate such vehicle

unless such person possessed a valid character license, was directed only to owners and operators who permitted unlicensed persons to drive; and defendant, who had an arrangement with corporation to rent taxicabs or to provide drivers but did not himself operate taxicabs and had no proprietary interest in corporation or its vehicles, could not properly be convicted under statute, where he was not accused of aiding and abetting corporation, and evidence did not comport with that of a case tried on theory of aiding and abetting. D.C. Code 1951, § 22-105. *Sellers v. District of Columbia*, 143 A.2d 96, 1958 D.C. App. LEXIS 319 (Cr.App. 1958).

— **Motor vehicle offenses, persons liable.**

To be an “aider and abettor” in unauthorized use of motor vehicle, a mere passenger must be shown to have had guilty knowledge, and this requires more than showing that he rode in automobile, pushed automobile, and repaired a punctured tire. D.C. Code 1961, §§ 22-105, 22-2204. *Kemp v. U.S.*, 311 F.2d 774, 1962 U.S. App. LEXIS 3334 (C.A.D.C. 1962).

One aiding and abetting unauthorized use of automobile stands in same shoes as principal offender. D.C. Code 1951, §§ 22-105, 22-2204. *Allen v. U.S.*, 257 F.2d 188, 1958 U.S. App. LEXIS 4469 (C.A.D.C. 1958).

Defendant who aided and abetted the taking of an automobile and other property within the District of Columbia was liable as a principal. D.C. Code 1951, §§ 22-105, 22-2201, 22-2204; 18 U.S.C. § 2. *Williams v. U.S.*, 215 F.2d 35, 1954 U.S. App. LEXIS 2807 (C.A.D.C. 1954).

In order to convict passenger as aider and abettor in unauthorized use of motor vehicle, government must establish that he had actual knowledge of criminal act being committed. D.C. Code §§ 22-105, 22-2204. *In re D. M. L.*, 293 A.2d 277, 1972 D.C. App. LEXIS 225 (1972).

The District of Columbia vehicle title and registration regulations and the commissioners’ order concerning automobile conditional sales contracts were applicable only to licensed automobile dealers, and unlicensed dealer, even though he aided and abetted a licensed dealer, could not be convicted for violations of regulations and order on the sole basis that he was a dealer under their purview. D.C. Code 1951, § 22-105. *Jack Berman, Inc. v. District of Columbia*, 132 A.2d 147, 1957 D.C. App. LEXIS 235 (Cr.App. 1957).

— **Obscenity, persons liable.**

Under District of Columbia statute authorizing charging of aiders and abettors as principals, particular defendants who distributed allegedly obscene motion picture film could be convicted of knowingly presenting the film in the District of Columbia where such defendants

supplied film to exhibitor therein in return for share of proceeds from the exhibition. D.C. Code §§ 22-105, 22-2001; 18 U.S.C. § 2. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

— **Robbery, persons liable.**

Although an unarmed accomplice may be found guilty of armed robbery as an aider and abettor, such a theory of liability requires proof beyond a reasonable doubt that the use of the weapon was either known or “reasonably foreseeable” to the unarmed participant. *Abdus-Price v. United States*, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

To prove that defendant aided and abetted armed robbery, government was required to establish beyond reasonable doubt that armed robbery had been committed and that defendant knowingly participated in the robbery. D.C. Code 1981, § 22-105. *Kelly v. United States*, 639 A.2d 86, 1994 D.C. App. LEXIS 35 (1994).

An instruction under the aiding and abetting statute is not necessary in order for the acts of one principal in furtherance of a crime to be imputed to another principal; hence, fact that defendant may have only held gun during armed robbery of supermarket did not require finding that since he did not physically commit all elements of the offense he could not be held legally responsible for the acts of the other individual, who seized the cash from the safe, unless he was found to have aided and abetted such individual. D.C. Code §§ 22-105, 22-502, 22-2901 to 22-3202. *Hazel v. United States*, 353 A.2d 280, 1976 D.C. App. LEXIS 486 (1976).

An aider and abettor of an armed robbery is not guilty of a lesser included offense but is a principal to the robbery. D.C. Code § 22-105. *Atkinson v. United States*, 322 A.2d 587, 1974 D.C. App. LEXIS 243 (1974).

— **Sexual assaults, persons liable.**

Criminal liability for aiding and abetting carnal knowledge may not attach merely for accused’s presence during commission of unlawful coitus. D.C. Code §§ 22-105, 22-2801. *In re J.W.Y.*, 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Female may be charged as a principal under statute prohibiting carnal knowledge or abuse of a female child under 16 years of age if she has aided or abetted commission of the particular crime even though female is physically incapable of committing the prohibited act. D.C. Code §§ 22-105, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

Pleas.

Where defendant was fully informed about concept of aiding and abetting at guilty plea hearing, defendant specifically acknowledged that he was outside at scene of burglary know-

ing that others were going to commit crime and defendant admitted that he was assisting and advising the other perpetrators, defendant's plea of guilty to charge of first-degree burglary was made voluntarily, with understanding of nature of charge and consequences of plea and there was factual basis for plea; and trial court did not abuse its discretion in refusing to allow withdrawal of plea upon defendant's subsequent denial that he had known that perpetrators of crime were going to burglarize apartment in question. D.C. Code §§ 22-105, 22-1801(a); D.C. Code SCR, Criminal Rules 11, 32. *Austin v. United States*, 356 A.2d 648, 1976 D.C. App. LEXIS 528 (1976).

Presumptions and burden of proof.

A conviction for first-degree premeditated murder on a theory of aiding and abetting requires the prosecution to prove that the accomplice acted with premeditation and deliberation and intent to kill; abrogating *Daniels v. United States*, 738 A.2d 240, *Matthews v. United States*, 629 A.2d 1185, and *Byrd v. United States*, 364 A.2d 1215. *Wilson-Bey v. United States*, 903 A.2d 818, 2006 D.C. App. LEXIS 424 (2006), writ of certiorari denied by 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089, 2007 U.S. LEXIS 5173, 75 U.S.L.W. 3607 (2007).

To prove that a defendant aided and abetted a crime, the government must prove that the aider and abettor associated himself with the criminal venture, that he participated in it as in something he wished to bring about, and that he sought by his action to make it succeed. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

To prove aiding and abetting, the government has to show that a crime was committed by someone, the accused assisted or participated in its commission, and his participation was with guilty knowledge. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

In order to prove an offense on an aiding-and-abetting theory, the government is required to prove: (1) that the offense was committed by someone, (2) that the accused participated in the commission of the offense, and (3) that he did so with guilty knowledge. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

To prove aiding and abetting, the government must prove: (1) that an offense was committed by someone, (2) that the accused participated in its commission, and (3) that he did so with guilty knowledge. *Lyons v. U.S.*, 833 A.2d 481, 2003 D.C. App. LEXIS 618 (2003).

To prove aiding and abetting, the government must show that: (1) a crime was committed by

someone; (2) the accused assisted or participated in its commission; and (3) the participation was with guilty knowledge. *Hawthorne v. United States*, 829 A.2d 948, 2003 D.C. App. LEXIS 532 (2003).

A conviction for aiding and abetting requires proof of three elements: (1) a crime was committed by someone, (2) defendant assisted or participated in its commission, and (3) he did so with guilty knowledge. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

To prove aiding and abetting, the government must prove that (1) a crime was committed by someone, (2) the accused assisted or participated in its commission, and (3) his participation was with guilty knowledge. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

To be convicted of offense on an aiding and abetting theory, the government must prove that the defendant associated himself with the criminal activity, participated in it as something he wanted to bring about, and took some action to make it succeed. *Price v. United States*, 813 A.2d 169, 2002 D.C. App. LEXIS 723 (2002).

To establish that the accused aided and abetted the commission of crimes alleged, the government must prove that: (1) the offense was committed by someone; (2) the accused participated in the commission of the offense; and (3) he or she did so with guilty knowledge. *Price v. United States*, 813 A.2d 169, 2002 D.C. App. LEXIS 723 (2002).

Aiding and abetting a criminal offense requires proof: (1) that the offense was committed by someone; (2) that the accused participated in the commission; and (3) that he did so with guilty knowledge. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

In order to obtain a conviction for aiding and abetting the commission of a crime, the government must show that the defendant in some way associated himself with the criminal venture, that he participated in it as in something he wished to bring about and that he sought by his action to make it succeed. D.C. Code § 22-105. *Quarles v. United States*, 308 A.2d 773, 1973 D.C. App. LEXIS 333 (1973).

Questions of law and fact.

In murder prosecution against two defendants one of whom shot the victim, whether the codefendant had aided and abetted the offense was for jury under the evidence. D.C. Code §§ 22-105, 22-2403. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

In prosecution of Puerto Rican defendant, whose companion shot and killed guard in front of dwelling of President of the United States, for first-degree murder, wherein defendant in-

terposed defense that he and companion had no intent to kill anyone but merely wished to create an incident in order to bring to the attention of the American people conditions in Puerto Rico, jury, in determining whether the killing by defendant's companion was within design or plan of defendant and his companion, was entitled to consider whether it was a natural and probable result of the acts which defendant and his companion concerted to perform. D.C. Code 1940, §§ 22-105, 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

Uncontroverted testimony afforded ample basis for trier of fact to draw reasonable and permissible inference that the juvenile was involved as aider and abettor in the criminal conduct of robbing and assaulting another juvenile notwithstanding there was contradictory testimony by complaining witness. D.C. Code §§ 22-105, 22-502, 22-2901. *In re W.*, 294 A.2d 174, 1972 D.C. App. LEXIS 237 (1972).

Review.

Where prosecutor's improper closing and rebuttal arguments were so highly prejudicial as to require reversal of conviction of defendant who relied upon insanity as a defense and was convicted of first-degree murder and assault with intent to kill while armed, judgment of conviction of codefendant, who was charged as an aider and abettor, asserted lack of intent to commit murder, and was convicted of second-degree murder, would also be nullified. D.C. Code §§ 22-105, 22-501, 22-502, 22-2401, 22-2403, 22-3202. *United States v. Hawkins*, 480 F.2d 1151, 1973 U.S. App. LEXIS 9498 (C.A.D.C. 1973).

Defendant was not prejudiced by constructive amendment to indictment that occurred when he entered guilty plea to robbery rather than charged offense of assault with intent to rob, and thus that constructive amendment was not "plain error"; penalties for the two offenses were identical, defendant received maximum sentence available under either statute, and defendant's version of charged incident admitted conduct that constituted assault with intent to commit robbery as an aider or abettor. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Defendant's conviction for first-degree murder as aider and abettor in connection with street shooting was required to be affirmed if there was sufficient evidence from which reasonable juror could infer that he intentionally engaged in conduct from which death was likely to occur as a probable consequence. D.C. Code 1981, §§ 22-105, 22-2401. *Daniels v.*

United States, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Severance and joinder of prosecutions.

It was not material to consideration by Court of Appeals of district court's decision denying motion for severance that prejudice of character allegedly feared by defendant did not develop at trial. Fed. Rules Crim. Proc. rule 14, 18 U.S.C.; D.C. Code § 22-105. *United States v. Wilson*, 434 F.2d 494, 1970 U.S. App. LEXIS 8760 (C.A.D.C. 1970).

Validity of related laws.

Statute exempting accepted use of qualified paramedical personnel from proscription of aiding and abetting another in practice of healing art without a license survived constitutional vagueness attack because custom and usage of medical profession, its readily available policies and regulations, and knowledge presumably held by licensed practitioner can be read along with language of statute to supply adequate notice of what constitutes accepted use. D.C. Code 1973, §§ 2-102, 22-105; U.S. Const. Amend. 5. *Jacobs v. United States*, 436 A.2d 1286, 1981 D.C. App. LEXIS 390 (1981).

Verdict.

In prosecution for aiding and abetting another in practice of healing art without a license, trial court properly accepted unanimous verdict of jury despite pause and slight equivocation with which one juror answered poll. D.C. Code 1973, §§ 2-102, 22-105. *Jacobs v. United States*, 436 A.2d 1286, 1981 D.C. App. LEXIS 390 (1981).

Weight and sufficiency of evidence.

— Assault and battery, weight and sufficiency of evidence.

Evidence including testimony showing that defendant walked behind victims and tried to remove wallet from victim's pocket was sufficient to support the implicit finding of verdict that defendant aided and abetted the offense of assault with intent to commit robbery while armed with a dangerous weapon and the offense of assault with a dangerous weapon. D.C. Code §§ 22-105, 22-501 et seq., 22-502. *United States v. Prater*, 462 F.2d 292, 1972 U.S. App. LEXIS 10401 (C.A.D.C. 1972).

Evidence that inter alia, defendant and two other men entered store together, that they conversed together until other customers left the store, that defendant did not lie on the floor when one of the codefendants, with a gun, announced a "stick-up" and said "To the floor.", and that defendant moved from near the door to near the cash register after a codefendant ordered store employee to open it was sufficient to support defendant's conviction for armed robbery and assault with a dangerous weapon,

and conflicting testimony of defendant and his codefendants whereby they all sought to establish that defendant and one of his codefendants were innocent bystanders did not destroy the permissible inference of defendant's guilt. D.C. Code §§ 22-105, 22-502, 22-2901, 22-3202. *United States v. Lumpkin*, 448 F.2d 1085, 1971 U.S. App. LEXIS 9452 (C.A.D.C. 1971).

There was sufficient evidence from which jury could reasonably find that defendant aided and abetted shooting of victim outside of nightclub following fight in nightclub, thus sustaining conviction for assault with a dangerous weapon, where evidence showed that inside and outside events were part of continuous chain of events and the shooting outside the club was natural and probable consequence of defendant's actions in handing gun, inside the club, to person who shot victim outside of club. D.C. Code 1981, § 22-105. *Murchison v. United States*, 486 A.2d 77, 1984 D.C. App. LEXIS 575 (1984).

Evidence was sufficient to sustain defendant's assault with dangerous deadly weapon conviction on theory that coparticipant engaged in such assault and that assault was natural and probable consequence of attempted robbery or defendant's participation in events leading to assault warranted holding him responsible, or that assault took place during defendant's and coparticipant's escape after committing another offense, or that defendant aided and abetted coparticipant in escape and thus was equally responsible for intended assault by coparticipant or that assault was object of conspiracy. D.C. Code § 22-105. *Jones v. United States*, 386 A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

Evidence was sufficient to support juvenile court's finding that juvenile participated as an aider and abettor in assault with intent to commit robbery on a school teacher. D.C. Code §§ 11-1551(a)(1)(A), 22-105, 22-501. In re *Reeder*, 264 A.2d 893, 1970 D.C. App. LEXIS 210 (App. 1970).

Evidence supported conviction of appealing defendants of assault and of attempted petit larceny, since court could conclude that defendants were associated with principal offender in the venture and made a conscious effort to help it succeed. D.C. Code 1961, §§ 11-776(b), 22-105, 22-504, 22-2202. *Williams v. United States*, 190 A.2d 269, 1963 D.C. App. LEXIS 222 (App. 1963).

Evidence supported conviction of defendant, who at no time struck or pushed assault victim during altercation between victim, defendant and two others, and who could not be said by victim to have joined the other two in searching victim's pockets, for assault either on theory that concert of action by defendant and the

other two threatened or menaced the victim or that defendant aided and abetted the other two. D.C. Code 1951, §§ 22-105, 22-504. *Rogers v. U.S.*, 174 A.2d 356, 1961 D.C. App. LEXIS 324 (Cr.App. 1961).

— Burglary or larceny, weight and sufficiency of evidence.

Evidence was sufficient to establish defendant's guilty participation in crime of house-breaking and larceny. D.C. Code 1940, § 22-105. *Lanham v. U.S.*, 185 F.2d 435, 1950 U.S. App. LEXIS 3302 (C.A.D.C. 1950).

Evidence consisting of minor's admissions that he went to store with other "fellows" and that he was in store just before it closed and his flight from general vicinity of store was insufficient to support adjudication that minor was guilty as an aider and abettor in burglary and larceny of store. D.C. Code §§ 22-105, 22-1801(b), 22-2201. *Matter of R. A. B.*, 399 A.2d 81, 1979 D.C. App. LEXIS 312 (1979).

Evidence was not sufficient to support conviction of petit larceny as an aider and abettor by pushing victim at the very time that pickpocket pushed the victim from the rear and removed victim's wallet from his pocket. D.C. Code §§ 22-105, 22-2202. *Quarles v. United States*, 308 A.2d 773, 1973 D.C. App. LEXIS 333 (1973).

Mere showing that at time officer observed suspected criminal activity defendant was standing near right side of automobile at a point somewhere between automobile, which contained wine and beer allegedly stolen from store, and store was insufficient to support conviction for aiding and abetting petit larceny in violation of District of Columbia Code. D.C. Code §§ 22-105, 22-2202. *Williams v. United States*, 254 A.2d 722, 1969 D.C. App. LEXIS 272 (App. 1969).

— Conspiracy, weight and sufficiency of evidence.

Evidence was sufficient to support a conviction for conspiracy, even though one witness who was a member of defendant's group testified that there was no plan; witnesses who were members of defendant's group testified against defendant and detailed his involvement in a revenge venture, the witness who testified that there was no plan provided a description of the desire of the group, including defendant, to retaliate and testified that the group came together and decided to wear black and arm themselves before proceeding to the scene, and other witnesses testified that defendant had made the decision to go to the scene and led the group there. *McCrae v. United States*, 980 A.2d 1082, 2009 D.C. App. LEXIS 449 (2009).

— Gaming offenses, weight and sufficiency of evidence.

In prosecution for operation of lottery and for possession of numbers slips, slips used as evi-

dence to prove possession charge could also be used to prove charge of operation of lottery. D.C. Code 1951, §§ 22-105, 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Evidence sustained convictions for operation of lottery and possession of numbers slips and for aiding and abetting in such operation. D.C. Code 1951, §§ 22-105, 22-1501, 22-1502. *Maynard v. U.S.*, 215 F.2d 336, 1954 U.S. App. LEXIS 2836 (C.A.D.C. 1954).

Where tenant of premises, wherein gaming tables were kept, was an incorporated club, but there was evidence that defendants took part in carrying on its gambling activities, defendants were responsible as principals. D.C. Code 1940, §§ 22-105, 22-1504. *Warde v. U.S.*, 158 F.2d 651, 1946 U.S. App. LEXIS 2447 (1946).

— Homicide, weight and sufficiency of evidence.

In murder prosecution against two defendants one of whom shot the victim, evidence including showing of continuous association of codefendant with defendant who shot the victim, their furtive consultation immediately preceding the murder and codefendant's holding of bags of valuables that other defendant carried moments earlier, and standing close by while the defendant fought with and shot the victim sustained conviction of second-degree murder. D.C. Code §§ 22-105, 22-2403. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Evidence was sufficient to sustain conviction for aiding and abetting armed first-degree murder under District of Columbia law; defendant drove shooter to obtain firearm and then drove to location where victim was located. *United States v. Wilson*, 720 F.Supp.2d 51, 2010 U.S. Dist. LEXIS 65983 (2010).

Testimony that defendant had solicited the victim's murder and assisted in locating the victim, all with knowledge of the plan to murder him, provided sufficient basis for the convictions for first degree murder while armed and continuing criminal enterprise murder of victim. *United States v. Simmons*, 431 F.Supp.2d 38, 2006 U.S. Dist. LEXIS 26666 (2006).

Evidence was sufficient to support conviction of defendant on two counts of second-degree murder while armed and assault with intent to kill while armed, at trial of two defendants for murder and other crimes arising out of a retaliatory shooting; two witnesses to the shooting, who both suffered injuries, testified that they saw such defendant shooting at them and the two decedents, the two decedents died from their gunshot wounds, one of such witnesses was shot in the hand and head, the other such witness was shot in the leg, and another surviving victim was shot in the arm and shoulder.

Mitchell v. United States, 985 A.2d 1125, 2009 D.C. App. LEXIS 651 (2009), writ of certiorari denied by 131 S. Ct. 226, 178 L. Ed. 2d 150, 2010 U.S. LEXIS 6110, 79 U.S.L.W. 3201 (U.S. 2010).

Evidence was sufficient to support convictions of defendants for conspiracy to commit first-degree murder, at trial of two defendants for murder and other crimes arising out of a retaliatory shooting; two victims died from gunshot wounds, witnesses to the shooting testified that they recognized both defendants when they simultaneously came from behind trash dumpsters wielding guns, and police officer who heard the shooting testified that he noticed a black sports utility vehicle (SUV) with its engine running near the scene of the crime and saw two men run from the direction of the shooting and get into the SUV. *Mitchell v. United States*, 985 A.2d 1125, 2009 D.C. App. LEXIS 651 (2009), writ of certiorari denied by 131 S. Ct. 226, 178 L. Ed. 2d 150, 2010 U.S. LEXIS 6110, 79 U.S.L.W. 3201 (U.S. 2010).

Evidence was sufficient to support jury's finding that defendant aided and abetted the codefendant in committing murder, kidnapping, and carjacking, where defendant had the opportunity to disassociate himself from the codefendant at several points, but chose to stay when victim was kidnapped, stabbed, and shot, and defendant displayed his consciousness of guilt by fleeing from the police and attempting to conceal himself in some bushes. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Sufficient evidence supported conviction for first-degree murder under theory of aiding and abetting; record indicated that defendant was seen with co-defendant and others deliberating on victim's fate, defendant confessed that he participated in planning and murder of victim, and several witnesses identified defendant as fleeing scene in getaway car. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Evidence was sufficient to establish defendant's liability as codefendant's accomplice in victim's murder; evidence fairly allowed jury to find either that defendant advised and incited codefendant to shoot victim or, at the least, that defendant knowingly participated in shooting, and there was evidence that defendant and victim had words, that defendant then conferred with codefendant and warned bystanders to leave because something was about to happen, and that codefendant, accompanied by defendant, then pursued victim and shot him. *Lloyd v. United States*, 806 A.2d 1243, 2002 D.C. App. LEXIS 531 (2002).

Evidence that defendant was present when murder occurred, that he moved from back seat of car to driver's seat during altercation and drove off when his associates got back in the

car, and warned unwitting passenger not to tell anyone what he had witnessed was sufficient to support defendant's conviction for being accessory after the fact to felony-murder and armed robbery. D.C. Code 1981, § 22-105. *Jefferson v. United States*, 463 A.2d 681, 1983 D.C. App. LEXIS 420 (1983).

Evidence was sufficient in first-degree murder prosecution to sustain defendant's conviction as aider and abettor. D.C. Code § 22-105. *Byrd v. United States*, 364 A.2d 1215, 1976 D.C. App. LEXIS 394 (1976).

Fact that there was some evidence in first-degree murder prosecution that defendant attempted to break up earlier fight between his codefendant and murder victim and later cautioned his codefendant against shooting victim did not exonerate defendant as aider and abettor; such evidence was controverted and, in any event, did not otherwise negate account of his assisting with commission of homicide. D.C. Code § 22-105. *Byrd v. United States*, 364 A.2d 1215, 1976 D.C. App. LEXIS 394 (1976).

— In general.

Sufficient evidence supported conviction of defendant for possession of cocaine with intent to distribute on aiding and abetting theory; defendant not only resided at residence from which drug dealer was selling drugs, but he also owned it, defendant admitted that he knew dealer was engaging in drug transactions at residence, and that he was a “go between” for such transactions, and defendant testified that he regularly used the only working bathroom in basement of residence, where empty plastic bags, razor blades, and two plates coated with white powder residue were located on top of bar. *Trapps v. United States*, 887 A.2d 484, 2005 D.C. App. LEXIS 635 (2005).

Evidence was sufficient to support jury's finding that defendant aided and abetted the codefendant in committing murder, kidnapping, and carjacking, where defendant had the opportunity to disassociate himself from the codefendant at several points, but chose to stay when victim was kidnapped, stabbed, and shot, and defendant displayed his consciousness of guilt by fleeing from the police and attempting to conceal himself in some bushes. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Whether a defendant is guilty of aiding and abetting a crime depends on the totality of the evidence. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

Evidence was sufficient to convict defendant as an aider and abettor for first-degree fraud, in regard to his using Water and Sewer Authority (WASA) equipment and employees for his own profit; evidence showed that defendant offered apartment building owner a contract price for water pipe connection work that was well below

market price quoted by other private plumbers, and statement of government's principal witness, which he wrote during plea proceeding in federal court, implicated defendant as a co-conspirator in the fraudulent scheme. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

Evidence was sufficient to convict defendants as an aiders and abettors for first-degree fraud, in regard to their using Water and Sewer Authority (WASA) equipment for their own profit while they were WASA employees; statement of government's principal witness, which he wrote during plea proceeding in federal court, indicated that defendants were paid for water pipe connection work that they performed while they should have been working for WASA. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

Evidence was sufficient to support defendant's convictions for first-degree murder while armed, assault with intent to kill while armed, armed robbery, conspiracy to commit armed robbery, and first-degree burglary while armed; according to driver of get-away vehicle, defendant struggled to open stolen safe in vehicle following murders and made statement about apparent contents of safe, and other witnesses testified that defendant ran to vehicle from victims' house with codefendant, that defendant helped count out money, drugs, and other items found in safe, and that defendant ultimately took his own share, including a diamond ring which he was seen wearing shortly after the murders. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

— Kidnapping, weight and sufficiency of evidence.

Defendant's role as aider and abettor was sufficient to impute guilt for kidnapping, although defendant claimed that evidence was insufficient to establish his participation in kidnapping offense if kidnapping were found to be offense separate from robbery. D.C. Code 1981, § 22-105, 22-2101. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

— Motor vehicle offenses, weight and sufficiency of evidence.

Evidence was insufficient to convict defendant as aider and abettor of another in unauthorized use of motor vehicle. D.C. Code 1961, §§ 22-105, 22-2204. *Kemp v. U.S.*, 311 F.2d 774, 1962 U.S. App. LEXIS 3334 (C.A.D.C. 1962).

Evidence was sufficient to support convictions of defendants for unauthorized use of a motor vehicle, at trial of two defendants for

murder and other crimes arising out of a retaliatory shooting; owner of black sports utility vehicle (SUV) testified that she saw her SUV being stolen by two young black men, owner's SUV was recovered from behind the apartment building of one of the defendant's girlfriend, the girlfriend testified that she saw such defendant at her apartment the night of the shooting, two witnesses testified they saw defendants together during the shooting, and police officer who heard the shooting testified that he noticed a black SUV with its engine running near the scene of the crime and saw two men run from the direction of the shooting and get into the SUV. *Mitchell v. United States*, 985 A.2d 1125, 2009 D.C. App. LEXIS 651 (2009), writ of certiorari denied by 131 S. Ct. 226, 178 L. Ed. 2d 150, 2010 U.S. LEXIS 6110, 79 U.S.L.W. 3201 (U.S. 2010).

Evidence, including evidence that automobile was "hot wired" in a manner visible to anyone in rear seat, sustained delinquency adjudication of juvenile who was found in rear seat and charged as aider and abettor in unauthorized use of vehicle. D.C. Code §§ 22-105, 22-2204. *In re D. M. L.*, 293 A.2d 277, 1972 D.C. App. LEXIS 225 (1972).

— Obstructing justice-, weight and sufficiency of evidence.

Evidence did not support conviction of obstructing justice by attempting to intimidate a juror, on theory of aiding and abetting; evidence showed that defendant was present with other persons during encounter with juror at hot dog stand during which the other persons intimidated witness, but that defendant urged the others not to say anything to juror. *Smith v. United States*, 837 A.2d 87, 2003 D.C. App. LEXIS 701 (2003), writ of certiorari denied by 541 U.S. 1081, 124 S. Ct. 2435, 158 L. Ed. 2d 996, 2004 U.S. LEXIS 3976, 72 U.S.L.W. 3733 (2004).

Evidence did not support conviction for obstruction of justice arising from defendant's alleged complicity in threatening his former wife by letter in attempt to force her to abandon criminal contempt charges against defendant; defendant neither wrote letter nor delivered it, and references in letter to defendant and his wife's former address, and threat to harm "Maryleah" (defendant's former wife) and "the children" did not imply knowledge unique to defendant or a confederate. D.C. Code 1981, § 22-105. *Green v. United States*, 651 A.2d 817, 1994 D.C. App. LEXIS 247 (1994).

— Robbery, weight and sufficiency of evidence.

Evidence supported conclusion that victim of carjacking was in immediate possession of vehicle, as required for conviction under District of Columbia law, even though he was some

distance away from automobile unlocking door of credit union defendants were about to rob when a defendant drive vehicle into parking lot and parked it, and defendants subsequently used vehicle for getaway purposes; except for intimidation being applied, victim could have easily regained physical control of automobile. D.C. Code 1981, §§ 22-105, 22-3901. *United States v. Gilliam*, 167 F.3d 628, 1999 U.S. App. LEXIS 3012 (C.A.D.C. 1999), writ of certiorari denied by 526 U.S. 1164, 119 S. Ct. 2060, 144 L. Ed. 2d 225, 1999 U.S. LEXIS 3929, 67 U.S.L.W. 3748 (1999), writ of certiorari denied by 528 U.S. 845, 120 S. Ct. 118, 145 L. Ed. 2d 100, 1999 U.S. LEXIS 5424, 68 U.S.L.W. 3225 (1999).

Evidence of defendant's presence at scene of crime, slight association with actual perpetrator, and subsequent flight, did not sustain conviction for robbery. Fed.Rules Crim.Proc. rule 29(a), 18 U.S.C.; D.C. Code §§ 22-105, 22-2901. *Bailey v. United States*, 416 F.2d 1110, 1969 U.S. App. LEXIS 13359 (C.A.D.C. 1969).

Evidence at first trial that defendant acted with "guilty knowledge" that principal was committing robbery when defendant picked principal and companion up in car and drove away, and that defendant knew or should have foreseen that gun would be required to commit the robbery, was sufficient to sustain conviction for aiding and abetting armed robbery, so that retrial was not barred on double jeopardy grounds following remand based on reversible instructional errors, in view of evidence that defendant had inside information and arranged to drive robbers to particular grocery store on heavy check-cashing day at exact time when person would arrive with large amounts of cash, that reasonable precautions against theft might have been expected, and that principal entered defendant's car with two guns. U.S. Const.Amend. 5; D.C. Code 1981, § 22-105. *Kelly v. United States*, 639 A.2d 86, 1994 D.C. App. LEXIS 35 (1994).

Evidence supported conviction of defendant as aider and abettor of codefendant's armed robbery of parking lot attendant; two men were observed circling hospital parking lot two hours before robbery; during robbery defendant was seated in driver's seat of codefendant's car with motor running, had unobstructed view of robbery, and lied by telling police sergeant that he was not waiting for anyone; and jury could reasonably find that codefendant was unlikely to have kept gun in waistband for entire two-hour period and that use of some type of weapon was reasonably foreseeable. D.C. Code 1981, §§ 22-105, 22-2901, 22-3202. *Hodge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

— Weapons offenses, weight and sufficiency of evidence.

Evidence was sufficient to support defendant's conviction for conspiracy; fact that one

occupant of the car drove while the other fired gunshots and shouted instructions was enough to infer an agreement and knowing participation, and witness's testimony that defendant had admitted to performing the principal overt act, namely shooting at the victims, was sufficient to deduce that an overt act was committed in furtherance of the agreement. *McCoy v. United States*, 890 A.2d 204, 2006 D.C. App. LEXIS 7 (2006).

Where no evidence was introduced to show that codefendant, or anyone else besides defendant, had license for gun, and no one else was charged, let alone convicted, of carrying a pistol without a license, there was inconclusive evidence of an unlicensed weapons crime that defendant could be said to have aided and abetted. D.C. Code §§ 22-105, 22-3204. *Jackson v. United States*, 395 A.2d 99, 1978 D.C. App. LEXIS 573 (1978).

— Wire fraud, weight and sufficiency of evidence.

Evidence permitted jury to find that defendant was knowing participant in unlawful scheme to obtain real property for deflated price, supporting conviction for wire fraud and conspiracy to commit wire fraud, even though

defendant was acquitted of charges under District of Columbia law for fraud, forgery, and uttering forged instrument; jury could conclude from defendant's connection to forged deed for property, which was filed by his real estate agent after owner's death, that he knowingly entered into scheme to defraud owner's heirs, particularly given check that he wrote to agent after she purportedly purchased property, and defendant falsely represented to executor for owner's estate that he was United States marshal and that police were protecting property on his behalf, suggesting that if property were not sold to his group, protection would cease, property would be ruined, and estate would be liable. *United States v. Brockenborough*, 575 F.3d 726, 2009 U.S. App. LEXIS 17672 (C.A.D.C. 2009).

Witnesses generally.

In prosecution for aiding and abetting another in practice of healing art without a license, trial court did not act arbitrarily in quashing several subpoenas duces tecum sought by defendant against medical society and its officers and employees. D.C. Code 1973, §§ 2-102, 22-105. *Jacobs v. United States*, 436 A.2d 1286, 1981 D.C. App. LEXIS 390 (1981).

§ 22-1805a. Conspiracy to commit crime.

(a)(1) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.

(2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than \$3000 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

(b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose.

(c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:

(1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or

(2) Such conduct would constitute a criminal offense under an act of

Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.

(d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction.

(Mar. 3, 1901, ch. 854. § 908A; July 29, 1970, 84 Stat. 599, Pub. L. 91-358, title II, § 202; Dec. 10, 2009, D.C. Law 18-88, § 209, 56 DCR 7413.)

Prior Codifications. — 1981 Ed., § 22-105a.

1973 Ed., § 22-105a.

Effect of amendments. — D.C. Law 18-88 designated the existing text of subsec. (a) as subsec. (a)(1); and added subsec. (a)(2).

Emergency legislation. — For temporary (90 day) amendment of section, see § 209 of Omnibus Public Safety and Justice Emergency

Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 209 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

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Indictment or information.

Count of indictment charging defendant with conspiring to defraud District of Columbia of lawful government functions stated an offense. D.C. Code 1981, § 22-105a(a). *United States v. Lewis*, 716 F.2d 16, 1983 U.S. App. LEXIS 24725 (C.A.D.C. 1983), writ of certiorari denied by 464 U.S. 996, 104 S. Ct. 492, 78 L. Ed. 2d 686, 1983 U.S. LEXIS 2517, 52 U.S.L.W. 3422 (1983).

Indictment provided fair notice of charge of conspiracy to commit armed robbery, though it did not refer to statute defining conspiracy to commit crimes, where indictment alleged that defendant and two accomplices knowingly conspired and agreed to commit together criminal offenses, that object of conspiracy was to rob victim while armed, and that named conspirators committed overt acts including arming themselves, searching out intended victim, breaking into victim's apartment, and forcing victim to ride with them to his apartment for

purpose of committing armed robbery. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Instructions.

Error in aiding and abetting instruction regarding first-degree murder while armed and possession of a firearm during a crime of violence (PFCV), in that instruction amounted to a negligence instruction because error allowed jury to find defendant guilty of murder and PFCV as the natural and probable consequences of another's actions, was harmless beyond a reasonable doubt, in trial of defendant for conspiracy to commit first-degree murder, first-degree murder while armed and PFCV; court provided a valid Pinkerton co-conspirator instruction in addition to the erroneous aiding and abetting instruction, jury convicted defendant of conspiracy to commit first-degree murder and thus every juror found the requisite intent for first-degree murder, such findings sufficed for Pinkerton co-conspirator liability, and murder of victim by an armed killer was a reasonably foreseeable consequence of that conspiracy. *Wheeler v. United States*, 977 A.2d 973, 2009 D.C. App. LEXIS 343 (2009), amended by 987 A.2d 431, 2010 D.C. App. LEXIS 211 (D.C. 2010), writ of certiorari denied by 131 S. Ct. 325, 178 L. Ed. 2d 211, 2010 U.S. LEXIS 7488, 79 U.S.L.W. 3204 (U.S. 2010).

Presence of multiple conspiracies was not fairly raised by evidence, and thus defendant was not entitled to multiple conspiracy jury instruction in prosecution for conspiracy to commit murder and obstruction of justice; conspirators' single goal was to keep victim from testifying in separate murder trial, members of conspiracy were dependent upon each other to accomplish that goal, and there was no evidence of overlap in participants of conspiracy. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

For a multiple conspiracy instruction to be justified, the defendant must show that the instruction is on an issue that is fairly raised by the evidence. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Jury instruction governing conspiracy to commit robbery adequately explained requirement that defendant intended to commit unlawful objective of robbery, where it stated that government had to prove that an agreement existed to commit the crime of robbery, that the purpose of the agreement had to be to commit the unlawful object of the conspiracy, and that the government had to prove that the defendant intentionally joined in the agreement. D.C. Code 1981, § 22-105a. *Green v. United States*, 718 A.2d 1042, 1998 D.C. App. LEXIS 161 (1998), writ of certiorari denied by 526 U.S. 1011, 119 S. Ct. 1156, 143 L. Ed. 2d 222, 1999 U.S. LEXIS 1836, 67 U.S.L.W. 3560 (1999).

Merger of offenses.

Defendant's conviction for conspiracy to commit first-degree murder while armed did not merge with other offenses for which he was convicted, where none of the other offenses required proof of an agreement to commit crime. *Hammond v. United States*, 880 A.2d 1066, 2005 D.C. App. LEXIS 414 (2005), writ of certiorari denied by 547 U.S. 1184, 126 S. Ct. 2373, 165 L. Ed. 2d 287, 2006 U.S. LEXIS 4430, 74 U.S.L.W. 3677 (2006), writ of certiorari denied by 549 U.S. 931, 127 S. Ct. 374, 166 L. Ed. 2d 231, 2006 U.S. LEXIS 6404, 75 U.S.L.W. 3174 (2006).

Absent very special circumstances, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. *Hammond v. United States*, 880 A.2d 1066, 2005 D.C. App. LEXIS 414 (2005), writ of certiorari denied by 547 U.S. 1184, 126 S. Ct. 2373, 165 L. Ed. 2d 287, 2006 U.S. LEXIS 4430, 74 U.S.L.W. 3677 (2006), writ of certiorari denied by 549 U.S. 931, 127 S. Ct. 374, 166 L. Ed. 2d 231, 2006 U.S. LEXIS 6404, 75 U.S.L.W. 3174 (2006).

Defendant's conviction for conspiracy to murder and obstruction of justice did not merge with his convictions for substantive offenses of murder and obstruction of justice, for purposes of determining whether there are two offenses

or only one, thus requiring merger of the sentences, since conspiracy count did not merge with any underlying offense. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Generally, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Under "Wharton's Rule," as exception to general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to require necessarily the participation of two people for its commission. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Only where it is impossible under any circumstances to commit the substantive offense without cooperative action does Wharton's Rule bar convictions for both the substantive offense and conspiracy to commit that same offense. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

A participant is necessary to the commission of a crime, for purposes of merging substantive and conspiracy counts, if the substantive statute requires the participant's existence as an abstract legal element of the crime. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Crimes that traditionally fall under Wharton's Rule, barring prosecution for conspiracy when substantive offense is of such a nature as to require participation of two people for its commission, share three characteristics: (1) parties to agreement are the only persons who participate in commission of substantive offense; (2) immediate consequences of crime rest on parties themselves rather than on society at large; and (3) agreement that attends substantive offense does not appear likely to pose the distinct kinds of threats to society that law of conspiracy seeks to avert. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Wharton's Rule, as exception to general rule that conspiracy and completed substantive offense are discrete crimes for which separate sanctions may be imposed, does not preclude conviction in a single trial of conspiracy to commit armed robbery and the substantive offense of armed robbery or its lesser-included offense of attempted armed robbery. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

In prosecution for murder, kidnapping, and assault arising out of the "Hanafi" take-overs of three buildings, the kidnapping convictions of defendants did not merge with the other offenses. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Nature and elements of criminal conspiracy.

The essential element of conspiracy is the agreement to commit an unlawful act, which distinguishes it from other substantive offenses. *Hammond v. United States*, 880 A.2d 1066, 2005 D.C. App. LEXIS 414 (2005), writ of certiorari denied by 547 U.S. 1184, 126 S. Ct. 2373, 165 L. Ed. 2d 287, 2006 U.S. LEXIS 4430, 74 U.S.L.W. 3677 (2006), writ of certiorari denied by 549 U.S. 931, 127 S. Ct. 374, 166 L. Ed. 2d 231, 2006 U.S. LEXIS 6404, 75 U.S.L.W. 3174 (2006).

Essential element of conspiracy is the agreement to commit an unlawful act, which distinguishes it from other substantive offenses and aiding and abetting that do not require proof of an agreement. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Substance of crime of conspiracy is knowing participation in agreement to accomplish unlawful act. D.C. Code 1981, § 22-105a. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Overt act requirement is not part of "corpus delicti" of conspiracy; it is merely evidentiary prophylactic. D.C. Code 1981, § 22-105a. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Presumptions and burden of proof.

To sustain a conviction for conspiracy, the government must prove: (1) an agreement between two or more people to commit a criminal offense, (2) knowing and voluntary participation in the agreement by the defendant with the intent to commit a criminal objective, and (3) commission in furtherance of the conspiracy of at least one overt act by a co-conspirator

during the conspiracy. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Review.

Erroneous admission of out-of-court videotaped admissions and plea statement of non-testifying codefendants reasonably contributed to guilty verdict for defendant on conspiracy charge, and thus, was not harmless; although there was independent testimony admitted by co-conspirator at trial, prosecutor drew attention to videotape and plea statements implying that out-of-court statements should be considered more seriously than co-conspirator's testimony and encouraged jury to look at videotape and plea statements more carefully, showing that inadmissible evidence was used to strengthen otherwise less than compelling proof of guilt from co-conspirator's testimony. *Williams v. United States*, 858 A.2d 978, 2004 D.C. App. LEXIS 455 (2004).

Error in admitting non-testifying co-defendant's videotaped confession, as well as plea allocutions of non-testifying co-defendants, as declarations against penal interest, which violated murder defendants' right of confrontation, was not harmless, with respect to convictions for conspiracy to commit murder; testimony of government's principal insider witness did not conclusively establish existence of conspiracy, given that he was not disinterested witness, but one with weighty incentives to depict conspiracy and roster of its members in manner shaped to government's liking, and prosecutor's entreaty to jury to consider statements as proof that defendants had conspired to commit murder could not be said to have had no effect on jury's conclusion that there was a conspiracy, and that defendants had been members of it. *Morten v. United States*, 856 A.2d 595, 2004 D.C. App. LEXIS 422 (2004).

Sentence and punishment.

Defendant's conviction for conspiracy to murder and obstruction of justice did not merge with his convictions for substantive offenses of murder and obstruction of justice, for purposes of determining whether there are two offenses or only one, thus requiring merger of the sentences, since conspiracy count did not merge with any underlying offense. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Imposing consecutive sentences on defendant convicted of conspiracy to commit robbery and attempted robbery did not violate double jeopardy; each offense required proof of fact that the other did not. D.C. Code 1981, §§ 22-105a, 22-2901, 22-2902, 23-112; U.S.C. Const. Amend. 5. *Robinson v. United States*, 608 A.2d 115, 1992 D.C. App. LEXIS 122 (1992).

Weight and sufficiency of evidence.

Evidence was sufficient to show that codefen-

dant intended to prevent victim from giving truthful testimony regarding gang-related shooting, as required to support convictions for obstruction of justice and related conspiracy; defendant formulated plan to bribe victim to not identify him at trial as one of assailants, he first asked former girlfriend to contact victim with offer to pay victim money to not appear, codefendant joined with her brother in urging girlfriend to contact victim to bribe him "so he won't come to court," and codefendant also approached another person for help in locating victim so that she could offer bribe herself. *Campos-Alvarez v. United States*, 16 A.3d 954, 2011 D.C. App. LEXIS 153 (2011).

Evidence was sufficient to support conviction for conspiracy to commit first-degree murder; there was evidence that two individuals robbed the mother of defendant's child of \$17,000 he had given her for child care, that defendant told various individuals after the robbery that he was going to get revenge, that defendant drove around the neighborhood with another individual seeking information on who was responsible for the robbery and that several individuals told him that victim was one of the robbers, that defendant spoke in slang regarding getting an acquaintance to kill or harm the robber, that 31 hours after the money was stolen the victim was shot 10 times, that after the murder defendant was no longer angry, and that defendant made incriminating statement after the murder that he did not know what happened to the victim just like nobody knew who robbed his house. *Wheeler v. United States*, 977 A.2d 973, 2009 D.C. App. LEXIS 343 (2009), amended by 987 A.2d 431, 2010 D.C. App. LEXIS 211 (D.C. 2010), writ of certiorari denied by 131 S. Ct. 325, 178 L. Ed. 2d 211, 2010 U.S. LEXIS 7488, 79 U.S.L.W. 3204 (U.S. 2010).

Evidence was sufficient to support convictions of fifth defendant for conspiracy to assault and to commit murder, and first-degree premeditated murder while armed, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; three of the four eyewitnesses who testified for the prosecution testified that fifth defendant joined in the attack against the homeless man and the passerby who was stabbed to death. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Evidence was sufficient to support conviction for conspiracy to commit assault and murder; evidence showed that defendant and coconspirators discussed and agreed to exact revenge against persons in rival neighborhood faction,

and that together with others, defendant voluntarily and knowingly participated in the agreement by obtaining guns and ammunition and joining efforts to "catch" members of the rival faction. *Hairston v. United States*, 905 A.2d 765, 2006 D.C. App. LEXIS 484 (2006), writ of certiorari denied by 552 U.S. 994, 128 S. Ct. 491, 169 L. Ed. 2d 345, 2007 U.S. LEXIS 11896, 76 U.S.L.W. 3224 (2007).

Evidence was sufficient to support co-defendant's conviction for conspiracy to commit murder, despite his claim that there was no non-hearsay evidence connecting him with the conspiracy; evidence established that co-defendant had a long term relationship with the other defendants and attended a meeting at another co-defendant's house right before the murder, and witness placed three men at the scene of the murder. *Hammond v. United States*, 880 A.2d 1066, 2005 D.C. App. LEXIS 414 (2005), writ of certiorari denied by 547 U.S. 1184, 126 S. Ct. 2373, 165 L. Ed. 2d 287, 2006 U.S. LEXIS 4430, 74 U.S.L.W. 3677 (2006), writ of certiorari denied by 549 U.S. 931, 127 S. Ct. 374, 166 L. Ed. 2d 231, 2006 U.S. LEXIS 6404, 75 U.S.L.W. 3174 (2006).

Sufficient evidence supported conviction for conspiracy to commit first-degree premeditated murder and obstruct justice; evidence showed that defendant participated in conversations with his co-conspirators about murdering victim, and that he and others took actions designed to implement agreed upon murder. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

In determining whether the evidence supports a finding of a single conspiracy, the court looks at whether the defendants shared a common goal, any interdependence between the alleged participants and any overlap among the alleged participants. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

In prosecution for conspiracy to commit murder, evidence, including tape recordings, of conspirator's statements in which he purported to be trying to locate targeted victim and informant's direct testimony that conspirator had formulated plan to murder targeted victim was sufficient corroboration to establish that conspirator took overt acts in furtherance of conspiracy. D.C. Code 1981, § 22-105a. *Irving v. United States*, 673 A.2d 1284, 1996 D.C. App. LEXIS 53 (1996).

Although primarily circumstantial, the evidence was sufficient to establish beyond a reasonable doubt defendants' guilt of murder, assault, armed robbery, burglary and conspiracy. D.C. Code §§ 22-105a, 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S.

944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

Evidence was sufficient to sustain a defendant's conviction of two counts of assault with deadly weapon on theory that they were perpetrated in course of conspiracy in which defen-

dant was involved. D.C. Code § 22-105a. *Jones v. United States*, 386 A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

§ 22-1806. Accessories after the fact.

Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than $\frac{1}{2}$ the maximum fine or imprisonment, or both, to which the principal offender may be subjected.

(Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 909.)

Prior Codifications. — 1981 Ed., § 22-106.

1973 Ed., § 22-106.

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Accessories before the fact.

For purposes of criminal liability as accessory, phrase "in the ordinary course of things" refers to what may reasonably ensue from planned events, not to what might conceivably happen, and in particular suggests absence of intervening factors. *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

For purposes of criminal liability as accessory, "natural consequence" is one which is within normal range of outcomes that may be expected to occur if nothing unusual has intervened. *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

For purposes of criminal liability as accessory, "intervention" outside of natural consequence of crime may refer not only to physical

happenings, but also to mental events, such as inexplicable shift of mind unrelated to original plan. *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

For purposes of criminal liability as accessory, "natural and probable" consequence in "ordinary course of things" presupposes outcome within reasonably predictable range. *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

Admissibility of evidence.

Where police entry into apartment of female, who had left scene of fatal shooting with defendant, was in pursuit of defendant and when police arrived at apartment female was neither accused nor suspected of having committed any substantive crime and it was only after she attempted to impede search that she was arrested as an accessory after the fact, any failure to administer warning of right to counsel and right to remain silent immediately on entering did not make any of her statements or actions prior to arrest inadmissible. *United States v. Honesty*, 459 F.2d 1279, 1971 U.S. App. LEXIS 6679 (C.A.D.C. 1971).

Evidence of investigation of government witness' sons for sexual abuse of two of defendant's children was relevant to witness' bias, in prosecution for cruelty to children; witness was only adult witness who could corroborate testimony of three children regarding defendant's abuse during period charged in indictment, and witness could have motive to favor prosecution's case in hope of receiving beneficial treatment for her sons with regard to investigation and prosecution of allegations, and possibly for herself as an accessory, and as a de facto guardian

of children during time of some of alleged incidents. *McCloud v. United States*, 781 A.2d 744, 2001 D.C. App. LEXIS 206 (2001).

In prosecution for being accessory after the fact to felony-murder and armed robbery, testimony of police officer implicating defendant in unrelated assault charge was harmless where defendant's name was not repeated or reinforced by any other witness and jury could have drawn inference that defendant was involved without officer's testimony. *Jefferson v. United States*, 463 A.2d 681, 1983 D.C. App. LEXIS 420 (1983).

Aiders, abettors, and accomplices.

While mere presence at scene of crime is insufficient to establish criminal participation in offense, proof of presence at scene of crime plus conduct which designedly encourages or facilitates crime will support inference of guilty participation in crime as aider and abettor. *Jefferson v. United States*, 463 A.2d 681, 1983 D.C. App. LEXIS 420 (1983).

Arguments and conduct of counsel.

In prosecution for being accessory after the fact to felony-murder and armed robbery, prosecutor's imprecise statement that defendant's participation was established by his threatening to kill witness did not rise to level of reversible error even though evidence showed that defendant threatened to have witness' father's car blown up. *Jefferson v. United States*, 463 A.2d 681, 1983 D.C. App. LEXIS 420 (1983).

Common law.

Accessory statute enacted by Congress for District of Columbia modified common law by lowering punishment of accessory to one half of maximum authorized penalty of principal, but did not break link between accessory and principal and common-law notion of derivative culpability. D.C. Code 1981, § 22-106. *Heard v. United States*, 686 A.2d 1026, 1996 D.C. App. LEXIS 274 (1996).

At common law, "accessory after the fact" was one who knew of commission of felony by other person and hindered felon's apprehension, conviction, or punishment; one could not determine culpability of accessory by looking at his or her conduct alone, and to determine culpability of accessory, criminal acts of principal had to be consulted, as gravity of crimes of accessory was inextricably linked to crimes of principal. *Heard v. United States*, 686 A.2d 1026, 1996 D.C. App. LEXIS 274 (1996).

Under the common law, an "accessory after the fact" is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon in order to hinder the felon's apprehension, trial, or punishment. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari

denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

Different offenses in same transaction.

Under accessory statute, multiple convictions of accessory based on single course of conduct can be obtained when one act forms, or would form, basis for convicting principal of multiple violations of same statute; statute clearly ties punishment of the accessory to underlying crime committed by principal, and under common-law principles of accessory after the fact, accessory is considered to be accomplice of principal. D.C. Code 1981, §§ 22-106, 49-301. *Heard v. United States*, 686 A.2d 1026, 1996 D.C. App. LEXIS 274 (1996).

Homicide, generally.

Defendant could not be convicted of being an accessory after the fact (AAF) to murder on basis of actions taken while decedent was still alive, where victims of driveby shooting survived for at least a few minutes after defendant drove car away. D.C. Code 1981, § 22-106. *Little v. United States*, 709 A.2d 708, 1998 D.C. App. LEXIS 50 (1998), writ of certiorari denied by 525 U.S. 851, 119 S. Ct. 126, 142 L. Ed. 2d 102, 1998 U.S. LEXIS 5342, 67 U.S.L.W. 3232 (1998).

Reprimanding codefendant for not having killed victim with first shot, advancing upon victim with pistol, and continued presence at murder scene during police investigation was insufficient to support conviction for being accessory after the fact, even if defendant's acts were designed to silence potential witnesses. D.C. Code 1981, § 22-106. *Outlaw v. United States*, 632 A.2d 408, 1993 D.C. App. LEXIS 259 (1993), writ of certiorari denied by 510 U.S. 1205, 114 S. Ct. 1326, 127 L. Ed. 2d 674, 1994 U.S. LEXIS 2441, 62 U.S.L.W. 3624 (1994).

Directing gunman to go to specified place of refuge and returning the murder weapon to gunman was not assisting in escape needed to support conviction for accessory after the fact to second-degree murder while armed. D.C. Code 1981, § 22-106. *Outlaw v. United States*, 632 A.2d 408, 1993 D.C. App. LEXIS 259 (1993), writ of certiorari denied by 510 U.S. 1205, 114 S. Ct. 1326, 127 L. Ed. 2d 674, 1994 U.S. LEXIS 2441, 62 U.S.L.W. 3624 (1994).

Indictment and information.

Reversal was required due to misjoinder of charges connected with armed robbery of two vending trucks and misjoinder of those charges with charge against defendant's brother for being accessory after fact, receiving stolen property, and obstructing justice; trial was essentially swearing contest in which identifications by government witnesses were met by contradictory testimony from alibi witnesses; no physical evidence linked defendants to ei-

ther robbery; identifications were impeached by discrepancies and inconsistencies in description of defendants; statements of defendant's brother implicating one defendant in second robbery were admitted; and prosecutor's closing argument tried to link offenses together. D.C. Code 1981, §§ 22-106, 22-722(a)(3), 22-2101, 22-2901, 22-3202; Criminal Rules 8(b), 14. *Morris v. United States*, 548 A.2d 1383, 1988 D.C. App. LEXIS 189 (1988).

Crime of being an accessory after the fact is fundamentally dissimilar from that of a principal and must be distinctly charged in the indictment. *Williams v. United States*, 478 A.2d 1101, 1984 D.C. App. LEXIS 469 (1984).

Charges against defendant, accused of first-degree murder, and codefendant, charged with being an accessory after the fact by threatening a material witness, were not improperly joined in a single indictment, in view of allegation that defendants jointly participated in the same act; fact that count against codefendant was subsequently dismissed for lack of evidence did not infect the joinder itself. D.C. Code SCR, Criminal Rule 8(b); D.C. Code §§ 22-106, 22-2401. *Jackson v. United States*, 329 A.2d 782, 1974 D.C. App. LEXIS 331 (1974), writ of certiorari denied by 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74, 1975 U.S. LEXIS 2593 (1975).

The crime underlying the charge of accessory after the fact need not violate a law of the District of Columbia; hence, a District of Columbia indictment charging defendants with being accessories after the fact of an escape from lawful custody that took place in Maryland was proper where defendants concealed escapee in the District. *United States v. Butler*, 112 WLR 9 (Super. Ct. 1984).

Instructions.

Instruction, in prosecution for burglary and petty larceny, pursuant to request for clarification of aiding and abetting that if B came out of bank and said "I have just robbed it, I have the sack full of money, let's go," and then B got into A's automobile and A took off and ran knowing that crime had been committed, and helped in the escape, he could be liable was reversibly erroneous where indictment did not charge defendant with being accessory after the fact and where jury returned with guilty verdict less than fifteen minutes after being given such instruction. Fed. Rules Crim. Proc. rule 52(a), 18 U.S.C.; D.C. Code §§ 22-105, 22-106. *United States v. Irving*, 437 F.2d 649, 1970 U.S. App. LEXIS 7012 (C.A.D.C. 1970).

Joint or separate trials.

Female, charged with being an accessory after the fact to crime of assault with dangerous weapon, was not improperly denied trial separate from defendant, charged with assault with a dangerous weapon and carrying a dangerous

weapon, where trial judge diligently exercised his responsibility to keep the evidence and issues separated, both during trial and in his instructions. *United States v. Honesty*, 459 F.2d 1279, 1971 U.S. App. LEXIS 6679 (C.A.D.C. 1971).

Merger of offenses.

Because theoretical underpinning of common-law notion of accessory after the fact is derivative liability, accessory's liability must have basis in liability of principal, and therefore, when convictions of principal merge, convictions of accessory must also merge, but when convictions of principal do not merge, neither will convictions of accessory merge. D.C. Code 1981, § 22-106. *Heard v. United States*, 686 A.2d 1026, 1996 D.C. App. LEXIS 274 (1996).

Defendant's convictions for two counts of being accessory after the fact to assault with intent to kill while armed and one count of being accessory after the fact to possession of firearm during crime of violence, which arose from incident in which two passengers in automobile driven by defendant opened fire on occupants of another vehicle, did not merge, because underlying offenses did not merge; underlying assault charges did not merge because two distinct victims were injured, and firearm charge did not merge with assault charges. D.C. Code 1981, § 22-106. *Heard v. United States*, 686 A.2d 1026, 1996 D.C. App. LEXIS 274 (1996).

Nature and elements of accessory after the fact.

One is guilty as an "accessory after the fact" where he knows that offense has been committed and receives, relieves, comforts or assists offender in order to hinder his apprehension, trial or punishment. 18 U.S.C. § 3. *United States v. Barlow*, 470 F.2d 1245, 1972 U.S. App. LEXIS 7354 (C.A.D.C. 1972).

Felony must not be in progress when assistance is rendered in order for person assisting to be an accessory after the fact, since, if it were in progress, person assisting would be guilty as a principal. 18 U.S.C. § 3. *United States v. Barlow*, 470 F.2d 1245, 1972 U.S. App. LEXIS 7354 (C.A.D.C. 1972).

Defendant could be convicted as accessory after fact, even though he was present before, during and after crime. D.C. Code 1961, §§ 22-105, 22-106; 18 U.S.C. § 3. *Smith v. U.S.*, 306 F.2d 286, 1962 U.S. App. LEXIS 4395 (C.A.D.C. 1962).

Accessory after fact is one who assists principal to avoid apprehension or punishment. D.C. Code 1981, § 22-106. *Ruffin v. United States*, 524 A.2d 685, 1987 D.C. App. LEXIS 331 (1987), writ of certiorari denied by 486 U.S. 1057, 108 S. Ct. 2827, 100 L. Ed. 2d 927, 1988 U.S. LEXIS 2699, 56 U.S.L.W. 3848 (1988).

Accessory after fact is one who, knowing offense to have been committed by others, receives, relieves, comforts, or assists offenders in order to hinder their apprehension, trial or punishment. *Stevenson v. United States*, 522 A.2d 1280, 1987 D.C. App. LEXIS 321 (1987).

Gist of being accessory after fact essentially lies in obstructing justice by rendering assistance to offender after crime has been committed. *Stevenson v. United States*, 522 A.2d 1280, 1987 D.C. App. LEXIS 321 (1987).

"Accessory after the fact" is one who, knowing offense to have been committed by another, receives, relieves, comforts, or assists the offender in order to hinder the offender's apprehension, trial, or punishment. D.C. Code 1981, § 22-106. *Fields v. United States*, 484 A.2d 570, 1984 D.C. App. LEXIS 543 (1984), writ of certiorari denied by 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501, 1985 U.S. LEXIS 1693, 53 U.S.L.W. 3777 (1985).

In determining whether defendant's actions are intended to insure successful escape of offender and thus whether defendant is accessory after the fact, furtive movements, when combined with other factors, may be suggestive of criminal activity. *Fields v. United States*, 484 A.2d 570, 1984 D.C. App. LEXIS 543 (1984), writ of certiorari denied by 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501, 1985 U.S. LEXIS 1693, 53 U.S.L.W. 3777 (1985).

The offense of withholding information about a felony or other unlawful act is to be distinguished from the offense of accessory after the fact which requires an act of assistance by the alleged accessory. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

Person cannot assist a criminal to evade apprehension or punishment where escape has already been effected. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

"Accessory after the fact" is one who, with knowledge of the principal crime, rendered aid to the guilty actor. D.C. Code § 22-106. *Clark v. United States*, 418 A.2d 1059, 1980 D.C. App. LEXIS 348 (1980).

Pleadings and proof.

Proof that defendant drove vehicle in which robbers attempted to flee robbery scene immediately after the offense was committed established, if anything, that defendant was a principal, rather than an accessory after fact of robbery which was charged, and, given fundamental dissimilarity between the offense charged and that arguably proved, reversal of conviction for accessory after the fact was war-

ranted. *Williams v. United States*, 478 A.2d 1101, 1984 D.C. App. LEXIS 469 (1984).

Presumptions and burden of proof.

To establish crime of accessory after the fact, State must establish that completed felony was committed by another prior to accessoryship, accessory was not a principal in commission of the felony, accessory had knowledge of felony, and accessory acted personally to aid or assist felon to avoid detection or apprehension for the crime or crimes. D.C. Code 1981, § 22-106. *Little v. United States*, 709 A.2d 708, 1998 D.C. App. LEXIS 50 (1998), writ of certiorari denied by 525 U.S. 851, 119 S. Ct. 126, 142 L. Ed. 2d 102, 1998 U.S. LEXIS 5342, 67 U.S.L.W. 3232 (1998).

To sustain a conviction of accessory after the fact, Government was required to establish that defendant had knowledge of another's participation in the murder and that, with such knowledge, defendant aided or assisted the other with the specific intent to help him evade apprehension or punishment. D.C. Code 1981, § 22-106. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

Although defendant's specific intent to act so as to assist a principal in escape is relevant to proof of the offense of accessory after the fact, it is not, alone, sufficient; there must be assistance or aid designed to hinder apprehension, trial, or punishment. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

Under some circumstances, merely allowing a person who has committed an offense to ride in one's automobile away from scene of a crime, albeit for only a short distance, is a sufficient act to constitute an indictment of being an accessory after the fact; however, such act must be shown to have been done with guilty knowledge that the person aided has committed an offense. D.C. Code § 22-106. *Clark v. United States*, 418 A.2d 1059, 1980 D.C. App. LEXIS 348 (1980).

The government is not required to prove that the underlying offender has been convicted, but only that a separate and distinct offense has been committed. *United States v. Butler*, 112 WLR 9 (Super. Ct. 1984).

Search and seizure.

Where, following arrest of apartment dweller as an accessory after the fact to fatal shooting, dweller had been informed of her right to counsel and right to remain silent, the search of her purse prior to taking her downstairs to squad car was clearly within scope of protective

search and, gun found in purse, was properly admitted; fact that officers subsequently determined it to be wiser to release apartment dweller because of potential explosive situation in neighborhood and to issue a summons neither vitiated initial arrest nor invalidated search incident thereto. *United States v. Honesty*, 459 F.2d 1279, 1971 U.S. App. LEXIS 6679 (C.A.D.C. 1971).

Sentence and punishment.

Remand for resentencing was required for defendant sentenced to term of imprisonment of 15 years to life for conviction of accessory after the fact to first-degree murder while armed, where statute established maximum sentence of 20 years imprisonment for accessory after the fact to any crime punishable by death. D.C. Code 1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

Sentences of six and two-thirds to 20 years' imprisonment for each of defendant's two convictions as accessory after the fact to assault with intent to kill while armed were permissible; maximum penalty for underlying crime was life imprisonment, and defendant's maximum potential sentence on each count of 20 years' imprisonment was less than 45-year term which has been imposed in other cases in which life imprisonment was possible, and thus was necessarily less than half of maximum sentence to which principal may be sentenced. D.C. Code 1981, §§ 22-106, 22-501, 22-3202. *Heard v. United States*, 686 A.2d 1026, 1996 D.C. App. LEXIS 274 (1996).

Trial court erred in sentencing defendant to one year on conviction for being accessory after the fact to petit larceny. D.C. Code § 22-106. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

Verdict.

That the jury acquitted defendant of the various counts relating to murder incident, including carrying pistol without license and assault with intent to kill while armed, did not negate the sufficiency of the evidence as to the conviction for being an accessory after the fact; trial court in granting judgments of acquittal on counts of carrying pistol without license and assault with intent to kill while armed expressed concern about possible use of imitation firearm, yet jury could still remain thoroughly convinced that defendant's activities of chasing after eyewitness and firing in his direction made him accessory after the fact. D.C. Code

1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

Weight and sufficiency of evidence.

State presented sufficient evidence that defendant knew offense of first-degree murder while armed had been committed to support conviction of accessory after the fact to first-degree murder while armed, in light of evidence that defendant was placed as witness to event, and victim was shot seven times at close range from which defendant could infer that victim's death was instantaneous. D.C. Code 1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

State presented sufficient evidence that defendant personally aided or assisted principal of shooting to avoid detection or apprehension after shooting to support conviction of accessory after the fact to first-degree murder while armed, in light of evidence that defendant shot at or otherwise threatened witness in attempt to eliminate eyewitness to murder or at least intimidate him to not speak with authorities about matter or testify at trial. D.C. Code 1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

State presented sufficient evidence that defendant rendered his assistance with specific intent that it prevent principal's arrest, trial, or punishment for murdering victim to support conviction of accessory after the fact to first-degree murder while armed, in light of evidence that defendant attempted to eliminate or frighten eyewitness to prevent him from testifying against principal, defendant wrote letter to third party asking for help in covering up facts of case, and defendant was closely associated with principal, including at scene of murder itself. D.C. Code 1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

In prosecution for being an accessory after the fact of an armed robbery, evidence was insufficient to sustain an inference that when defendant drove passenger one block or less defendant knew that passenger had committed the armed robbery, and thus evidence was insufficient to sustain the conviction. D.C. Code § 22-106. *Clark v. United States*, 418 A.2d 1059, 1980 D.C. App. LEXIS 348 (1980).

Even though evidence might have been sufficient to support charge that juvenile was accessory after the fact to commission of robbery by reason of his assistance to two other persons to prevent their apprehension by police, evidence was insufficient to support trial court's finding that juvenile was guilty of obstruction of justice. D.C. Code § 22-703(a). In re K.W.G., 374 A.2d 852, 1977 D.C. App. LEXIS 447 (1977).

§ 22-1807. Punishment for offenses not covered by provisions of Code.

Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this Code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding \$1,000 or by imprisonment for not more than 5 years, or both.

(Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 910.)

Prior Codifications. — 1981 Ed., § 22-107. 1973 Ed., § 22-107.

CASE NOTES

ANALYSIS

Arrest of judgment.
Common law.
Felonies or misdemeanors.
Legislative powers.
Validity of sentence.

Arrest of judgment.

Where police officers, acting as guards at jail, were independently responsible to the same authority as was superintendent of the jail, the police officers were subject to prosecution for offense of negligent escape, and order in arrest of judgment was improper. Federal Rules of Criminal Procedure, rule 34, 18 U.S.C.; D.C. Code 1940, §§ 4-103, 22-107, 24-409, 24-411, 49-301. *U.S. v. Davis*, 167 F.2d 228, 1948 U.S. App. LEXIS 2429 (1948).

Common law.

Sentence should be imposed, not as for common-law conspiracy, but under Pen.Code U.S. § 37, 18 U.S.C. § 371, relating to conspiracy to commit an offense against the United States, upon conviction under an indictment which, even though sufficient to charge common-law conspiracy, charges every element of the offense of conspiracy to commit perjury in violation of said section 37 in conjunction with Code § 858, D.C. Code 1929, T. 6, § 131, denouncing perjury, and avers that the offense was committed against the form of the statute and against the peace and government of the United States, where there is ample evidence to support the indictment as to every element of the offense including the overt act, and the trial and charge to the jury proceeded upon the theory that the defendants were being tried for conspiracy to commit perjury. *Fletcher v. U.S.*, 42 App.D.C. 53, 1914 U.S. App. LEXIS 2236 (1914).

While the keeping of a disorderly house was a misdemeanor at common law, punishable by jail imprisonment, the effect of section 1, Code D.C. (D.C. Code 1929, T. 1, § 21), continuing

the common law in force in this District, except in so far as it is inconsistent with the Code, and of section 910, D.C. Code 1929, T. 6, § 7, making all criminal offenses not covered by the Code and federal statutes not locally inapplicable punishable by imprisonment in the penitentiary, is to make that offense infamous in this District, and, as such, not within the jurisdiction of the police court, under sections 43 and 934 (31 Stat. 1196, 1341). *Palmer v. Lenovitz*, 35 App.D.C. 303, 1910 U.S. App. LEXIS 5898 (1910).

Felonies or misdemeanors.

Under District of Columbia Code prescribing fine not exceeding \$1,000 or imprisonment for not more than five years or both as punishment for any offense not specifically covered by statute, conviction of negligent escape, punishment for which is not specifically prescribed, invokes the punishment of a felony, although it was apparently classified as a misdemeanor at common law. D.C. Code 1940, § 22-107. *U.S. v. Davis*, 167 F.2d 228, 1948 U.S. App. LEXIS 2429 (1948).

Under District of Columbia Code prescribing fine not exceeding \$1,000 or imprisonment for not more than five years, or both, as punishment for any offense not specifically covered by statute, all common-law misdemeanors, not embodied in any act of Congress, became felonies in District of Columbia, since any offense potentially punishable by imprisonment for more than one year is a "felony." D.C. Code 1940, § 22-107. *U.S. v. Davis*, 71 F.Supp. 749, 1947 U.S. Dist. LEXIS 2588 (D.D.C.1947).

Legislative powers.

A crime and its punishment can be separated and distinguished by the Legislature. One statute may create an offense and another provide for its punishment. What may not have been an infamous crime at common law may by statute be made such; and in determining whether a crime is infamous, the penalty the law imposes

must be looked to. *Palmer v. Lenovitz*, 35 App.D.C. 303, 1910 U.S. App. LEXIS 5898 (1910).

Validity of sentence.

A penalty of a fine not exceeding \$1,000, or

imprisonment for not more than five years, or both, imposed upon one keeping a disorderly house, is not so severe as to come within the inhibition of the federal Constitution. *Palmer v. Lenovitz*, 35 App.D.C. 303, 1910 U.S. App. LEXIS 5898 (1910).

§ 22-1808. Offenses committed beyond District.

Any person who by the commission outside of the District of Columbia of any act which, if committed within the District of Columbia, would be a criminal offense under the laws of said District, thereby obtains any property or other thing of value, and is afterwards found with any such property or other such thing of value in his or her possession in said District, or who brings any such property or other such thing of value into said District, shall, upon conviction, be punished in the same manner as if said act had been committed wholly within said District.

(Mar. 3, 1901, ch. 854, § 836a; Dec. 21, 1911, 37 Stat. 45, ch. 2; May 21, 1994, D.C. Law 10-119, § 2(c), 41 DCR 1639.)

Cross references. — Receiving stolen goods, see §§ 22-3231 and 22-3232.

Prior Codifications. — 1981 Ed., § 22-108. 1973 Ed., § 22-108.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-1804.

CASE NOTES

ANALYSIS

Admission of evidence.

Instructions.

Joint or separate trials of codefendants.

Admission of evidence.

Error, if any, in introduction into evidence of recordings between since deceased accomplice-informer and first defendant was not reversible error, in prosecution for conspiracy, burglary, grand larceny, interstate transportation of stolen property and bringing stolen property into the District of Columbia. U.S. Const. Amends. 5, 6; 18 U.S.C. §§ 371, 2314; D.C. Code §§ 22-108, 22-1801, 22-2201. *United States v. Lemonakis*, 485 F.2d 941, 1973 U.S. App. LEXIS 9078 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 989, 94 S. Ct. 1586, 94 S. Ct. 1587, 39 L. Ed. 2d 885, 1974 U.S. LEXIS 757 (1974).

Instructions.

Convictions of second defendant for burglary and grand larceny were mutually exclusive with conviction for receiving stolen property

and bringing it into the District of Columbia, and vacating the burglary and larceny convictions which carried longer sentences cured any prejudice which resulted from the failure to properly instruct. D.C. Code §§ 22-108, 22-1801, 22-2201. *United States v. Lemonakis*, 485 F.2d 941, 1973 U.S. App. LEXIS 9078 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 989, 94 S. Ct. 1586, 94 S. Ct. 1587, 39 L. Ed. 2d 885, 1974 U.S. LEXIS 757 (1974).

Joint or separate trials of codefendants.

Trial court did not abuse its discretion in prosecution for conspiracy, burglary, grand larceny, interstate transportation of stolen property, and bringing stolen property into the District of Columbia by denying severance to second defendant on ground of antagonistic defenses. 18 U.S.C. §§ 371, 2314; D.C. Code §§ 22-108, 22-1801, 22-2201. *United States v. Lemonakis*, 485 F.2d 941, 1973 U.S. App. LEXIS 9078 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 989, 94 S. Ct. 1586, 94 S. Ct. 1587, 39 L. Ed. 2d 885, 1974 U.S. LEXIS 757 (1974).

§ 22-1809. Prosecutions.

All prosecutions for violations of § 22-1321 or any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name

of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of § 22-1321 or any of the provisions of this act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the Workhouse of the District of Columbia for a term not exceeding 6 months for each and every offense. The second sentence of this section shall not apply with respect to any violation of § 22-1312(b).

(July 29, 1892, 27 Stat. 325, ch. 320, § 18; June 29, 1953, 67 Stat. 93, 98, ch. 159, §§ 202(a)(2), 211(b); redesignated § 211a, May 26, 2011, D.C. Law 18-375, § 3(b), 58 DCR 731.)

Cross references. — Adulteration of food and drugs, see § 48-101 et seq.

Alcoholic Beverage Control Act, see § 25-101 et seq.

Conduct of prosecutions, see § 23-101.

Uniform Narcotic Drug Act, see § 48-901.02 et seq.

Prior Codifications. — 1981 Ed., § 22-109. 1973 Ed., § 22-109.

Emergency legislation. — For temporary (90 day) amendment of section, see § 303(b) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 303(b) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 18-375. — For history of Law 18-375, see notes under § 22-1307.

References in text. — The term, “this act,” referred to twice in this section, refers to the Act of July 29, 1892, 27 Stat. 325, ch. 320.

CASE NOTES

ANALYSIS

In general.

Prosecuting authority.

In general.

Defendants, who were arrested after refusing to move out of corridor in House wing of Capitol building when ordered to do so by Capitol police, were entitled to know with certainty offense with which they were charged and possible penalty threatened and were entitled to definite reference to the law which they had allegedly violated, and thus where, notwithstanding request of defense, no one had given citation of statute under which prosecution was being had, other than statement of prosecutor that two sections were involved, convictions under section carrying lighter sentence, as requested by prosecutor, were required to be set aside. D.C. Code §§ 22-101 et seq., 22-109, 22-1107, 22-1121, 22-3102, 22-3111; 40 U.S.C. § 101. *Smith v. District of Columbia*, 387 F.2d 233, 1967 U.S. App. LEXIS 5491 (C.A.D.C. 1967).

The disorderly conduct statute and statute providing that all prosecutions for a violation of disorderly conduct statute shall be conducted in name of and for benefit of District of Columbia

and in same manner as provided by law for prosecution of offenses against laws and ordinances of the District must be read together. D.C. Code 1961, §§ 22-109, 22-1121. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

Prosecuting authority.

Office of Corporation Counsel did not lack jurisdiction to prosecute for violations of disorderly conduct statute on ground that prosecution of offenses punishable by fine and imprisonment must be conducted by the United States Attorney, since the statute relating to prosecutions by United States Attorney specifically excepts prosecutions under disorderly conduct statute from operation of such rule. D.C. Code 1961, §§ 22-109, 22-1121. *Feeley v. District of Columbia*, 220 A.2d 325, 1966 D.C. App. LEXIS 187 (App. 1966), vacated by 387 F.2d 216, 128 U.S. App. D.C. 258, 1967 U.S. App. LEXIS 6298 (1967).

Informations charging disorderly conduct were properly prosecuted by the Corporation Counsel on behalf of the District of Columbia even though the informations charged an offense punishable by a fine or by imprisonment,

or both. D.C. Code 1961, §§ 22-109, 22-1121, 23-101. *Smith v. District of Columbia*, 219 A.2d 842, 1966 D.C. App. LEXIS 181 (App. 1966), vacated by 387 F.2d 233, 128 U.S. App. D.C. 275, 1967 U.S. App. LEXIS 5491 (1967).

Where question as to proper prosecuting authority as between District of Columbia Corporation Counsel and United States Attorney is raised, the court must certify question to Court of Appeals for District of Columbia, and Munic-

ipal Court of Appeals was required to reverse action of Municipal Court in dismissing informations brought by Corporation Counsel after ruling that United States Attorney was proper prosecuting authority and the court would remand with instructions to reinstate informations and to certify questions to Court of Appeals. D.C. Code 1951, §§ 22-109, 22-3112, 23-101. *District of Columbia v. Moody*, 175 A.2d 782, 1961 D.C. App. LEXIS 290 (Cr.App. 1961).

§ 22-1810. Threatening to kidnap or injure a person or damage his property.

Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than \$5,000 or imprisoned not more than 20 years, or both.

(June 19, 1968, 82 Stat. 238, Pub. L. 90-351, title X, § 1502.)

Cross references. — Blackmail, see § 22-3202.

Extortion, see § 22-3251.

Section references. — This section is referred to in § 23-546.

Prior Codifications. — 1981 Ed., § 22-2307.

1973 Ed., § 22-2307.

CASE NOTES

ANALYSIS

Adequacy of counsel for accused.
Admissibility of evidence.
Construction and application.
Double jeopardy and collateral estoppel.
Evidence.
Indictment or information.
Instructions.
Jurisdiction.
Nature and elements of crime.
Review.
Sentence, and punishment.
Speedy trial.
Validity.

Adequacy of counsel for accused.

In proceeding in which defendant was convicted of threatening to injure person, assistance of defense counsel was not constitutionally ineffective due to alleged failure of counsel to present expert witness against admissibility of voice spectrographic evidence or due to counsel's alleged failure to effectively cross-examine Government's witnesses in support of admissibility where any error in admission of such evidence was harmless error. D.C. Code§ 22-2307. *Brown v. United States*, 384 A.2d 647, 1978 D.C. App. LEXIS 454 (1978).

Admissibility of evidence.

Manner in which a mug shot-type photo-

graph of defendant was presented to the jury drew particular attention to the source and implications of a criminal history, and thus the photograph was inadmissible at a trial for threatening; trial court's instructions effectively told the jurors that the photograph was one that police had already had at the time that a photo array shown to victim was composed and informed the jurors of the fact that defendant had been arrested previously. *Bishop v. United States*, 983 A.2d 1029, 2009 D.C. App. LEXIS 603 (2009).

Construction and application.

Statute which makes it a felony to threaten to injure another person is not in pari materia with statute which prohibits transmission of a threat to injure with the intent to extort money or other thing of value. D.C. Code §§ 22-2306, 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

Double jeopardy and collateral estoppel.

Double jeopardy did not bar prosecution of defendant for threats to injure or kidnap after he was prosecuted for violating civil protection order which prohibited him from in any manner threatening his wife, as conviction for criminal contempt required willful violation of civil protection order which the conviction for making threats to kidnap or injure did not require

and conviction for making threats to kidnap or injure required particular types of threats which the civil protection order did not require. (Per Justice Scalia with one Justice concurring and three Justices concurring in the judgment.) U.S. Const. Amend. 5; D.C. Code 1981, § 22-2307. *U.S. v. Dixon*, 113 S.Ct. 2849, 1993 U.S. LEXIS 4405 (U.S. Dist. Col. 1993).

Conviction for threatening to injure and kidnap did not merge for double jeopardy purposes with kidnapping conviction, as each offense required proof of an element that the other did not: kidnapping did not require the utterance of words, and threats offense did not require some form of seizure and detention. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Defendant committed two separate offenses under the felony-threats statute, and thus two separate convictions for felony threats did not violate double jeopardy, even though defendant argued that the government presented evidence of only one threat addressed to two individuals; defendant uttered one threat directed to one victim when he told her that he would bust her in the face and blow her head off, and defendant uttered a new, distinct threat when he directed his attention to the second victim, striking her and uttering a second threat, directed to both victims collectively, as he left the premises. *Hunter v. United States*, 980 A.2d 1158, 2009 D.C. App. LEXIS 459 (2009).

In view of facts that in prosecution of defendant for three counts of "threats" and four counts of "obstructing justice" instructions indicated that only one of the four essential elements of an obstruction of justice charge involved proof of "threats", that proof of "threats" was not absolutely necessary to defendant's conviction since proof of force would also have led to his conviction, and that defendant was acquitted of threats against one witness, although the jury found him guilty of obstructing justice with regard to the same conduct towards the same witness, proof of guilt on the obstruction of justice counts did not necessarily establish guilt of the "threats" counts, and therefore defendant's convictions of both offenses did not constitute double jeopardy. D.C. Code §§ 22-703(a), 22-2307; U.S. Const. Amend. 5. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

After accused was acquitted of a threat to do bodily harm and bribery and jury "hung" on charge of obstruction of justice, Government was not collaterally estopped from retrying accused on charge of obstruction of justice on theory that verdict of not guilty on "threats" charge determined the issue with respect to identical threats alleged in obstruction of justice charge. D.C. Code §§ 22-701, 22-703, 22-2307; U.S. Const. Amend. 5. *United States v.*

Smith, 337 A.2d 499, 1975 D.C. App. LEXIS 375 (1975).

Evidence.

Reasonable person in position of neighbor, whose house caught fire on day before alleged threat was made, would not believe that juvenile, who paraded back and forth on sidewalk in front of neighbor, performing to laughing audience and singing modified rap song about setting block and her house on fire, meant to damage her house, and thus, evidence was insufficient to support delinquency adjudication based on felony threats to damage property; neighbor and juvenile were friends with no history of animosity, much less violence, and there was no basis for reasonable inference that juvenile was involved in fire at neighbor's house. *In re S.W.*, 45 A.3d 151, 2012 D.C. App. LEXIS 285 (2012).

Refusal, in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, to allow cross-examination of alleged victim concerning mental breakdown three years after charged incident that resulted in hospitalization and treatment with psychotropic medication was not abuse of discretion; such evidence was not relevant to alleged victim's perception of events at time of assault, there was no evidence she had mental illness at time of her testimony that would have affected her credibility, and she was not on any medication at time of trial. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Restriction on cross-examination of alleged victim in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, barring inquiry into apparently delusional statements by alleged victim to her doctors three years after charged incident that she thought her pastor and his wife were trying to kill her; did not violate Confrontation Clause and was not abuse of discretion; accusations bore little relationship to alleged victim's willingness to lie under oath, and danger of unfair prejudice outweighed probative value. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

No due process violation occurred under *Brady*, in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, based on government's failure to disclose records of alleged victim's treatment for depression following charged incident, where records in question were not in government's possession at time of trial, and

there was no indication that records would have been material for Brady purposes. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Denial of defense request, in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person, for a continuance of sentencing to allow time for defense to try to secure records of alleged victim's mental health treatment for depression following charged incident was not prejudicial; defendant could go forward with sentencing and still move for a new trial if he ascertained anything helpful from any records located thereafter. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Any error in admitting under the "report of rape" exception to hearsay rule the testimony of police officer concerning alleged victim's statements to him was harmless in prosecution for assault with intent to commit first-degree rape and threatening to injure a person; other evidence strongly supported alleged victim's testimony, and she remained firm in her account of what happened when tested on cross-examination. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Evidence was sufficient to find that defendant threatened intended victim and that his words were of nature as to convey fear of serious bodily harm or injury to ordinary hearer so as to support conviction of offense of threatening to injure a person, where defendant told witness in weeks after shooting of bystander that he planned to "put a cap in [intended victim's] hand." *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Indictment or information.

Charge of threatening to injure another person, under District of Columbia law, was not properly joined with federal weapons charges, and district court thus lacked jurisdiction over local charge; threat charge was discrete and dissimilar from federal charges and did not constitute part of common scheme or plan, and there was no overlap of issues or evidence. 18 U.S.C. § 922(g)(1, 3); D.C. Code 1981, § 22-2307; Fed.R.Cr.Proc. Rule 8(a), 18 U.S.C. *United States v. Richardson*, 161 F.3d 728, 1998 U.S. App. LEXIS 27464 (C.A.D.C. 1998).

In view of facts that the offenses of "threats" and "obstructing justice" include provisions not

included in the other, so that conduct prohibited by the threat statute would not necessarily be prohibited under the obstruction of justice statute, that the "threats" sentence carries a much more severe penalty than the "obstructing justice" offense, and that the two offenses lack a similar purpose and the "inherent relationship" required to apply the doctrines of merger and lesser included offenses, the offense of "threats" is not a lesser included offense of "obstructing justice." D.C. Code §§ 22-703(a), 22-2307. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

Indictment charging defendant with threatening to injure another person and her property was not insufficient because it failed to charge that offense was committed knowingly and intentionally. D.C. Code § 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

Indictment which follows substantially language of statute making it a felony to threaten to injure person and property of another, which particularized the date of offending conduct and stated species of unlawful communication at issue, i.e., a threat, was sufficient to charge an offense under such statute even though indictment did not contain actual words of alleged threat or allege that threats were made knowingly and intentionally. D.C. Code § 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

Instructions.

Error in trial court's admission of a mug shot-type photograph of defendant, the manner of which it was presented to the jury drew particular attention to the source and implications of a criminal history, was not harmless beyond a reasonable doubt at a trial for threatening to damage property and do bodily harm, even though trial court instructed the jury that an arrest did not mean that the arrestee was guilty of the offense for which he was arrested; the instruction was not a remedy, repeated references were made appellant's bad character, and the government's evidence was not so strong as to overcome a concern about the possibility that undue prejudice influenced the verdict. *Bishop v. United States*, 983 A.2d 1029, 2009 D.C. App. LEXIS 603 (2009).

Trial judge committed reversible constitutional error when it declined to give a special unanimity instruction, during prosecution for threatening to injure a person; the State's proof showed that defendant made threats against victim to different people by different means at different times and in different locations, and it was possible that the jury reasonably believed that one specific threat occurred but a different threat did not occur, while other jurors believed the opposite. *Williams v. United States*, 981 A.2d 1224, 2009 D.C. App. LEXIS 504 (2009).

Trial court's failure to give, *sua sponte*, a limiting instruction to the jury on proper use of testimony by police officer that was admitted under "report of rape" hearsay exception was not plain error in prosecution for assault with intent to commit first-degree sexual abuse and threatening to injure a person. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Jurisdiction.

Felony threat defendant committed offense within District of Columbia, even if victim did not understand English and third party who heard and understood threat did not interpret threat for victim within District of Columbia; crime was complete when made in presence of third party who heard and understood it. D.C. Code 1981, § 22-2307. *Joiner v. United States*, 585 A.2d 176, 1991 D.C. App. LEXIS 19 (1991).

Judge, who sentenced alien defendant for offense of transmitting threat to injure person of another with intent to extort money, did exercise jurisdiction over defendant's motion for recommendation against deportation where judge removed any immediate threat of deportation by suspending imposition of sentence and judge denied the motion. D.C. Code § 22-2306(2); Immigration and Nationality Act, §§ 212, 241(a)(4), (b)(2), 245-250, 8 U.S.C. §§ 1182, 1251(a)(4), (b)(2), 1255-1260. *Mariam v. United States*, 385 A.2d 776, 1978 D.C. App. LEXIS 500 (1978).

Nature and elements of crime.

To support conviction for threatening to injure the person of another, the evidence must show that the threatening message was conveyed to either the object of the threat or a third party. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Defendant who individually threatened two victims as they sat together in truck could properly be convicted of two counts of felony threat; defendant distinctly singled out and focused on each of the two victims while uttering words and physically touching them, one after the other. D.C. Code 1981, § 22-2307. *Joiner v. United States*, 585 A.2d 176, 1991 D.C. App. LEXIS 19 (1991).

Felony threat defendant communicated threat to victim, even if victim could not understand English, where third party heard and fully understood threat. D.C. Code 1981, § 22-2307. *Joiner v. United States*, 585 A.2d 176, 1991 D.C. App. LEXIS 19 (1991).

Intent to extort is not element of felony threat statute. D.C. Code 1981, § 22-2307. *Holt v. United States*, 565 A.2d 970, 1989 D.C. App. LEXIS 227 (1989).

Defendant's threat to complainant "I'm gonna get you, bitch" was sufficient to sustain a conviction for felony threats, without any additional indication of specific intent to extort. D.C. Code 1981, § 22-2307. *Holt v. United States*, 547 A.2d 158, 1988 D.C. App. LEXIS 149 (1988), vacated by 552 A.2d 529, 1989 D.C. App. LEXIS 28 (D.C. 1989), affirmed by 565 A.2d 970, 1989 D.C. App. LEXIS 227 (D.C. 1989).

Crime of threatening to injure was complete as soon as threat was communicated to third party, regardless of whether intended victim ever knew of plot to injure him. D.C. Code 1981, § 22-2307. *Beard v. United States*, 535 A.2d 1373, 1988 D.C. App. LEXIS 1 (1988).

Person "threatens," within meaning of criminal statutes prohibiting the making of threats to do bodily harm, when she utters words which are intended to convey her desire to inflict physical or other harm on any person or on property, and such words are communicated to someone. D.C. Code 1973, §§ 22-507, 22-2307. *United States v. Baish*, 460 A.2d 38, 1983 D.C. App. LEXIS 363 (1983).

Statute, which prohibits "any threat to injure the person of another," encompasses threats "to injure the person of another" which are communicated directly to intended victim. D.C. Code §§ 22-2306, 22-2306(2, 3). *Mariam v. United States*, 385 A.2d 776, 1978 D.C. App. LEXIS 500 (1978).

There is no positive repugnancy between misdemeanor statute prohibiting threats to do bodily harm and felony statute prohibiting threats to injure another person as would operate to repeal earlier misdemeanor statute. D.C. Code §§ 22-507, 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

That defendant's alleged conduct in threatening to injure another person and her property was punishable under both misdemeanor statute and felony statute did not require dismissal of indictment charging felony offense. D.C. Code §§ 22-507, 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

Specific intent to extort is not necessary element of crime of threatening to injure another person. D.C. Code § 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

Statute which makes it a felony to threaten to injure another person is constitutional. D.C. Code § 22-2307. *United States v. Young*, 376 A.2d 809, 1977 D.C. App. LEXIS 352 (1977).

Term "threats" as used in both statute relating to offense of obstructing justice and statute pertaining to offense of threats to do bodily harm means only that the words have a reasonable tendency to intimidate. D.C. Code §§ 22-

703, 22-2307. *United States v. Smith*, 337 A.2d 499, 1975 D.C. App. LEXIS 375 (1975).

Review.

On appeal from proceeding in which defendant was convicted of threatening to injure person and in which defendant was identified on basis of spectrographic comparison of his voice and voice of person making threatening telephone calls, defendant's assertion that trial court erred in refusing to qualify defense witness as an expert in technique of identification through analysis of voice spectrograms was moot, in view of the overwhelming nonspectrographic identification of defendant as perpetrator of the crime. D.C. Code § 22-2307. *Brown v. United States*, 384 A.2d 647, 1978 D.C. App. LEXIS 454 (1978).

In prosecution for threatening to injure person, any error in admission of identification of defendant based on spectrographic comparison of his voice and voice of person making threatening telephone calls was harmless, in light of the overwhelming nonspectrographic identification of defendant as perpetrator of the crime. D.C. Code § 22-2307. *Brown v. United States*, 384 A.2d 647, 1978 D.C. App. LEXIS 454 (1978).

Sentence, and punishment.

Sentence of defendant to six months imprisonment on conviction of threats to injure, on

theory that conduct only amounted to misdemeanor, resulted in illegal sentence, where defendant was convicted under felony threats statute. D.C. Code, § 22-2307. *Hayward v. United States*, 612 A.2d 224, 1992 D.C. App. LEXIS 221 (1992).

Speedy trial.

Where defendant failed to assert his speedy trial right until three days before trial, never requested an expedited resolution of his trial or appeal, never objected to the trial court's granting continuances during the pendency of the government's appeal of the pretrial dismissal of several "threats" counts, and failed to point to any specific examples of prejudice attributable to the pretrial delay, eight and one-half-month delay in deciding the government's interlocutory appeal did not entitle defendant to reversal on speedy trial grounds. U.S. Const. Amend. 6; D.C. Code § 22-2307. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

Validity.

Interpretation of statute which makes threatening to injure a crime, so as to include words threatening intended victim's life in context of business transaction aimed at hiring someone to kill a third party, did not violate First Amendment. U.S. Const. Amend. 1; D.C. Code 1981, § 22-2307. *Beard v. United States*, 535 A.2d 1373, 1988 D.C. App. LEXIS 1 (1988).

CHAPTER 18A. HUMAN TRAFFICKING.

Sec.	Sec.
22-1831. Definitions.	22-1836. Benefitting financially from human trafficking.
22-1832. Forced labor.	22-1837. Penalties.
22-1833. Trafficking in labor or commercial sex acts.	22-1838. Forfeiture.
22-1834. Sex trafficking of children.	22-1839. Reputation or opinion evidence.
22-1835. Unlawful conduct with respect to documents in furtherance of human trafficking.	22-1840. Civil action.
	22-1841. Data collection and dissemination [Not funded].

§ 22-1831. Definitions.

For the purposes of this chapter, the term:

(1) “Abuse or threatened abuse of law or legal process” means the use or threatened use of law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) “Business” means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, joint stock, trust, and any legal entity through which business is conducted.

(3) “Coercion” means any one of, or a combination of, the following:

(A) Force, threats of force, physical restraint, or threats of physical restraint;

(B) Serious harm or threats of serious harm;

(C) The abuse or threatened abuse of law or legal process;

(D) Fraud or deception;

(E) Any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint;

(F) Facilitating or controlling a person’s access to an addictive or controlled substance or restricting a person’s access to prescription medication; or

(G) Knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person’s circumstances to believe that he or she is the property of a person or business.

(4) “Commercial sex act” means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person. The term “commercial sex act” includes a violation of § 22-2701, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722

(5) “Debt bondage” means the status or condition of a person who provides labor, services, or commercial sex acts, for a real or alleged debt, where:

(A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;

(B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or

(C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.

(6) “Labor” means work that has economic or financial value.

(7) “Serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.

(8) “Services” means legal or illegal duties or work done for another, whether or not compensated.

(9) “Sexual act” shall have the same meaning as provided in § 22-3001(8).

(10) “Sexual contact” shall have the same meaning as provided in § 22-3001(9).

(11) “Venture” means any group of 2 or more individuals associated in fact, whether or not a legal entity.

(Oct. 23, 2010, D.C. Law 18-239, § 101, 57 DCR 5405.)

Legislative history of Law 18-239. — Law 18-239, the “Prohibition Against Human Trafficking Amendment Act of 2010”, was introduced in Council and assigned Bill No. 18-70, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted

on first and second readings on March 16, 2010, and June 1, 2010, respectively. Signed by the Mayor on June 21, 2010, it was assigned Act No. 18-444 and transmitted to both Houses of Congress for its review. D.C. Law 18-239 became effective on October 23, 2010.

§ 22-1832. Forced labor.

(a) It is unlawful for an individual or a business knowingly to use coercion to cause a person to provide labor or services.

(b) It is unlawful for an individual or a business knowingly to place or keep any person in debt bondage.

(Oct. 23, 2010, D.C. Law 18-239, § 102, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1833. Trafficking in labor or commercial sex acts.

It is unlawful for an individual or a business to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person, knowing, or in reckless disregard of the fact that:

(1) Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act; or

(2) The person is being placed or will be placed or kept in debt bondage.

(Oct. 23, 2010, D.C. Law 18-239, § 103, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1834. Sex trafficking of children.

(a) It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.

(b) In a prosecution under subsection (a) of this section in which the defendant had a reasonable opportunity to observe the person recruited, enticed, harbored, transported, provided, obtained, or maintained, the government need not prove that the defendant knew that the person had not attained the age of 18 years.

(Oct. 23, 2010, D.C. Law 18-239, § 104, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1835. Unlawful conduct with respect to documents in furtherance of human trafficking.

It is unlawful for an individual or business knowingly to destroy, conceal, remove, confiscate, or possess any actual or purported government identification document, including a passport or other immigration document, or any other actual or purported document, of any person to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor or services of that person.

(Oct. 23, 2010, D.C. Law 18-239, § 105, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1836. Benefitting financially from human trafficking.

It is unlawful for an individual or business knowingly to benefit, financially or by receiving anything of value, from voluntarily participating in a venture which has engaged in any act in violation of § 22-1832, § 22-1833, § 22-1834, or § 22-1835, knowing or in reckless disregard of the fact that the venture has engaged in the violation.

(Oct. 23, 2010, D.C. Law 18-239, § 106, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1837. Penalties.

(a)(1) Except as provided in paragraph (2) of this subsection, whoever violates § 22-1832, § 22-1833, or § 22-1834 shall be fined not more than \$200,000, imprisoned for not more than 20 years, or both.

(2) Whoever violates sections § 22-1832, § 22-1833, or § 22-1834 when the victim is held or provides services for more than 180 days shall be fined not more than 1½ times the maximum fine authorized for the designated act, imprisoned for not more than 1½ times the maximum term authorized for the designated act, or both.

(b) Whoever violates § 22-1835 shall be fined not more than \$ \$5,000, imprisoned for not more than 5 years, or both.

(c) Whoever violates § 22-1836 shall be fined or imprisoned up to the maximum fine or term of imprisonment for a violation of each referenced section.

(d) Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than ½ the maximum fine otherwise authorized for the offense, imprisoned for not more than ½ the maximum term otherwise authorized for the offense, or both.

(e) No person shall be sentenced consecutively for violations of §§ 22-1833 and 22-1834 for an offense arising out of the same incident.

(Oct. 23, 2010, D.C. Law 18-239, § 107, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1838. Forfeiture.

(a) In imposing sentence on any individual or business convicted of a violation of this chapter, the court shall order, in addition to any sentence imposed, that the individual or business shall forfeit to the District of Columbia:

(1) Any interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of the violation; and

(2) Any property, real or personal, constituting or derived from any proceeds that the individual or business obtained, directly or indirectly, as a result of the violation.

(b) The following shall be subject to forfeiture to the District of Columbia and no property right shall exist in them:

(1) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.

(2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

(Oct. 23, 2010, D.C. Law 18-239, § 108, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1839. Reputation or opinion evidence.

In a criminal case in which a person is accused of trafficking in commercial

sex, as prohibited by § 22-1833, sex trafficking of children, as prohibited by § 22-1834, or benefitting financially from human trafficking, as prohibited by § 22-1836, reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. Evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence also is not admissible, unless such evidence other than reputation or opinion evidence is admitted in accordance with § 22-3022(b), and is constitutionally required to be admitted.

(Oct. 23, 2010, D.C. Law 18-239, § 109, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1840. Civil action.

(a) An individual who is a victim of an offense prohibited by § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 may bring a civil action in the Superior Court of the District of Columbia. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages shall be awarded on proof of actual damages where a defendant's acts were willful and malicious.

(b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836, or until a minor plaintiff has reached the age of majority, whichever is later.

(c) If a person entitled to sue is imprisoned, insane, or similarly incapacitated at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the incapacity is not part of the time limited for the commencement of the action.

(d) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action.

(Oct. 23, 2010, D.C. Law 18-239, § 110, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

§ 22-1841. Data collection and dissemination [Not funded].

Omitted

(Oct. 23, 2010, D.C. Law 18-239, § 111, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-1831.

Editor's notes. — Subsection (e) of this section, states that this section shall not apply until its fiscal effect is included in an approved budget and financial plan.

The Budget Director of the Council of the District of Columbia has determined, as of February 15, 2012, that the fiscal effect of this section has not been included in an approved budget and financial plan. Therefore, the provisions of this section, enacted by Law 17-146, are not in effect.

CHAPTER 19. INCEST.

Sec.

22-1901. Definition and penalty.

§ 22-1901. Definition and penalty.

If any person in the District related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law, shall marry or cohabit with or have sexual intercourse with such other so-related person, knowing him or her to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment for not more than 12 years.

(Mar. 3, 1901, 31 Stat. 1332, ch. 854, § 875.)

Prior Codifications. — 1981 Ed., § 22-1901. 1973 Ed., § 22-1901.

CASE NOTES

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Admissibility of evidence.
Habeas corpus.
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Nature and elements of crime.
View and inspection.
Weight and sufficiency of evidence.

Admissibility of evidence.

Generally, evidence of offenses other than offense for which the accused is on trial is inadmissible. *Hodge v. U.S.*, 126 F.2d 849, 1942 U.S. App. LEXIS 4271 (1942).

In prosecutions for sexual offenses, general rule, that evidence of offenses other than offense for which accused is on trial is inadmissible, is subject to an exception on the theory that, since the mental disposition of the defendant at the time of the act charged is relevant, evidence that at some other time he was similarly disposed is also relevant. *Hodge v. U.S.*, 126 F.2d 849, 1942 U.S. App. LEXIS 4271 (1942).

In prosecutions for sexual offenses, evidence of prior acts between the same parties is admissible as showing a disposition to commit the act charged, the probabilities being that the emotional predisposition or passion will continue. *Hodge v. U.S.*, 126 F.2d 849, 1942 U.S. App. LEXIS 4271 (1942).

In prosecution for incest and child sexual abuse, expert testimony from state's clinical psychologist regarding behavior of sexually abused children was properly admitted with

limitations precluding expert from making ultimate conclusions on whether victim was truthful or whether defendant was guilty, as information was beyond average juror's understanding, where expert discussed ability of children to sequence events, and she made observations that child victims of incest do not always promptly report such abuse, and that children, unlike adults, display range of responses to abuse, including not visibly reacting. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for incest and child sexual abuse, defendant was not denied his right of confrontation when trial court, during cross-examination of state's psychological expert, precluded defendant from asking specific questions regarding suggestibility of children on ground that such questions were beyond scope of the direct examination testimony; although expert's direct examination testimony on children's ability to access their memories may have raised suggestibility issue, trial court allowed defendant opportunity to establish his main point on cross-examination that suggestibility can influence accuracy of children's memories. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for child sexual abuse and incest, victim's failure to mention in first trial

that defendant gave her rides on his back into his bedroom before abusing her, which was her testimony on retrial, did not amount to an inconsistency by omission such that defendant could use it for impeachment purposes; victim was asked in first trial whether defendant did something that saddened or hurt her, but her testimony regarding the piggy back rides would not have been an appropriate response to such a question. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for child sexual abuse and incest, victim's failure to mention in first trial that a spirit moved her to tell her mother about the abuse, which was her testimony on retrial, did not amount to an inconsistency by omission such that defendant could use it for impeachment purposes; question posed in first trial, inquiring why she did not tell her mother about the abuse, did not naturally call for her statement in second trial, which was in response to question regarding what caused her to choose a particular day to tell her mother. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for child sexual abuse and incest, victim's failure to mention in first trial that she was sexually abused in the bathtub of defendant's apartment, which was her testimony on retrial, did not amount to an inconsistency by omission such that defendant could use it for impeachment purposes; fact was not sufficiently material that the failure to mention it amounted to an inconsistency, as the question posed in the first trial concerned abuse that occurred after family split up, and victim's testimony about bathtub incident was that it occurred while family was still living together. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

Habeas corpus.

Where accused was found not guilty by reason of insanity and was committed to hospital and some two months thereafter accused petitioned for writ of habeas corpus without prepayment of costs and District Court denied such petition without a hearing and without stating reasons for denial, case could be remanded and District Court, if it rejected allegation of poverty, would be required to state basis for such rejection, and if leave to file without costs was permitted or if accused should pay necessary filing fees, hospital super-

intendent would be directed to report as to accused's condition, and upon the return the District Court should conduct hearing to determine whether accused had recovered sanity and would not be dangerous to himself or others in reasonable future. D.C. Code 1951, §§ 22-1901, 22-2801, 24-301; 18 U.S.C. §§ 1915(d), 2243, 2244. *Tatem v. U.S.*, 275 F.2d 894, 1960 U.S. App. LEXIS 5235 (C.A.D.C. 1960).

Indictment and information.

Neither rape nor carnal knowledge is lesser included offense of incest. D.C. Code 1981, §§ 22-1901, 22-2801. *Pounds v. United States*, 529 A.2d 791, 1987 D.C. App. LEXIS 415 (1987).

Instructions.

In prosecution for incest, refusal to give a prayer requested by defendant concerning reputation was not error where the subject had been adequately covered in an instruction given. *Hodge v. U.S.*, 126 F.2d 849, 1942 U.S. App. LEXIS 4271 (1942).

Joint or separate trial of charges.

Trial court's denial of defendant's motion to sever two counts of incest was not an abuse of discretion, since the two offenses were separate and distinct. D.C. Code 1981, § 22-1901; Criminal Rules 8, 14. *Robinson v. United States*, 452 A.2d 354, 1982 D.C. App. LEXIS 471 (1982).

Nature and elements of crime.

Defendant's convictions for rape, carnal knowledge, and incest for same incidents did not merge. D.C. Code 1981, §§ 22-1901, 22-2801. *Pounds v. United States*, 529 A.2d 791, 1987 D.C. App. LEXIS 415 (1987).

Elements of the crime of incest include sexual intercourse, that the victim was related to the defendant within the third degree of consanguinity, and that the defendant knew the victim was so related at the time of sexual intercourse. D.C. Code 1981, § 22-1901. *Robinson v. United States*, 452 A.2d 354, 1982 D.C. App. LEXIS 471 (1982).

Of the various forms of sexual conduct prohibited by statute, such as adultery, indecent exposure, incest, fornication, seduction, indecent liberties with children, and sodomy, only sodomy, indecent exposure, and indecent sexual acts with children can reasonably be deemed "lewd, obscene or indecent," within meaning of sexual proposal statute, with the result that statute's "sexual proposal" clause could be fairly construed to prohibit only proposals to commit sodomy, indecent exposure, or in the case of sexual proposals with children, to perform some sexual act. D.C. Code §§ 22-301, 22-1002, 22-1112, 22-1901, 22-3001, 22-3501, 22-3502. *District of Columbia v. Garcia*, 335 A.2d 217, 1975 D.C. App. LEXIS 353 (1975),

writ of certiorari denied by 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125, 1975 U.S. LEXIS 2945 (1975).

View and inspection.

In prosecution for incest, refusal to grant defendant's motion for view of premises was not an abuse of discretion. *Hodge v. U.S.*, 126 F.2d 849, 1942 U.S. App. LEXIS 4271 (1942).

Weight and sufficiency of evidence.

Evidence sustained conviction of carnal knowledge and incest. D.C. Code 1951, §§ 22-1901, 22-2801. *Lee v. U.S.*, 200 F.2d 134, 1952 U.S. App. LEXIS 2252 (C.A.D.C. 1952).

Evidence supported trial court's finding that juvenile and complainant were related by blood within fourth degree of consanguinity, as required to support adjudication of delinquency for incest; complainant's father testified that he had five children, including juvenile and complainant, notwithstanding lack of paternity test, and that he considered himself their father, complainant testified that she and juvenile had same father, complainant's mother testified that juvenile was father's son by another woman, and complainant's grandfather testified that both juvenile and complainant

were his grandchildren. *In re D.W.*, 27 A.3d 1164, 2011 D.C. App. LEXIS 521 (2011).

Victim's testimony, without independent corroboration, was sufficient to support convictions for carnal knowledge, incest, first-degree child sexual abuse, taking indecent liberties with a minor, and second-degree child sexual abuse. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for incest, corroboration of the testimony of a mature female victim is not required. D.C. Code 1981, § 22-1901. *Robinson v. United States*, 452 A.2d 354, 1982 D.C. App. LEXIS 471 (1982).

While age alone is not determinative of maturity, it is an important factor in determining whether corroboration of the testimony of a victim of incest is required. D.C. Code 1981, § 22-1901. *Robinson v. United States*, 452 A.2d 354, 1982 D.C. App. LEXIS 471 (1982).

Record in prosecution for incest evidenced a sufficient degree of maturity on the part of the victim that corroboration of her testimony was not required. D.C. Code 1981, § 22-1901. *Robinson v. United States*, 452 A.2d 354, 1982 D.C. App. LEXIS 471 (1982).

CHAPTER 19A. REPORTS OF CRIME AND REQUESTS FOR ASSISTANCE.

Sec.

22-1931. Obstructing, preventing, or interfering with reports to or requests for

assistance from law enforcement agencies, medical providers, or child welfare agencies.

§ 22-1931. Obstructing, preventing, or interfering with reports to or requests for assistance from law enforcement agencies, medical providers, or child welfare agencies.

(a) It shall be unlawful for a person to knowingly disconnect, damage, disable, temporarily or permanently remove, or use physical force or intimidation to block access to any telephone, radio, computer, or other electronic communication device with a purpose to obstruct, prevent, or interfere with:

(1) The report of any criminal offense to any law enforcement agency;

(2) The report of any bodily injury or property damage to any law enforcement agency;

(3) A request for ambulance or emergency medical assistance to any governmental agency, or any hospital, doctor, or other medical service provider, or

(4) The report of any act of child abuse or neglect to a law enforcement or child welfare agency.

(b) A person who violates subsection (a) of this section shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both.

(Apr. 24, 2007, D.C. Law 16-306, § 107, 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) enactments, see § 107 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) enactments, see § 107 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) enactments, see § 107 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) enactments, see

§ 107 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — Law 16-306, the “Omnibus Public Safety Amendment Act of 2006”, was introduced in Council and assigned Bill No. 16-247, which was referred to Committee on the Judiciary. The Bill was adopted on first and second readings on June 6, 2006, and October 3, 2006, respectively. Signed by the Mayor on October 17, 2006, it was assigned Act No. 16-482 and transmitted to both Houses of Congress for its review. D.C. Law 16-306 became effective on April 24, 2007.

CHAPTER 20. KIDNAPPING.

Sec.

22-2001. Definition and penalty; conspiracy.

§ 22-2001. Definition and penalty; conspiracy.

Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years. For purposes of imprisonment following revocation of release authorized by § 24-403.01, the offense defined by this section is a Class A felony. This section shall be held to have been violated if either the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia. If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 812; Feb. 18, 1933, 47 Stat. 858, ch. 103; Nov. 8, 1965, 79 Stat. 1307, Pub. L. 89-347, § 3; June 8, 2001, D.C. Law 13-302, § 4(g), 47 DCR 7249.)

Cross references. — Armed offenses, additional penalty, see §§ 22-4501 and 22-4502.

Section references. — This section is referred to in §§ 11-502 and 23-546.

Prior Codifications. — 1981 Ed., § 22-2101.

1973 Ed., § 22-2101.

Effect of amendments. — D.C. Law 13-302, substituted “not more than 30 years” for “life or for any term as the court in its discretion may determine”; and inserted the second sentence.

Emergency legislation. — For temporary (90 day) amendment of section, see § 4(g) of the Sentencing Reform Congressional Review

Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 4(g) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(g) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

CASE NOTES

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—Abduction, nature and elements of crime.

—Asportation, nature and elements of crime.

—Different offenses in same transaction, nature and elements of crime.

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—In general.

—Merger of offenses, nature and elements of crime.

—Pecuniary benefit, nature and elements of crime.

- Robbery distinguished, nature and elements of crime.
- Persons liable, generally.
- Pleas.
- Presumptions and burden of proof.
- Questions of law and fact.
- Review.
- Harmless or reversible error, review.
- In general.
- Presentation and reservation of grounds for review.
- Sentence and punishment.
- Validity.
- Weight and sufficiency of evidence.
- Witnesses and evidence, generally.

Admissibility of evidence.

Probative value of evidence of defendant's heroin addiction to place what happened at the crime scene in an understandable context was substantially outweighed by the prejudicial effect its admission would have for defendant, such that the evidence was inadmissible for this purpose, in prosecution for burglary, robbery, kidnapping, and felony murder; jury did not need the drug-addiction evidence to derive a coherent story of the evidence, in that even without the evidence of drug addiction, the evidence suggested that the crimes likely were the acts of a desperate person, and it did not appear that the drug-addiction evidence would be indispensable to the jury's understanding of the charged offenses. *U.S. v. Morton*, 2012 WL 3242844 (2012).

Remand was required for trial court to conduct anew its discretionary balancing of the probative value of the evidence of defendant's heroin addiction as corroborative of inferences that pointed to defendant as the perpetrator against its prejudicial effect, in prosecution for burglary, robbery, kidnapping, and felony murder; defendant's addiction had probative value as corroborative of defendant's identity as the perpetrator, while evidence of his addiction might be reflective of his character and might suggest that he had criminal propensities, the relevance of the evidence was logically independent of those possibilities, and a fuller assessment by trial court of probative value of the evidence could affect its balancing of probative value against prejudicial effect. *U.S. v. Morton*, 2012 WL 3242844 (2012).

Trial court failed to exercise its discretion when it excluded testimony of defendant's expert on eyewitness reliability, in trial in which prosecution relied exclusively on five eyewitnesses who were strangers to defendant and which resulted in conviction for armed kidnapping and related weapons offense; expert testimony on eyewitness reliability was not automatically inadmissible, court did not consider *Dyas* factors applicable when determining whether to admit expert testimony on eyewitness

reliability, court's decision was not grounded in defendant's proffer and its relevance to the identifications at issue, court did not address assertion in defendant's proffer that scientific research had both identified factors that could lead a jury to question an eyewitness identification and determined that some of these factors were not evident to lay jurors, and court should have conducted a voir dire of witness before it made decision. *Benn v. United States*, 978 A.2d 1257, 2009 D.C. App. LEXIS 384 (2009).

Alleged victim's statements to detective that she had been kidnapped and raped by defendant and codefendant was admissible under the excited utterance exception to hearsay rule in prosecution for first-degree sexual abuse and kidnapping; alleged victim made statements after she was placed in an ambulance following six hour kidnapping that involved repeated rapes that ended in police shootout, alleged victim's statements were corroborated by other evidence admitted at trial, and alleged victim was available for cross-examination of her statement. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Alleged victim's statement to police officer and detective that she had been kidnapped and raped by defendant and codefendant was admissible under excited utterance exception to hearsay rule in prosecution for first-degree sexual abuse and kidnapping; alleged victim made the statements in the moments immediately following a six-hour kidnapping that involved repeated rapes and ended in a dramatic police shootout, alleged victim made her comments as soon as she saw officer, and when officer saw alleged victim in the back of the van, she was crying, shaking, and very distraught. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Evidence that defendant, a dissatisfied former employee of a federal agency, contacted congressional subcommittee to discuss his concerns about the agency was irrelevant to issue of whether defendant kidnapped an agency employee and was thus inadmissible, although he alleged the evidence tended to prove that he acted not for his own benefit, but for benefit of the taxpayers. *Dade v. United States*, 663 A.2d 547, 1995 D.C. App. LEXIS 287 (1995).

Applying either abuse of discretion standard or "plainly wrong or without evidence to support it" standard, bail hearing testimony of deceased kidnap victim was admissible under prior recorded testimony hearsay exception; victim's testimony at bail hearing went directly to heart of issue at trial, whether defendant's conduct constituted kidnapping, and trial counsel was afforded ample opportunity during bail hearing to challenge victim's assertion that defendant was actively involved. D.C. Code

1981, § 22-2101. *Skyers v. United States*, 619 A.2d 931, 1993 D.C. App. LEXIS 15 (1993).

Trial court's sustaining of Government's objection, based on relevancy grounds, to question put to kidnapping complainant as to whether she once failed to appear for court, was not abuse of discretion, notwithstanding argument that question was relevant to defense theory of case, that complainant had consented to being detained and prevented from appearing at court. *Bush v. United States*, 516 A.2d 186, 1986 D.C. App. LEXIS 461 (1986), writ of certiorari denied by 513 U.S. 882, 115 S. Ct. 217, 130 L. Ed. 2d 145, 1994 U.S. LEXIS 6470, 63 U.S.L.W. 3263 (1994).

In murder and kidnapping prosecution, trial court properly refused to permit defendant's mother to testify, over state's hearsay objection, as to what defendant told her on the telephone after defendant encountered the murder victim on day of his death, despite defense counsel's argument that the statement was not being offered for its truth but rather to show defendant's state of mind. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Aiders and abettors.

Where manager of restaurant was forcibly taken in his own car from scene of robbery by defendant and codefendant, fact that defendant when he left car in District of Columbia, told codefendant to take manager and "get rid of him" and codefendant crossed Maryland state line before he ordered manager to leave car did not make defendant guilty of violating federal kidnapping statute on theory that defendant knowingly aided and abetted codefendant in transportation of manager into Maryland. 18 U.S.C. § 1201. *Matthews v. United States*, 449 F.2d 985, 1971 U.S. App. LEXIS 11551 (C.A.D.C. 1971).

Conviction for aiding and abetting kidnapping was supported by sufficient evidence, including defendant's brandishing of a gun at time of robbery, which intimidated victim and facilitated codefendant's ability to lead victim away, and by defendant's later announcement that he wanted to have sex with victim, which encouraged codefendant to detain her. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Defendant's role as aider and abettor was sufficient to impute guilt for kidnapping, although defendant claimed that evidence was insufficient to establish his participation in kidnapping offense if kidnapping were found to be offense separate from robbery. D.C. Code 1981, § 22-105, 22-2101. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S.

1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

Evidence supported defendant's conviction for kidnapping as aider and abettor; jury could find that robbery of drug dealer's apartment, in which defendant participated, was related to dealer's possession of valuable drugs, and that when defendant and co-defendant did not find dealer or drugs there, they pursued him to victim's home using victim as unwilling accomplice, and thus evidence permitted jury to find more than defendant's mere presence with co-defendant. *Ersikines v. United States*, 696 A.2d 1077, 1997 D.C. App. LEXIS 147 (1997).

Arguments and conduct of counsel.

Prosecutor's statement during closing argument of kidnapping trial that jury was required to believe defendant's story if it found him not guilty was improper; statement wrongly implied that defendant had burden to explain himself sufficiently to create reasonable doubt. *Murray v. United States*, 855 A.2d 1126, 2004 D.C. App. LEXIS 421 (2004).

Prosecutor's argument in rebuttal of kidnapping trial that essentially urged jury to vindicate sacrifice that witnesses had made in accusing defendants was improper; argument was inflammatory and suggested that acquittal would both allow defendants to get away with violent crime and somehow breach compact with witnesses whose sacrifice in testifying should be rewarded and not made nugatory. *Murray v. United States*, 855 A.2d 1126, 2004 D.C. App. LEXIS 421 (2004).

Prosecutor's statement during rebuttal argument in kidnapping trial that eyewitnesses were reluctant to testify due to their fear of defendants was improper; no evidence at all permitted fair inference that eyewitnesses had been given reason to fear defendants or were in fact afraid of them, and thus prosecutor's statement introduced unsubstantiated fear of reprisal from defendants and thereby invited conviction based on jury's aversion to such intimidation. *Murray v. United States*, 855 A.2d 1126, 2004 D.C. App. LEXIS 421 (2004).

Prosecutor's statement during rebuttal argument in kidnapping trial that victim was reluctant to testify due to his fear of defendants was reasonable inference from evidence, where victim testified that defendants shoved him into vehicle, pummeled him, and told him that they were going to "take him to the fat man," which was something that victim feared meant worse violence, and one defendant, after incident, warned victim not to talk to police. *Murray v. United States*, 855 A.2d 1126, 2004 D.C. App. LEXIS 421 (2004).

Trial court erred in denying defendant's motion for new trial without evidentiary hearing, following convictions for kidnapping while armed, armed robbery, assault with intent to

commit rape while armed, and possession of firearm during crime of violence, basis of which motion was ineffective assistance of counsel, where court made credibility determination that defendant had not provided names of exculpatory witnesses without hearing testimony from anyone who had any direct knowledge regarding this disputed fact, as trial attorney never denied or admitted that defendant had provided names, investigator did not testify, and defendant was not permitted to be present. *Arrington v. United States*, 804 A.2d 1068, 2002 D.C. App. LEXIS 483 (2002).

Prosecutor's representation of the evidence in prosecution for murder and homicide did not constitute misconduct. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Prosecutor's statement in closing argument in murder prosecution, to the effect that defendant got a gun from the trunk of his car before going to place where victim was kidnapped, was most likely an inadvertent, and under the circumstances, understandable mistake, despite fact that no such evidence was offered, where defendant's counsel had sought to obtain an admission from a witness that the witness had stated previously this very fact. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

In murder and kidnapping prosecution, prosecutor's comments to jury in closing argument as to statements made by one defendant to bystanders as he pushed murder victim into the car, including a statement that "signifying is worse than stealing," and "don't think this can't happen to you," did not fall within rule proscribing use of missing witness inference, where such statement was made to explain Government's lack of corroborative evidence, not to suggest there were witnesses whom defendants were afraid to call because their testimony would be adverse. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Prosecutor's remarks to jury in closing argument, in defendant's murder and kidnapping prosecution, regarding defendant's two prior murder convictions were not improper, where prosecutor's remarks came in the midst of a discussion concerning defendant's credibility, and where prosecutor correctly told jurors that they could consider defendant's prior convictions in determining whether he was telling the truth, but not to infer that "because he did those, he did these." D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Defenses.

Voluntary intoxication may be a defense to a

kidnaping charge. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

"Parent" within meaning of statutory defense to kidnapping charge may include someone in loco parentis such as step-parent, and thus, person who stands in place of biological parent at time of kidnapping is exempt from prosecution pursuant to kidnapping statute. D.C. Code 1981, § 22-2101. *Byrd v. United States*, 705 A.2d 629, 1997 D.C. App. LEXIS 233 (1997).

On issue of whether defendant is entitled to protection of "parent" defense in kidnapping statute, jury must decide whether defendant continued to fulfill responsibilities of "parent" at time of kidnapping, since in loco parentis status is temporary and may be relinquished at any time by voluntary conduct. D.C. Code 1981, § 22-2101. *Byrd v. United States*, 705 A.2d 629, 1997 D.C. App. LEXIS 233 (1997).

In case of defendant claiming in loco parentis status for purposes of "parent" defense in kidnapping statute, defense is not available where defendant has engaged in separate felonious conduct during kidnapping which exposes child to serious risk of death or bodily injury. D.C. Code 1981, § 22-2101. *Byrd v. United States*, 705 A.2d 629, 1997 D.C. App. LEXIS 233 (1997).

Indictment or information.

Government's alleged alteration of its theory of kidnapping—effected by its proof only that defendant abducted victim, not for ransom, but "for otherwise"—caused defendant no substantial prejudice and thus did not warrant judgment of acquittal, where defendant was well aware of facts upon which Government's case rested and had been apprised by other counts of indictment, that, in Government's view, facts would support conviction under "otherwise" language of kidnapping statute. 18 U.S.C. § 1201(a). *United States v. Kelly*, 711 F. Supp. 36, 1989 U.S. Dist. LEXIS 5289 (1989).

Allegation of particular purpose for which kidnapping was carried out is surplusage; indictment's specification of particular purpose for kidnapping carries no legal significance. *Erskines v. United States*, 696 A.2d 1077, 1997 D.C. App. LEXIS 147 (1997).

Instructions.

In prosecution of defendant who, with codefendant, robbed restaurant, forcibly took restaurant manager in car, and when he left automobile in District of Columbia, told codefendant to "get rid" of manager who codefendant released in Maryland, instruction that it was not necessary that any specific time or mode of committing offense had been advised by defendant or that there had been any direct

communication between actual perpetrator and defendant for defendant to be an aider or abettor was erroneous for failure to state necessity of finding that defendant knowingly associated himself in transportation of manager in interstate commerce in violation of criminal kidnapping statute. 18 U.S.C. § 1201; D.C. Code § 22-2101. *Matthews v. United States*, 449 F.2d 985, 1971 U.S. App. LEXIS 11551 (C.A.D.C. 1971).

Evidence was sufficient to support jury's finding that defendant aided and abetted the co-defendant in committing murder, kidnapping, and carjacking, where defendant had the opportunity to disassociate himself from the co-defendant at several points, but chose to stay when victim was kidnapped, stabbed, and shot, and defendant displayed his consciousness of guilt by fleeing from the police and attempting to conceal himself in some bushes. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Defendant, in prosecution for kidnapping and first-degree sexual abuse, was not entitled to instruction on consent as a defense to such charges; while alleged victim acknowledged being a prostitute, no evidence existed that alleged victim consented to being kidnapped and raped, as evidence indicated that alleged victim was taken from the street at gunpoint, forced into a van, and held for over six hours, during which she was ordered to perform sexual acts with several men or else she would be shot. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Finding that defendant seized victim and detained him against his will was supported, in prosecution for armed kidnapping, by evidence that victim did not want to get into car with defendant and accomplice and that accomplice said, "If you don't want to come with us, it's going to be the Fourth of July out here," that defendant pulled out gun and put his arm around victim's neck when victim's friend was later ordered out of car, and that victim appeared frightened when he arrived at his apartment, where defendant and accomplices proceeded with felonious plan to rob victim and killed victim in the process. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Any pistol or other firearm was, by statutory definition, a dangerous or deadly weapon, and jury was not required to find specifically that particular pistol was a dangerous or deadly weapon to find defendant guilty of kidnapping while armed, although defendant alleged that weapon was not loaded; therefore, defendant was not entitled to instruction on "while armed" component of offense which included definition of dangerous or deadly weapon. D.C. Code 1981, § 22-3202(a). *Dade v. United*

States, 663 A.2d 547, 1995 D.C. App. LEXIS 287 (1995).

Kidnapping defendant was not entitled to instruction or lesser included charge of assault with intent to kidnap where seizure and detention of victim were completed deeds rather than plans for future; there was no basis for finding that defendant committed assault but not kidnapping. D.C. Code 1981, § 22-2101. *Walker v. United States*, 617 A.2d 525, 1992 D.C. App. LEXIS 310 (1992).

Question whether defendant was armed when he allegedly kidnapped victim was for jury regardless of whether defendant disputed "while armed" element of charge of kidnapping while armed; accordingly, it was within court's discretion to instruct jury on lesser included offense of kidnapping. D.C. Code 1981, §§ 22-2101, 22-3202. *Whitaker v. United States*, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

In prosecution for kidnapping 14-year-old boy for purpose of sexually assaulting him, failure to instruct that consent to accused's sexual advances was a defense to kidnapping was not error. D.C. Code § 22-2101. *Ledbetter v. United States*, 350 A.2d 379, 1976 D.C. App. LEXIS 451 (1976).

Joint or separate trial of charges.

Offense of carrying dangerous weapon could be tried with burglary and robbery charges, where proof of the robberies and burglaries included substantially all of the proof of the weapons charge; although crimes were not similar, they were sufficiently connected to warrant joinder. Criminal Rules 8, 8(a); D.C. Code 1981, §§ 22-1801(a, b), 22-2101, 22-2901, 22-3209, 22-3811, 22-3812(a), 22-3901. *Coleman v. United States*, 619 A.2d 40, 1993 D.C. App. LEXIS 6 (1993).

In prosecutions for murder, kidnapping, etc., arising out of the so-called "Hanafi" take-overs of three buildings, the trial court did not abuse its discretion in refusing to sever that count of the indictment charging assault with a deadly weapon. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Nature and elements of crime.

— Abduction, nature and elements of crime.

Action of defendant in forcing complainant into house at knifepoint for purpose of rape or robbery not only made it easier for defendant to commit offenses, but also subjected complainant to greater danger and was such as to constitute crime of armed kidnapping despite claim that movement of complainant was merely incidental to rape or robbery. D.C. Code

§§ 22-2101, 22-3202. *Beck v. U.S.*, 402 A.2d 418, 1979 D.C. App. LEXIS 372 (1979).

— **Asportation, nature and elements of crime.**

Asportation is not essential element of kidnapping statute. D.C. Code 1981, § 22-2101. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

Asportation is not an essential element of kidnapping under the District of Columbia statute. D.C. Code § 22-2101. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Asportation is not an essential element of the kidnapping statute. D.C. Code 1981, § 22-2101. *Butler v. United States*, 614 A.2d 875, 1992 D.C. App. LEXIS 188 (1992), writ of certiorari denied by 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558, 1992 U.S. LEXIS 7611, 61 U.S.L.W. 3401 (1992).

Under kidnapping statute, there is no requirement that victim be moved any particular distance or held for any particular length of time; all that is required is "seizing, confining" or the like, and "holding or detaining" for ransom or reward "or otherwise." D.C. Code 1981, § 22-2101. *West v. United States*, 599 A.2d 788, 1991 D.C. App. LEXIS 307 (1991).

— **Different offenses in same transaction, nature and elements of crime.**

Given length and circumstances of detention in armed robberies, in which defendant frequently drove or had victims drive him around following robberies, kidnappings were not approximately coextensive in time and place with armed robberies, and thus constituted separate criminal acts. *Bond v. United States*, 614 A.2d 892, 1992 D.C. App. LEXIS 244 (1992).

If kidnapping charge is joined with other charges, key inquiry is whether seizure or asportation of victim was merely incidental to another crime and thus an integral part of it or whether confinement and restraint were significant enough in themselves to warrant independent prosecution for kidnapping. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

Kidnapping was not merely incidental to assault with intent to kill in light of evidence that defendant initially tried to kill assault victim by shooting him in back of head, then forced victim to garage and attempted to place victim in trunk of automobile; assault ended before kidnapping began and getting into trunk would have increased danger to victim while at same time lessening likelihood of defendant's cap-

ture. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

Where complainant was initially accosted and robbed on well-lighted street in front of her home and she was taken over 200 yards to darkened secluded spot and spent approximately one hour with defendant, asportation was not integral part of rape, and defendant could be convicted both for kidnapping and for rape, as well as robbery. D.C. Code 1981, §§ 22-2101, 22-2801, 22-2901, 22-3202. *Boyd v. United States*, 473 A.2d 828, 1984 D.C. App. LEXIS 328 (1984).

Detention, coercion or confinement, which is an integral part of every rape, cannot support a separate conviction for kidnapping. D.C.C.E §§ 22-2101, 22-2801. *Smothers v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

A separate conviction for kidnapping can be sustained when movement places victim in greater danger or makes it more likely that perpetrator will succeed in underlying crime and will not be apprehended. D.C. Code §§ 22-2101, 22-3202. *Beck v. U.S.*, 402 A.2d 418, 1979 D.C. App. LEXIS 372 (1979).

The forcible detention and carrying away of victim, during which he was transported, via automobile, for 25 blocks and which began before and continued after he was forced to yield his money and other valuables, was not a detention approximately coextensive with or a necessary incident to the armed robbery offense, and, thus, there had been a separate kidnapping offense of which defendant could be convicted in addition to her conviction of armed robbery. D.C. Code §§ 22-2101, 22-2901, 22-3202. *Sinclair v. United States*, 388 A.2d 1201, 1978 D.C. App. LEXIS 490 (1978), writ of certiorari denied by 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77, 1979 U.S. LEXIS 517 (1979).

— **Federal offenses, nature and elements of crime.**

Federal offense of kidnapping did not conclude once victim was abducted and transported across state lines, but rather continued while victim remained held for ransom. 18 U.S.C. § 1201(a). *United States v. Seals*, 130 F.3d 451, 1997 U.S. App. LEXIS 34307 (C.A.D.C. 1997), writ of certiorari denied by 524 U.S. 928, 118 S. Ct. 2323, 141 L. Ed. 2d 697, 1998 U.S. LEXIS 3923, 66 U.S.L.W. 3789 (1998), writ of certiorari denied by 525 U.S. 844, 119 S. Ct. 111, 142 L. Ed. 2d 89, 1998 U.S. LEXIS 5231, 67 U.S.L.W. 3232 (1998).

Congress enacted Hostage Taking Act to implement International Convention Against the Taking of Hostages, to which United States became signatory in 1979, and in drafting Act chose to conform domestic law with the Convention, which permits prosecution of hostage

takers who commit offense within single state and are not nationals of that state. 18 U.S.C. § 1203. *United States v. Lin*, 101 F.3d 760, 1996 U.S. App. LEXIS 31848 (C.A.D.C. 1996), remanded by 1998 U.S. App. LEXIS 1975 (D.C. Cir. Jan. 13, 1998).

Fact that defendants were seeking to collect debt rather than to extort money is not relevant under Hostage Taking Act, as terms of Act apply broadly to hostage takers seeking to compel third person "to do any act," and Act does not differentiate between various motivations that might prompt person to take hostages in order to compel action by third person. 18 U.S.C. § 1203. *United States v. Lin*, 101 F.3d 760, 1996 U.S. App. LEXIS 31848 (C.A.D.C. 1996), remanded by 1998 U.S. App. LEXIS 1975 (D.C. Cir. Jan. 13, 1998).

Essential elements of a hostage taking under Hostage Taking Act are (1) seizure or detention of another person, (2) threatening to kill, injure, or continue to detain that person, and (3) with purpose of compelling third person or governmental organization to do or abstain from doing something in order to obtain release of person detained. 18 U.S.C. § 1203. *United States v. Lin*, 101 F.3d 760, 1996 U.S. App. LEXIS 31848 (C.A.D.C. 1996), remanded by 1998 U.S. App. LEXIS 1975 (D.C. Cir. Jan. 13, 1998).

Conviction under Hostage Taking Act did not require showing that defendant acted with specific intent. 18 U.S.C. § 1203(a). *United States v. Yunis*, 924 F.2d 1086, 1991 U.S. App. LEXIS 1098 (C.A.D.C. 1991).

That defendant could have been convicted of kidnapping under District of Columbia code was not relevant to consideration of whether he was guilty of violation of federal kidnapping statute as charged. 18 U.S.C. § 1201; D.C. Code § 22-2101. *Matthews v. United States*, 449 F.2d 985, 1971 U.S. App. LEXIS 11551 (C.A.D.C. 1971).

Kidnapping of foreign nationals within United States and obtaining ransom from third parties fell within plain meaning of Hostage Taking Act, notwithstanding defendants were United States nationals. 18 U.S.C. § 1203(a), (b)(2). *United States v. Lin*, 881 F. Supp. 34, 1995 U.S. Dist. LEXIS 4254 (1995), remanded by 101 F.3d 760, 322 U.S. App. D.C. 87, 1996 U.S. App. LEXIS 31848 (1996).

Accredited Swedish diplomat was an "internationally protected person" within meaning of Act for Prevention and Punishment of Crimes Against Internationally Protected Persons, 18 U.S.C. §§ 1116, 1201(a)(4), (e), and his kidnapping by officials of the Soviet Union was therefore a violation of § 1201(a)(4), and if the diplomat was no longer alive, § 1116 was also violated. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 1985 U.S. Dist. LEXIS 14886 (1985), vacated by, dismissed by

736 F. Supp. 1, 1990 U.S. Dist. LEXIS 10960 (D.D.C. 1990).

— In general.

Involuntary nature of the seizure and detention is the essence of the crime of kidnapping. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Kidnapping includes seizing, confining, or detention of another and thus continues as long as detention endures. *Byrd v. United States*, 705 A.2d 629, 1997 D.C. App. LEXIS 233 (1997).

Involuntary nature of seizure and detention is the essence of crime of kidnapping. *Erskin v. United States*, 696 A.2d 1077, 1997 D.C. App. LEXIS 147 (1997).

Involuntary seizure and detention is very essence of kidnapping. D.C. Code 1981, § 22-2101. *Walker v. United States*, 617 A.2d 525, 1992 D.C. App. LEXIS 310 (1992).

Motive behind kidnapping is unimportant so long as act is done with expectation of benefit to transgressor. D.C. Code 1981, § 22-2101. *Walker v. United States*, 617 A.2d 525, 1992 D.C. App. LEXIS 310 (1992).

Kidnapping statute applies to those kidnappings in which motive is lust, desire for companionship, revenge, or some other motive not involving ransom or reward. D.C. Code 1981, § 22-2101. *Walker v. United States*, 617 A.2d 525, 1992 D.C. App. LEXIS 310 (1992).

Involuntary nature of seizure and detention is essence of crime of kidnapping. D.C. Code 1973, §§ 22-2101, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

Secrecy was not an element of kidnapping at common law, nor is it under the District of Columbia statute. D.C. Code § 22-2101. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

— Merger of offenses, nature and elements of crime.

Where helper on truck was detained and transported against his will to a different location, several miles away from scene where truck was hijacked, and purpose of detention, to facilitate success of hijacking, was to secure benefit to hijackers, two separate and distinct crimes were committed, i.e., kidnapping and armed robbery of contents of truck, and offenses did not merge. D.C. Code §§ 22-2101, 22-2901, 22-3202. *United States v. Wolford*, 444 F.2d 876, 1971 U.S. App. LEXIS 11155 (C.A.D.C. 1971).

Conviction for threatening to injure and kidnap did not merge for double jeopardy purposes

with kidnapping conviction, as each offense required proof of an element that the other did not: kidnapping did not require the utterance of words, and threats offense did not require some form of seizure and detention. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Trial court's findings that juvenile was responsible for kidnapping and child sexual abuse did not merge in delinquency proceeding, where offense of kidnapping required proof of asportation or confinement, and offense of child sexual abuse required proof on an actual or attempted sexual act. *In re D.W.*, 989 A.2d 196, 2010 D.C. App. LEXIS 78 (2010).

Defendant's conviction for kidnapping did not merge with his conviction for enticing a child; each of two crimes required proof of a factual element which the other did not. *Blackledge v. United States*, 871 A.2d 1193, 2005 D.C. App. LEXIS 155 (2005).

Carjacking and kidnapping are distinct offenses that do not merge; each includes an element that the other does not, and there is no clear indication of contrary legislative intent. *Malloy v. United States*, 797 A.2d 687, 2002 D.C. App. LEXIS 91 (2002).

While evidence supported convictions, kidnapping convictions that were rendered under alternate theories of intent had to merge. *D.C. Code* 1981, §§ 22-2101, 22-3202. *Green v. United States*, 718 A.2d 1042, 1998 D.C. App. LEXIS 161 (1998), writ of certiorari denied by 526 U.S. 1011, 119 S. Ct. 1156, 143 L. Ed. 2d 222, 1999 U.S. LEXIS 1836, 67 U.S.L.W. 3560 (1999).

Charges of first-degree murder and kidnapping each required proof that of element that other did not, and thus, convictions for kidnapping and murder did not merge, notwithstanding defendant's claim that kidnapping was incidental to underlying crime of murder. *D.C. Code* 1981, §§ 22-2101, 22-2401. *Parker v. United States*, 692 A.2d 913, 1997 D.C. App. LEXIS 61 (1997).

No merger occurred between counts of kidnapping while armed and assault with dangerous weapon (ADW) directed against different victims, during same criminal incident, or between any of these counts and any other count involving crimes directed at still other identifiable victims. *D.C. Code* 1981, §§ 22-502, 22-2101, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon (ADW) counts from same criminal incident, since burglary required proof of element that other crimes did not, and kidnapping, armed robbery and assault with dangerous weapon all required proof of elements that burglary did not. *D.C. Code* 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901,

22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Possession of firearm during crime of violence (PFCV) count did not merge with any kidnapping "while armed" count, burglary while armed count, armed robbery count, or assault with dangerous weapon (ADW) count from same criminal incident. *D.C. Code* 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(b). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Despite common victim, kidnapping count did not merge with armed robbery count, since the two crimes had different elements; kidnapping required proof that victim was seized or detained which armed robbery did not, and armed robbery required proof that property of value was taken, which kidnapping did not. *D.C. Code* 1981, §§ 22-2101, 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Conviction for kidnapping did not merge with convictions for assault with intent to rape while armed, mayhem while armed, and assault with a deadly weapon; assault-related convictions required proof that defendant was armed, and kidnapping conviction required proof of asportation or confinement. *D.C. Code* 1981, §§ 22-501, 22-506, 22-2101, 22-3202. *Whitaker v. United States*, 616 A.2d 843, 1992 D.C. App. LEXIS 287 (1992).

Trial court was correct in refusing to merge kidnapping convictions into rape and robbery convictions, where detention in each case extended over considerable period of time and provided opportunity for defendant to perpetrate series of unrelated offenses on victim, and victim in each case was ordered to remain where she was for period of time following crime and departure of defendant. *D.C. Code* 1981, § 22-2101. *West v. United States*, 599 A.2d 788, 1991 D.C. App. LEXIS 307 (1991).

Asportation of victim was not integral part of robbery, rather than separate offense of kidnapping, so as to merge into robbery offense; actions of forcing victim into alley, away from street where bystanders might have seen and interfered, exposed victim to more danger and decreased risk that defendants would be caught, and the forcible detention of victim, which began before and continued after victim's valuables were forcibly removed, could not be deemed detention approximately coextensive or necessary incident to crime of robbery. *D.C. Code* 1981, §§ 22-2101, 22-2901. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

While not every robbery gives rise to responsibility for kidnapping, kidnapping does not necessarily merge into robbery when commit-

ted during closely related incidents. D.C. Code 1981, §§ 22-2101, 22-2901. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

In prosecution for murder, kidnapping, and assault arising out of the "Hanafi" take-overs of three buildings, the kidnapping convictions of defendants did not merge with the other offenses. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Seizure and asportation, which consisted of fact that defendant, without a weapon, had dragged victim approximately 63 paces before throwing her to ground and attempting to rape her, was an integral element of the assault with intent to rape offense, and, thus, the seizure and asportation merged into such offense and was not a separate kidnapping offense. D.C. Code §§ 22-501, 22-2101. *Robinson v. United States*, 388 A.2d 1210, 1978 D.C. App. LEXIS 541 (1978).

In determining whether separate crimes of rape and kidnapping have been committed or whether they have merged, inquiry is to be made as to whether the asportation or seizure in question was of the type incidental to every rape or whether the confinement and restraint were significant enough of themselves to warrant an independent prosecution for kidnapping. D.C. Code § 22-2101. *Robinson v. United States*, 388 A.2d 1210, 1978 D.C. App. LEXIS 541 (1978).

Detention or confinement, if approximately coextensive in time and place with principal offense itself, is an integral element of such offense and may be viewed as merging with that offense in contradistinction to constituting a separate kidnapping offense. D.C. Code § 22-2101. *Robinson v. United States*, 388 A.2d 1210, 1978 D.C. App. LEXIS 541 (1978).

Each of defendant's and codefendant's two convictions for kidnapping and first-degree sexual abuse did not merge for double jeopardy purposes; each offense had at least one element that the other did not have. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Conviction for assault with a dangerous weapon did not merge into convictions for assault with intent to kidnap while armed. When the plan to kidnap the victim went sour, and the victim broke free and ran, the offense of assault on the victim with intent to kidnap while armed had ended and the subsequent shooting of the victim invaded a separate interest, and thus constituted a separate offense.

United States v. Rodriguez, 115 WLR 2729 (Super. Ct.).

— Pecuniary benefit, nature and elements of crime.

Evidence that pimp seized prostitute to obtain revenge for prostitute having left him and for reporting pimp to police established that pimp derived benefit from seizing prostitute, as needed to support kidnapping conviction. D.C. Code 1981, § 22-2101. *Walker v. United States*, 617 A.2d 525, 1992 D.C. App. LEXIS 310 (1992).

— Robbery distinguished, nature and elements of crime.

To constitute "abduction," separate and apart from robbery, victim's detention must be greater than restraint that is intrinsic in robbery. Code 1950, § 18.2-31, subd. 1. *Cardwell v. Commonwealth*, 248 Va. 501, 450 S.E.2d 146, 1994 Va. LEXIS 149 (1994), writ of certiorari denied by 514 U.S. 1097, 115 S. Ct. 1826, 131 L. Ed. 2d 747, 1995 U.S. LEXIS 3099, 63 U.S.L.W. 3787 (1995).

Persons liable, generally.

In no case, in the absence of an express provision of statute, can a parent be guilty of kidnapping his or her own minor child, unless the forcible taking is from the custody established by the decree of a competent court. *Hard v. Splain*, 45 App.D.C. 1, 1916 U.S. App. LEXIS 2646 (1916).

A father held not to commit the crime of kidnapping, where he forcibly takes his child, who is under 12 years of age, from his wife, the child's mother, though a statute gives the wife the custody of the child. *Hard v. Splain*, 45 App.D.C. 1, 1916 U.S. App. LEXIS 2646 (1916).

A father does not commit the crime of kidnapping, where he forcibly takes his minor child from his wife, the mother of the child, even though there exists at the time a separation agreement between his wife and himself, whereby he has agreed that the custody of the child should be in the mother, and to pay her a fixed contribution for her and its support. *Hard v. Splain*, 45 App.D.C. 1, 1916 U.S. App. LEXIS 2646 (1916).

Once defendant brings himself or herself within statutory exception to prosecution for kidnapping by presenting some evidence that he or she was "parent" within meaning of statute, jury must be allowed to decide whether defendant stood in loco parentis on proper instructions as part of ultimate question of whether government has proven its case beyond a reasonable doubt. D.C. Code 1981, § 22-2101. *Byrd v. United States*, 705 A.2d 629, 1997 D.C. App. LEXIS 233 (1997).

Pleas.

Defendant's guilty pleas to first-degree sexual abuse and kidnapping were knowingly and

voluntarily made, where defendant initiated the plea negotiations after being moved by the victim's trial testimony, defendant told the court he had sufficient opportunity to discuss an insanity defense with his lawyer and that he did not intend to pursue it, and defendant cogently told the court that his reason for the pleas was that he did not want to put the victim through any more humiliation. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Sufficient factual basis existed for trial court's accepting guilty plea to kidnapping, though defendant claimed to not remember incident because of voluntary intoxication, which could be a defense to the offense; defendant initiated the plea discussions after his memory was refreshed by the victim's testimony, defendant stated during the plea colloquy that he knew the victim was not lying and that he agreed with her testimony, and defendant was informed that specific intent was required for a conviction of kidnapping. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Defendant's motion to withdraw pre-sentence guilty pleas to first-degree sexual abuse and kidnapping should not have been granted on ground it would be "fair and just," where defendant never asserted his legal innocence, government would have been prejudiced if the motion were granted, in that it was presented in the middle of trial, and defendant received effective assistance of counsel. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Presumptions and burden of proof.

"For ransom" element of indictment charging kidnapping was satisfied even though abductors released victim when they decided that, instead of killing victim, they would kill original employer if victim paid abductors double amount of original contract; had victim refused to negotiate, abductors would have killed him. 18 U.S.C. § 1201(a). *United States v. Kelly*, 711 F. Supp. 36, 1989 U.S. Dist. LEXIS 5289 (1989).

To prove kidnapping while armed, prosecution only had to prove defendant expected to gain some kind of benefit by his actions; prosecution did not have to establish defendant sought revenge, which was only one of many possible motives for kidnapping. D.C. Code 1981, §§ 22-2101, 22-3202. *Dade v. United States*, 663 A.2d 547, 1995 D.C. App. LEXIS 287 (1995).

Questions of law and fact.

Evidence that defendant had provided food

and shelter to his step-children, that he removed children from their mother's home out of concern for their safety, that he did not force them to stay against their will, and that fire started accidentally, raised issue of law and fact for jury on whether defendant was "parent" entitled to statutory defense against kidnapping charge. D.C. Code 1981, § 22-2101. *Byrd v. United States*, 705 A.2d 629, 1997 D.C. App. LEXIS 233 (1997).

Rule restricting separate conviction for kidnapping when alleged confinement was factually incidental to sexual assault convictions was merger test to be applied by trial court as matter of law, which did not have to be basis of instruction to jury. D.C. Code 1981 § 22-2101. *Hagins v. United States*, 639 A.2d 612, 1994 D.C. App. LEXIS 44 (1994).

Evidence, from which jury could find that by not availing himself of opportunities to withdraw from kidnapping and rape scheme, defendant gave his tacit approval and encouragement to what other defendant was doing, was sufficient for jury on question whether defendant aided and abetted another. *Settles v. United States*, 522 A.2d 348, 1987 D.C. App. LEXIS 306 (1987).

Evidence supported submission to jury of case in which defendants were charged with armed kidnapping, armed rape, armed robbery and carrying pistol without a license. D.C.C.E §§ 22-2101, 22-2801, 22-2901, 22-3202, 22-3204. *Smith v. United States*, 389 A.2d 1356, 1978 D.C. App. LEXIS 399 (1978), writ of certiorari denied by 439 U.S. 1048, 99 S. Ct. 726, 58 L. Ed. 2d 707, 1978 U.S. LEXIS 4242 (1978).

Review.

— Harmless or reversible error, review.

Charging document was sufficient as to the kidnapping charge in delinquency proceeding, even though it failed to include the essential facts regarding the purpose for the commission of the crime or the particular facts about the manner in which the seizure occurred; the other counts of the charging document relating to events alleged a factual context sufficient to apprise juvenile of what conduct the kidnapping count covered, to enable him to prepare a defense, and to avoid any future charge based on the same conduct. *In re D.W.*, 989 A.2d 196, 2010 D.C. App. LEXIS 78 (2010).

Error of trial court in failing to exercise its discretion when it excluded testimony of defendant's expert on eyewitness reliability was not harmless, in trial that resulted in conviction of defendant for armed kidnapping and a related weapons offense, where prosecution relied exclusively on five eyewitnesses who were strangers to defendant, witnesses initially identified defendant in a photo spread, four of the five

witnesses initially stated that one of the photographs “looked like” the tall man of the two suspects who abducted the victim, there was no corroborating evidence, the eyewitnesses’ identifications increased in certainty over time, prosecution emphasized the alleged credibility of the eyewitnesses during closing argument, and without the expert’s testimony defendant’s attorney could only make what appeared to be unwarranted attacks on the credibility of witnesses perceived to be honest. *Benn v. United States*, 978 A.2d 1257, 2009 D.C. App. LEXIS 384 (2009).

Trial court error in admitting hearsay testimony that identified defendant as one of two individuals that kidnapped victim was harmless, during prosecution for murder, kidnapping, and other offenses; witness heard defendant threaten to put three bullets in his girlfriend “because he had already used the other three” on victim, after hearing the threat witness called the police and defendant was arrested and a revolver was recovered, ballistic evidence established that revolver was used to kill victim, and defendant’s girlfriend initially told police that defendant threatened to kill her and that he boasted about the murder of victim. *Randolph v. United States*, 882 A.2d 210, 2005 D.C. App. LEXIS 464 (2005).

Prosecutor’s improper statement during closing argument of kidnapping trial that jury was required to believe defendant’s story if it found him not guilty was harmless, even though statement wrongly implied that defendant had burden to explain himself sufficiently to create reasonable doubt; trial court repeatedly told jury that government had burden of proving guilt beyond reasonable doubt, defendant was arrested on scene, and defendant’s fingerprints were found on ammunition cartridge inside vehicle that was used during kidnapping. *Murray v. United States*, 855 A.2d 1126, 2004 D.C. App. LEXIS 421 (2004).

Prosecutor’s improper references in rebuttal argument to eyewitness fear of defendants and witness sacrifice in accusing defendants were harmless, in kidnapping trial; prosecutor’s improprieties did not include attempts to elicit testimony about fear of defendants, trial court instructed jury that arguments of counsel were not evidence and that it could consider during its deliberations only evidence properly admitted at trial, prosecutor’s reason for why witnesses were afraid was that they had watched defendants’ involvement in crime or antecedent events, which jury might naturally have understood anyway, and government’s case against defendants was very substantial. *Murray v. United States*, 855 A.2d 1126, 2004 D.C. App. LEXIS 421 (2004).

Defendant was not prejudiced by the denial of a continuance of prosecution for first-degree sexual abuse and kidnapping, allegedly re-

quired to permit defense counsel to prepare adequately for trial and to allow defendant to consider a “combination” plea offer made by the government, where defendant obtained a de facto continuance of three months. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Defendant’s conviction of kidnapping while armed and armed robbery did not have to be reversed, based on prosecution’s alleged failure to provide defense during discovery with certain incriminating statements allegedly made by defendant to police officer; error, if any, was not clear or obvious, and there was no miscarriage of justice. D.C. Code 1981, §§ 22-2101, 22-2901, 22-3202. *Quallis v. United States*, 654 A.2d 1281, 1995 D.C. App. LEXIS 41 (1995).

Trial court’s erroneous failure to give requested instruction that consent is a defense to charge of assault with intent to commit sodomy was harmless since there was neither direct nor persuasive evidence in record to suggest that complainant consented to defendant’s behavior, and in view of jury’s rejection of findings of consent to kidnapping and rape, offenses which took place both before and after the intervening sexual assault. D.C. Code 1981, §§ 22-503, 22-2101, 22-2801, 22-2901, 22-3502, 23-1327(a). *Jenkins v. United States*, 506 A.2d 1120, 1986 D.C. App. LEXIS 304 (1986), writ of certiorari denied by 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99, 1986 U.S. LEXIS 3765, 55 U.S.L.W. 3234 (1986).

Even if testimony of murder and kidnapping defendant’s mother, as to telephone conversation she had with defendant after defendant encountered murder victim on day of his kidnapping and death, was admissible to show defendant’s prior consistent statement, any error in excluding such testimony was harmless, where defendant had already testified that she had recounted the day’s events to her mother, and where testimony would have helped defendant little, if at all. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Trial court’s action in murder and kidnapping prosecution in allowing prosecutor to establish through cross-examination that one defendant had not told anyone except her mother about her encounter with murder victim on day of his death did not cause serious prejudice to defendant, since such impeachment did not encroach upon defendant’s constitutional right against self-incrimination, since prosecutor made no mention of it in closing, and in light of strong evidence in the case. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Remarks made by prosecutor in closing argument in murder and kidnapping prosecution, reminding jurors of their obligation to avoid deciding the case on the basis of sympathy, and stating that defendant was not on trial for what she did all her life, but rather what she did on the day of the murder, were not so prejudicial as to jeopardize fairness of the trial. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

In prosecution wherein defendants were convicted of armed kidnapping and armed robbery, where defense counsel was denied any opportunity to cross-examine as to possible liberty interest bias after making adequate proffer and where witness involved was key government witness and where chance of testimonial motivation of witness was not otherwise made known to jury, so that jury had no opportunity to assess potential bias of witness, error in refusing to allow cross-examination of prosecuting witness against whom an unrelated drug charge was pending could not be said to be harmless. D.C. Code 1973, §§ 22-2101, 22-2901, 22-3202; U.S. Const. Amend. 6. *Coligan v. United States*, 434 A.2d 483, 1981 D.C. App. LEXIS 351 (1981).

— In general.

Trial court error in admitting hearsay testimony that identified defendant as one of two individuals that kidnapped victim prejudiced defendant and warranted reversal of his convictions for kidnapping, first-degree murder while armed, and possession of a firearm during a crime of violence; defendant never confessed to the crimes, and girlfriend of co-defendant only testified that defendant possessed revolver that was later identified as weapon that killed victim and that he gave revolver to co-defendant the following day. *Randolph v. United States*, 882 A.2d 210, 2005 D.C. App. LEXIS 464 (2005).

Trial court erred in denying defendant's motion for new trial, following convictions for kidnapping while armed, armed robbery, assault with intent to commit rape while armed, and possession of firearm during crime of violence, which motion was based on newly discovered evidence consisting of handwritten affidavit from alleged participant in crimes, who stated that defendant did not participate, where government conceded its one ground for opposing motion, that is, untimeliness, and trial court's remaining reasons for denying motion without evidentiary hearing were not asserted by government in trial court and were unpersuasive. *Arrington v. United States*, 804 A.2d 1068, 2002 D.C. App. LEXIS 483 (2002).

By pleading guilty to first-degree sexual abuse and kidnapping, defendant waived appellate review of contention that the trial court

erred in refusing to grant a continuance to permit defense counsel to prepare adequately for trial and to allow defendant to consider a "combination" plea offer made by the government four days before the trial date. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Reversal was required due to misjoinder of charges connected with armed robbery of two vending trucks and misjoinder of those charges with charge against defendant's brother for being accessory after fact, receiving stolen property, and obstructing justice; trial was essentially swearing contest in which identifications by government witnesses were met by contradictory testimony from alibi witnesses; no physical evidence linked defendants to either robbery; identifications were impeached by discrepancies and inconsistencies in description of defendants; statements of defendant's brother implicating one defendant in second robbery were admitted; and prosecutor's closing argument tried to link offenses together. D.C. Code 1981, §§ 22-106, 22-722(a)(3), 22-2101, 22-2901, 22-3202; Criminal Rules 8(b), 14. *Morris v. United States*, 548 A.2d 1383, 1988 D.C. App. LEXIS 189 (1988).

Where defendant encountered complainant and persuaded him to leave public street in order to take a shortcut that led into a field, and thereafter drew a knife and compelled victim to accompany him to a secluded area about 100 feet from road, and then committed sodomy, defendant's conduct could not support separate convictions for both kidnapping and assault with intent to commit sodomy, and kidnapping conviction would be reversed, even though, after being sexually assaulted, victim ran from the place of attack and defendant pursued and recaptured him and brought him back to wooded area where he suffered multiple stab wounds before being able to make successful escape. D.C. Code §§ 22-503, 22-2101, 22-3202. *Morgan v. United States*, 402 A.2d 598, 1979 D.C. App. LEXIS 367 (1979).

— Presentation and reservation of grounds for review.

Where defense counsel, when government rested its case, moved for judgment of acquittal on kidnapping count, arguing, in part, that when defendant left automobile in which he and codefendant had been driven from scene of robbery by restaurant manager, "there is no question it was in the District of Columbia" theory that jury could not properly convict defendant of knowingly having transported manager into Maryland when defendant left car in District of Columbia was adequately raised. 18 U.S.C. § 1201; D.C. Code § 22-2101.

Matthews v. United States, 449 F.2d 985, 1971 U.S. App. LEXIS 11551 (C.A.D.C. 1971).

Failure of trial court to intervene sua sponte while prosecutor argued that kidnapping defendant's purpose was to retaliate and perhaps execute victim was not plain error. D.C. Code 1981, § 22-2101. *Walker v. United States*, 617 A.2d 525, 1992 D.C. App. LEXIS 310 (1992).

Trial court's failure to sua sponte instruct jury on "simple" assault during kidnapping prosecution was not plain error. D.C. Code 1981, § 22-2101. *Walker v. United States*, 617 A.2d 525, 1992 D.C. App. LEXIS 310 (1992).

Defendant's failure to advance in trial court in her prosecution for murder and kidnapping her theory of admissibility for proffered testimony by her mother as to what defendant told her mother on the telephone after her encounter with murder victim on day he was kidnapped and murdered precluded her from relying upon such theory on appeal. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Even if it was error for trial court in murder and kidnapping prosecution to permit impeachment of defendant on basis of her omission to tell police of her encounter with murder victim on day of his death, it was not plain error affecting defendant's substantial rights, since evidence against her was strong. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Where defendant's objections to prosecutor's closing arguments in murder and kidnapping prosecution were not made at trial, Court of Appeals could reverse convictions only if there was misconduct so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Sentence and punishment.

Imposition of consecutive sentences for multiple counts of kidnapping involving separate victims who were held hostage for 39 hours and subjected to numerous distinct threats and acts of violence was not violative of double jeopardy. D.C. Code 1981, § 22-2101; U.S. Const. Amend. 5. *Razzaaq v. United States*, 514 A.2d 783, 1986 D.C. App. LEXIS 425 (1986).

Validity.

Contrary to defendants' Eighth Amendment claim that only one form of punishment is provided in the District of Columbia kidnapping statute, the statute expressly provides for "imprisonment for life or for such term as the court in its discretion may determine." D.C. Code § 22-2101; U.S. Const. Amend. 8. *Khaalis*

v. United States, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

District of Columbia kidnapping statute is not unconstitutionally vague, nor is it an ex post facto law. D.C. Code § 22-2101. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Weight and sufficiency of evidence.

Testimony by prison guards that they were locked in a cell and held as hostages, that defendant frequently checked the cell where the guards were confined, that he told the guards that he "had nothing to lose by going out looking," that defendant separated himself from a group of inmates who did not want to escape immediately before rebellious inmates clustered for breakout attempt, and that defendant thereafter came by the cell many times armed with a short piece of steel with a sharp end and threatened the hostages was sufficient to sustain defendant's convictions for attempted escape, armed kidnapping, robbery, and riot. 18 U.S.C. § 751; D.C. Code §§ 22-502, 22-1122, 22-2901, 22-3202. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Evidence, including testimony of complainant and others concerning incident, reasonably permitted a finding of guilt on charges of armed kidnapping, armed assault with intent to kill, and carrying a dangerous weapon. D.C. Code §§ 22-501, 22-2101, 22-3202, 22-3204. *Wooten v. United States*, 343 A.2d 281, 1975 D.C. App. LEXIS 240 (1975).

Evidence that defendant assisted in detaining victim and in retrieving ransom money supported his kidnapping conviction, at least as aider and abettor, even without evidence that he was present at or assisted in abduction and transportation of victim across state lines. 18 U.S.C. § 1201(a). *United States v. Seals*, 130 F.3d 451, 1997 U.S. App. LEXIS 34307 (C.A.D.C. 1997), writ of certiorari denied by 524 U.S. 928, 118 S. Ct. 2323, 141 L. Ed. 2d 697, 1998 U.S. LEXIS 3923, 66 U.S.L.W. 3789 (1998), writ of certiorari denied by 525 U.S. 844, 119 S. Ct. 111, 142 L. Ed. 2d 89, 1998 U.S. LEXIS 5231, 67 U.S.L.W. 3232 (1998).

Evidence was not insufficient to support defendant's kidnapping conviction on ground victim was not transported subsequent to robbery. D.C. Code 1981, §§ 22-2101, 22-2901. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d

803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

Defendants' convictions under Hostage Taking Act were supported by evidence that they had detained captives and initially sought to recover from captives money which captives allegedly owed, and that after captives professed poverty, defendants tried to get hostages to think of someone who might lend them money, which resulted in third person being brought to scene and paying sum for release of captives. 18 U.S.C. § 1203. *United States v. Lin*, 101 F.3d 760, 1996 U.S. App. LEXIS 31848 (C.A.D.C. 1996), remanded by 1998 U.S. App. LEXIS 1975 (D.C. Cir. Jan. 13, 1998).

Evidence in prosecution for kidnapping for the purpose of rape and assault and related firearms offenses, including complainant's testimony that she was forced to drive across state line and engage in sexual intercourse with defendant, was sufficient to support conviction. 18 U.S.C. § 1201(a); D.C. Code § 22-2101. *United States v. Sheppard*, 569 F.2d 114, 1977 U.S. App. LEXIS 5791 (C.A.D.C. 1977).

Even without defendant's admissions, evidence supported conviction for kidnapping in that jury could conclude that victim was detained against her will as she drove to her home with defendant behind her and walked up front path followed closely by defendant holding gun; witness' testimony that defendant was about to shoot victim, plainly inconsistent with voluntary presence on her part, was confirmed when he in fact shot her repeatedly as she tried to flee, and defendant's knowledge that victim and her drug-partner had valuable quantity of drugs furnished motive. *Ers kines v. United States*, 696 A.2d 1077, 1997 D.C. App. LEXIS 147 (1997).

There was sufficient evidence that defendant, a former employee of a federal agency, held victim, a former coemployee, against his will and that defendant received a benefit from his conduct so as to sustain conviction for kidnapping while armed; defendant entered office of victim, slammed door, pointed gun at him, and forced victim to make telephone calls until he reached agency employee of defendant's choice. D.C. Code 1981, §§ 22-2101, 22-3202. *Dade v. United States*, 663 A.2d 547, 1995 D.C. App. LEXIS 287 (1995).

Weaknesses in complainant's testimony did not render evidence insufficient to support defendant's kidnapping conviction; defendant's own testimony about "tussling and pulling and yanking and hitting and slinging" he engaged in with complainant corroborated complainant's testimony about assault and, thus, case was not one in which complainant's testimony was incredible. *Davis v. United States*, 613 A.2d 906, 1992 D.C. App. LEXIS 222 (1992).

Testimony regarding restrictions on movement of kidnapping complainants during time

that they should have been testifying at criminal trial, including that gun was used to stop one of complainants from leaving on one occasion, was evidence capable of persuading jury beyond reasonable doubt that defendants detained complainants against complainants' will, notwithstanding existence of evidence in support of defense theory that complainants were not held against their will, but were seeking to avoid having to testify at trial. *Bush v. United States*, 516 A.2d 186, 1986 D.C. App. LEXIS 461 (1986), writ of certiorari denied by 513 U.S. 882, 115 S. Ct. 217, 130 L. Ed. 2d 145, 1994 U.S. LEXIS 6470, 63 U.S.L.W. 3263 (1994).

Evidence that first defendant took complainant to hospital, rented motel room, and appeared daily to provide money for food and that second defendant commented that another individual was "just doing his job" when he used gun to prevent complainant from leaving, was sufficient to support convictions of kidnapping while armed. *Bush v. United States*, 516 A.2d 186, 1986 D.C. App. LEXIS 461 (1986), writ of certiorari denied by 513 U.S. 882, 115 S. Ct. 217, 130 L. Ed. 2d 145, 1994 U.S. LEXIS 6470, 63 U.S.L.W. 3263 (1994).

Finding that defendant participated in kidnappings and was not merely present was sustained by evidence that three separate but related offenses were committed with almost identical modus operandi over a period of several months, that defendant held a butcher knife which was used to threaten one victim, that he held second victim's legs while she was raped by two other participants, and that he lay on the third victim and ejaculated upon her. *Warren v. United States*, 515 A.2d 208, 1986 D.C. App. LEXIS 429 (1986).

Evidence that defendant grabbed victim and forced her into his car and then drove her three miles from point of abduction to empty lot, where he assaulted her with intent to commit sodomy and assaulted her with intent to commit rape, was sufficient to support separate kidnapping conviction. D.C. Code 1981, §§ 22-501, 22-503, 22-2101, 22-3502. *Robinson v. United States*, 501 A.2d 1273, 1985 D.C. App. LEXIS 538 (1985).

Circumstantial evidence, including complainant's testimony that her abductor held gun to her head, that he had taken one of her husband's black leather gloves from car, and that he had emptied her pants pockets of money and watch, and other evidence that handgun was found close to spot where defendant was apprehended after he had run from car which held complainant, that defendant had covered gun with black leather glove, and that defendant had watch and money on person, was sufficient to support defendant's convictions for armed robbery, rape and kidnap-

ping. *White v. United States*, 484 A.2d 553, 1984 D.C. App. LEXIS 546 (1984).

Evidence, which did not contain direct or circumstantial evidence that taking of victims from one place to another was against their will or any indication of struggle, was not sufficient to support defendant's armed kidnapping convictions. D.C. Code 1973, §§ 22-2101, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

Evidence that victim was near shopping mall and intended to go to her sister's home, that defendant had said he intended to take pistol to shopping mall and rob some of the women there, that defendant admitted that he shot a woman and that body was discovered near hospital was insufficient to support inference that victim was taken from one place to another against her will. D.C. Code § 22-2101. *Smotherers v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

Evidence in prosecution for kidnapping and armed robbery was sufficient to withstand both defendant's motion for acquittal after Government rested and her motion for acquittal after both sides had rested. D.C. Code §§ 22-2101, 22-2901, 22-3202. *Sinclair v. United States*, 388 A.2d 1201, 1978 D.C. App. LEXIS 490 (1978), writ of certiorari denied by 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77, 1979 U.S. LEXIS 517 (1979).

Convictions for multiple charges arising out of armed robbery of apartment building were supported by the identification of defendants by victims and police officers, and testimony that the defendants' weapons were operational. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(a, b), 22-3214(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Evidence, including permissible inference jury was permitted to draw from fact that defendant was found within an hour of larceny in exclusive possession of recently stolen truck, supported convictions of kidnapping of truck helper, armed robbery and assault with a dangerous weapon. D.C. Code §§ 22-502, 22-2101, 22-2901, 22-3202. *United States v. Wolford*, 444 F.2d 876, 1971 U.S. App. LEXIS 11155 (C.A.D.C. 1971).

Evidence was sufficient to support defendant's conviction of six counts of armed kidnapping, five counts of armed rape, two counts of armed robbery, and one count each of assault with a deadly weapon and armed assault with intent to commit sodomy. D.C. Code §§ 22-502, 22-2101, 22-2801, 22-2901, 22-3202, 22-3502. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

Witnesses and evidence, generally.

Conduct of prosecution in preliminary hearing, wherein, after testimony of complaining

witness had been taken, government moved to dismiss when defendant sought to test credibility of complainant by calling her mother, and magistrate granted motion, did not warrant dismissal of kidnapping indictment or, in the alternative, suppression of complainant's testimony. D.C. Code § 22-2101; 18 U.S.C. § 1201. *United States v. Regisser*, 309 F. Supp. 879, 1970 U.S. Dist. LEXIS 12662 (D.D.C.1970).

Trial court, in prosecution for armed robbery, kidnapping, and sexual abuse, did not violate defendant's and codefendant's Sixth Amendment right of confrontation by limiting defendant's and codefendant's cross-examination of witness concerning witness's mental state to date charged offenses occurred and during any other time about witness might have testified; evidence of witness's mental condition at another time in his life was not relevant to witness's perception of events on the night offenses occurred. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Trial judge's actions in murder and kidnapping prosecution in cutting off defense counsel before she completed her questioning of a witness as to what the witness had told her at jail on a previous occasion, in order to keep defense counsel from putting herself in a position where she could be called to testify, did not violate defendant's right to confront witnesses against him. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202; U.S. Const. Amend. 6. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Prosecutor's opening questions on cross-examination of defendant's character witnesses in prosecution for murder and kidnapping, as to whether the witnesses had been with defendant on day of the murder, were a proper attempt to establish the limitations of the character testimony. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

There was sufficient inconsistency between murder defendant's omission to tell police of her encounter with murder victim on day of his death when she waived her Miranda rights and talked to police and her testimony at trial to make it permissible for the state to impeach defendant on the basis of her omission, since under the circumstances it would have been natural for defendant to mention fact that she had been with the victim on the day of his death, and since defendant knew that the murder victim had been killed only hours after she saw him alive. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Kidnapping conviction can be based on circumstantial evidence. D.C. Code § 22-2101. *Smotherers v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

Refusal to compel a mental examination of complaining witness in prosecution for kidnapping 14-year-old boy for purpose of sexually assaulting him was not an abuse of discretion, notwithstanding accused's contentions that such an examination would have revealed evidence of a distorted perception of reality and sexual fantasies helpful to defense theory that

boy consented to the alleged assault and that refusal to order such examination constituted a violation of accused's right to effective assistance of counsel. D.C. Code § 22-2101; U.S. Const. Amend. 6. *Ledbetter v. United States*, 350 A.2d 379, 1976 D.C. App. LEXIS 451 (1976).

CHAPTER 21. MURDER; MANSLAUGHTER.

- | | |
|---|---|
| <p>Sec.
22-2101. Murder in the first degree — Purposeful killing; killing while perpetrating certain crimes.
22-2102. Same — Placing obstructions upon or displacement of railroads.
22-2103. Murder in the second degree.
22-2104. Penalty for murder in first and second degrees.</p> | <p>Sec.
22-2104.01. Sentencing procedure for murder in the first degree.
22-2105. Penalty for manslaughter.
22-2106. Murder of law enforcement officer.
22-2107. Penalty for solicitation of murder or other crime of violence.</p> |
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§ 22-2101. Murder in the first degree — Purposeful killing; killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary, or without purpose to do so kills another in perpetrating or in attempting to perpetrate any arson, as defined in § 22-301 or § 22-302, first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, or kidnaping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, or in perpetrating or attempting to perpetrate a felony involving a controlled substance, is guilty of murder in the first degree. For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the first degree is a Class A felony.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339; Sept. 26, 1992, D.C. Law 9-153, § 2(a), 39 DCR 3868; May 23, 1995, D.C. Law 10-257, § 401(b)(1), 42 DCR 53; May 16, 1998, D.C. Law 12-113, § 2, 44 DCR 6931; June 8, 2001, D.C. Law 13-302, § 4(a), 47 DCR 7249.)

Cross references. — Life-sustaining procedures, health care provider immunity for good faith conduct, see § 7-627.

Sex offender registration, sexually violent offense defined, see § 22-4101.

Section references. — This section is referred to in §§ 11-502, 22-2103, 23-546, and 24-251.02.

Prior Codifications. — 1981 Ed., § 22-2401.

1973 Ed., § 22-2401.

Effect of amendments. — D.C. Law 13-302 added the last sentence.

Emergency legislation. — For temporary (90-day) amendment of section, see § 4(a) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of section, see §§ 4(a) and 11 of the Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 4(a) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(a) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 9-153. — For legislative history of D.C. Law 9-153, see Historical and Statutory Notes following § 22-2104.01.

Legislative history of Law 10-257. — Law 10-257, the “Anti-Sexual Abuse Act of 1994,” was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses

of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

Legislative history of Law 12-113. — Law 12-113, the “Felony Murder Amendment Act of 1997,” was introduced in Council and assigned Bill No. 12-139, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on September 22, 1997, and October 7, 1997, respectively.

Signed by the Mayor on October 17, 1997, it was assigned Act No. 12-176 and transmitted to both Houses of Congress for its review. D.C. Law 12-113 became effective on May 16, 1998.

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

Editor’s notes. — Section 11 of D.C. Law 13-302 provided: “This act shall apply to offenses committed on or after August 5, 2000.”

CASE NOTES

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Admissibility of evidence.

— Accomplice testimony, admissibility of evidence.

Suspicion of codefendants charged with first-degree murder that some understanding existed that witness, who had also participated in alleged murder, might not be prosecuted or that he believed he would not be, was not sufficient to exclude his otherwise admissible testimony as to details of crime. D.C. Code 1961, § 22-2401. *Brown v. United States*, 375 F.2d 310, 1966 U.S. App. LEXIS 3854 (C.A.D.C. 1966), writ of certiorari denied by 388 U.S. 915, 87 S. Ct. 2133, 18 L. Ed. 2d 1359, 1967 U.S. LEXIS 1180 (1967).

Trial court did not abuse its discretion in murder prosecution by refusing to permit defense witness to testify about a shooting in which co-defendant, who entered a plea and testified against defendant, was presumably involved on his own and not at the direction of defendant; testimony would have been confusing if permitted, as co-defendant testified that he did not shoot at rival gang members for his "own purposes," and other than prior shooting and shooting that resulted in victim's death, co-defendant was never questioned about any others in which he was involved, whether on his own or in defendant's behalf. *Dockery v. United States*, 853 A.2d 687, 2004 D.C. App. LEXIS 274 (2004).

— Admissions by accused, admissibility of evidence.

Conversation in which codefendants related to a nonaccomplice the events giving rise to murder prosecution, including defendant's involvement in chasing, abducting, and delivering victim to one of the codefendants who placed him in trunk of car, was admissible as an adoptive admission by defendant, where defendant neither appeared surprised by what codefendants were saying nor denied that he was involved in the ways that they described. *Dowtin v. United States*, 999 A.2d 903, 2010 D.C. App. LEXIS 412 (2010).

Individual's alleged admission to committing murder was completely uncorroborated, even

by other defense evidence, such that it could not be used in post-trial motion as newly discovered evidence to advance third-party perpetrator defense; individual refused to sign an affidavit or to testify, there was no explanation as to individual's motive for possibly being at the crime site at the exact moment victim was murdered, and no witnesses, including defense witnesses, ever placed individual at the scene during the trial. *Williamson v. United States*, 993 A.2d 599, 2010 D.C. App. LEXIS 207 (2010).

Defendant's admission with respect to the premeditation element of first-degree murder, i.e., his statements to jailhouse informant that he had been involved in an earlier fight with victim and that he had wanted to see the victim again, was corroborated by independent evidence; testimony of two attendees of outdoor cookout at which victim was killed showed that defendant arrived at the cookout already armed, that he waited for victim to approach, and that when victim was close, he drew the gun and fired repeatedly before fleeing. *West v. United States*, 866 A.2d 74, 2005 D.C. App. LEXIS 9 (2005).

Threats evidence obtained through witness's testimony describing manner in which two trial spectators made throat-slashing gestures to him during his testimony during murder trial met foundational requirement of showing that threats were made with defendant's knowledge or authorization, and was admissible as relevant to showing defendant's consciousness of guilt; officer testified that while witness was testifying, defendant communicated three or four times by gesture with spectators, prompting spectators to sit in a position in courtroom where witness could see them and their throat-slashing gestures. *Ebron v. United States*, 838 A.2d 1140, 2003 D.C. App. LEXIS 755 (2003), writ of certiorari denied by 543 U.S. 939, 125 S. Ct. 347, 160 L. Ed. 2d 247, 2004 U.S. LEXIS 6901, 73 U.S.L.W. 3236 (2004).

A defendant's failure to object to or deny a codefendant's statements at time they were made is especially probative of defendant's acquiescence if they are made in presence of a third party who was not an accomplice in the crime. D.C. Code §§ 22-1801(a), 22-2401, 22-2901. *Brown v. United States*, 464 A.2d 120, 1983 D.C. App. LEXIS 437 (1983).

— Cause of death, admissibility of evidence.

Although medical testimony is certainly the preferred manner of proving cause of death, it is not indispensable when the evidence is such that any layman of average intelligence would know from his own knowledge and experience that the injuries were the cause of death. *Battle v. United States*, 754 A.2d 312, 2000 D.C. App. LEXIS 127 (2000).

In the trial of an accused for the murder of his wife, the defense being suicide, evidence that six months before the shooting and three months before her marriage the deceased bought a revolver and declared her intention to use it upon herself under certain circumstances is too remote to be admissible. *U.S. v. Cross*, 20 D.C. 365 (D.C.Sup. 1892).

— Character and habits of accused, admissibility of evidence.

Question of guilt of murder and question of punishment were properly submitted together, defendant being permitted to introduce character testimony, possibly relevant to choice of sentences, before submission. D.C. Code 1961, § 22-2404. *United States v. White*, 225 F. Supp. 514, 1963 U.S. Dist. LEXIS 6247 (D.D.C.1963), remanded by 349 F.2d 965, 121 U.S. App. D.C. 287, 1965 U.S. App. LEXIS 5055 (1965).

Proffered testimony by defendant's employer as to defendant's conduct as employee and activities in his own home was insufficiently related to issue of justifiable provocation to be admissible in homicide prosecution, as was proffered testimony by defendant's mother. *United States v. White*, 225 F. Supp. 514, 1963 U.S. Dist. LEXIS 6247 (D.D.C.1963), remanded by 349 F.2d 965, 121 U.S. App. D.C. 287, 1965 U.S. App. LEXIS 5055 (1965).

Testimony of defendant's former wife that defendant became quarrelsome when drinking at the time that they were married more than 20 years prior to killing of defendant's girlfriend had little or no relevance to relationship between defendant and his girlfriend. *Clark v. United States*, 593 A.2d 186, 1991 D.C. App. LEXIS 188 (1991).

Ordinarily, in a homicide trial, character of deceased is irrelevant to question whether accused has committed crime charged; but, where evidence tends to show, even in slightest degree, that killing was in self-defense or leaves any doubt as to identity of first aggressor, peaceful or violent character of decedent becomes particularly significant and should be admitted. *Carter v. United States*, 475 A.2d 1118, 1984 D.C. App. LEXIS 363 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1097, 53 U.S.L.W. 3599 (1985).

Whether a defendant or some other defense witness in homicide prosecution testifies about deceased victim's violent character or its relevance to "reasonable fear" and/or "aggressor" aspects of self-defense claim, general rule of policy against admission of evidence about defendant's own character shall prevail, unless defendant first places her own good character in issue. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

In murder prosecution, testimony concerning defendant's homosexual relationship with vic-

tim was admissible, in that testimony was highly relevant to question of motive or intent, the central issue in the case, and was not presented in such way as to be unduly inflammatory. *Smith v. United States*, 381 A.2d 258, 1977 D.C. App. LEXIS 308 (1977).

— **Character and habits of victim, admissibility of evidence.**

Evidence of the previous bad character of deceased, killed in the act of committing a felony, is admissible on indictment for a murder committed by means of a spring gun. *U.S. v. Gilliam*, 25 F.Cas. 1319, 1882 U.S. App. LEXIS 2913 (1882).

Evidence of the defendant's knowledge of the victim's reputation for violence is admissible to support a self-defense claim, because it tends to support the contention that the accused acted from an honest and reasonable apprehension of imminent bodily harm because of the information imparted to him about the complainant. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Except in homicide cases (where the person alleged to have been the aggressor is unavailable for questioning), neither evidence of the victim's prior violent acts nor evidence of reputation for violence can be admitted for the purpose of proving that the victim was the first aggressor. *Hart v. United States*, 863 A.2d 866, 2004 D.C. App. LEXIS 686 (2004).

Where defendant in murder case has raised defense of accident, suicide, or self-defense, victim's state of mind is of particular concern to jury. *United States v. Williams*, 697 A.2d 1244, 1997 D.C. App. LEXIS 165 (1997).

Probative value of testimony by decedent's father concerning decedent's vocation as social worker, which testimony provided some background on victim's life and career and her relationship to defendant, was not outweighed by any possible prejudice to defendant. *Fornah v. United States*, 460 A.2d 556, 1983 D.C. App. LEXIS 353 (1983).

In criminal proceeding charging assault or homicide, evidence of victim's general reputation for violence, or evidence of specific prior acts of violence which were known to defendant, may be used to support defendant's claim of self-defense. *Cooper v. United States*, 353 A.2d 696, 1975 D.C. App. LEXIS 269 (1975).

— **Circumstances preceding act, admissibility of evidence.**

Where, in prosecution of defendant for first-degree murder and carrying dangerous weapon, there was no claim of self-defense, suicide, accidental death or any other plausible issue that would justify inquiry into victim's state of mind, court committed prejudicial error in admitting testimony by victim's wife that victim was frightened that he might be killed

by defendant. *United States v. Brown*, 490 F.2d 758, 1973 U.S. App. LEXIS 6261 (C.A.D.C. 1973).

Alleged conversation between defendant and homicide victim that deceased had demanded that defendant give him defendant's gun so that he could kill a third party was irrelevant and incompetent to show that deceased intended to kill the defendant or that deceased had shown any malice towards defendant and the defendant's testimony was properly excluded. *United States v. Hardin*, 443 F.2d 735, 1970 U.S. App. LEXIS 5866 (C.A.D.C. 1970).

Evidence of one defendant's activities prior to alleged homicide was admissible in prosecution of three defendants for such homicide, in view of close proximity, in time, place and persons between such activities and subsequent homicide. D.C. Code 1961, § 22-2401. *Turberville v. U.S.*, 303 F.2d 411, 1962 U.S. App. LEXIS 6036 (C.A.D.C. 1962).

In murder prosecution, evidence of uncommunicated complaint which victim of defendant had made about his work prior to the offense was properly excluded, where the complaint was not a threat, and there was no claim of self-defense. *Fisher v. U.S.*, 149 F.2d 28, 1945 U.S. App. LEXIS 2550 (1945).

In a prosecution for assault to kill, where the defense was insanity, testimony that defendant had called at the home of his victim on the morning in question was competent to show purpose and calculation on his part. *Grock v. U.S.*, 289 F. 544, 1923 U.S. App. LEXIS 1997 (1923).

Evidence as to defendant's conduct in his mother's home years before date of offense was irrelevant and immaterial in murder prosecution. *United States v. White*, 225 F. Supp. 514, 1963 U.S. Dist. LEXIS 6247 (D.D.C.1963), remanded by 349 F.2d 965, 121 U.S. App. D.C. 287, 1965 U.S. App. LEXIS 5055 (1965).

Evidence of defendant's prior threats and assaults against assault victim, his former girlfriend, was admissible in murder and assault prosecution to prove defendant's identity as victim's assailant, which defendant contested. *Parks v. United States*, 656 A.2d 1137, 1995 D.C. App. LEXIS 73 (1995), writ of certiorari denied by 516 U.S. 873, 116 S. Ct. 198, 133 L. Ed. 2d 133, 1995 U.S. LEXIS 6237, 64 U.S.L.W. 3245 (1995).

Even if court could consider defendant's claim that telephone calls he made to victim's apartment short time before his death were erroneously admitted, there was no abuse of discretion in prosecution for first-degree premeditated murders; jury could find premeditation and deliberation by inferring that defendant had set up murder by having codefendant call victim to arrange cocaine pickup, codefendant testified that she called victim before going to his apartment and phone calls, regard-

less of who made them, were thus properly before jury. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

Hearsay statements of decedent indicating fear of defendant are admissible in homicide case under state of mind exception; hearsay evidence of a prior specific act by the defendant is not. *Giles v. United States*, 432 A.2d 739, 1981 D.C. App. LEXIS 322 (1981).

Evidence relating to drugstore which defendant and others were intending to rob at time defendant saw, shot and killed victim was admissible to explain immediate setting of murder where probative value of evidence outweighed any prejudicial effect. D.C. Code §§ 22-2401, 22-3202. *Tabron v. United States*, 410 A.2d 209, 1979 D.C. App. LEXIS 538 (1979).

Evidence relating to defendant's presence when another tested rifle later used in murder was admissible to explain immediate setting of murder where probative value outweighed any prejudicial effect. D.C. Code §§ 22-2401, 22-3202. *Tabron v. United States*, 410 A.2d 209, 1979 D.C. App. LEXIS 538 (1979).

Admissibility of extrajudicial declarations that a homicide victim feared the accused must be determined by a careful balancing of their probative value against their prejudicial effect. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

Direct evidence of a homicide victim's mental state, such as the declaration "I am afraid of D", are considered hearsay if offered to prove the truth of their contents; however, such declarations are generally admissible under the present state of mind exception to the hearsay rule. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

Extrajudicial declarations which are only circumstantially probative of a homicide victim's state of mind, such as a statement that "D threatened to kill me," are offered not to prove the truth of what was said but to circumstantially show the victim's state of mind toward the accused and, therefore, the hearsay rule is not applicable to such declarations; however, such declarations present an admissibility problem in that they involve extraneous factual elements which create risk that they will be considered by the jury not only as circumstantial evidence of the declarant's mental state but also for the truth of the matters asserted therein. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

In prosecution for assault or homicide accused may show prior acts of violence by alleged victim to support claim of self-defense. *King v. U.S.*, 177 A.2d 912, 1962 D.C. App. LEXIS 254 (Cr.App. 1962).

— Commission of or attempt to commit other unlawful act, admissibility of evidence.

It is error for the trial court to admit testi-

mony on behalf of the prosecution in a murder case, that the accused, indicted for killing his wife by shooting her, went to the house of his wife's mother about a half hour afterwards and shot her with intent to kill, in the absence of evidence showing any connection between the two crimes, except a statement by the accused to his wife, shortly before killing her, that her mother was the cause of her leaving him, and a statement by him after his arrest that his mother-in-law at one time used a flatiron on him, and he went back that night to try to settle matters with her. *Burge v. U.S.*, 26 App.D.C. 524, 1906 U.S. App. LEXIS 5118 (1906).

Where, in a homicide case, the prosecution seeks to prove that the accused committed a later crime, the question whether any connection existed between the two crimes, so as to make such evidence admissible, is a judicial question; and, if the court does not perceive such a connection, the accused should be given the benefit of the doubt, and the evidence should be rejected. *Burge v. U.S.*, 26 App.D.C. 524, 1906 U.S. App. LEXIS 5118 (1906).

— Confessions, admissibility of evidence.

In prosecution for murder in first degree committed in perpetration of offense of house-breaking while armed with deadly weapon, ruling that statement of witness that he told defendant that lie detector indicated that defendant was lying, would not be admitted as evidence of any alleged lying of defendant, but merely as evidence bearing upon question whether defendant's confession was, in fact, voluntary, was correct. D.C. Code 1940, §§ 22-2401, 22-2404. *Tyler v. U.S.*, 193 F.2d 24, 1951 U.S. App. LEXIS 2855 (C.A.D.C. 1951).

In prosecution for murder in first degree committed in perpetration of offense of house-breaking while armed with a deadly weapon, evidence sustained admission in evidence of defendant's written confession, subject to final determination by jury, upon all evidence, as to its voluntary nature. D.C. Code 1940, §§ 22-2401, 22-2404. *Tyler v. U.S.*, 193 F.2d 24, 1951 U.S. App. LEXIS 2855 (C.A.D.C. 1951).

In prosecution for murder in first degree committed in perpetration of offense of house-breaking while armed with deadly weapon, without considering defendant's written confession, evidence was sufficient to prove corpus delicti. D.C. Code 1940, §§ 22-2401, 22-2404. *Tyler v. U.S.*, 193 F.2d 24, 1951 U.S. App. LEXIS 2855 (C.A.D.C. 1951).

Evidence established that defendant's confession made at jail to police officer was voluntary. D.C. Code 1951, §§ 22-1801, 22-2401. *U.S. v. Naples*, 192 F.Supp. 23, 1961 U.S. Dist. LEXIS 3087 (D.D.C.1961).

Murder defendant's confession, though obtained after police failed to scrupulously honor his assertion of his right to remain silent dur-

ing police interview, was nevertheless voluntary, such that confession was admissible for the limited purpose of impeachment, as there was no hint of physical coercion of defendant by police, or that police raised their voices to defendant, police gave defendant sodas and allowed him to smoke, he received several breaks to use the bathroom and was allowed to meet with his grandmother, and given defendant's extensive experience with criminal and juvenile justice systems, he clearly understood the Miranda rights that were given to him. *Pettus v. United States*, 37 A.3d 213, 2012 D.C. App. LEXIS 22 (2012).

Defendant was not in custody for Miranda purposes when he confessed to killing victim, even though interview during which defendant confessed was held at prison where he was serving a sentence for an unrelated crime; defendant was summoned to interview in same way that all inmates in prison were called to meet with visitors, prison was a minimum-security facility where defendant was free to move around with almost no restrictions, interviewing officers instructed defendant that he was not under arrest and that he did not need to speak to them, officers provided defendant with a detailed recounting of events surrounding murder, and no physical force was used in any way. *Lindsey v. United States*, 911 A.2d 824, 2006 D.C. App. LEXIS 630 (2006), writ of certiorari denied by 552 U.S. 1077, 128 S. Ct. 804, 169 L. Ed. 2d 607, 2007 U.S. LEXIS 12987, 76 U.S.L.W. 3303 (2007).

Defendant's confession to murder was voluntary, even though defendant, who was serving a sentence for unrelated crime pursuant to a plea agreement, argued that he believed that he was required to cooperate with investigators and would be protected from prosecution for murder by his previous plea agreement; defendant did not ask interviewing officers at any point whether plea agreement could be vacated if he refused to speak with them, officers told defendant that he did not have to talk with them, and, furthermore, defendant had refused to discuss murder when previously asked about it at a time when he undoubtedly knew that plea agreement was in effect. *Lindsey v. United States*, 911 A.2d 824, 2006 D.C. App. LEXIS 630 (2006), writ of certiorari denied by 552 U.S. 1077, 128 S. Ct. 804, 169 L. Ed. 2d 607, 2007 U.S. LEXIS 12987, 76 U.S.L.W. 3303 (2007).

— Declarations by accused, admissibility of evidence.

In murder prosecution, wherein defendant proposed to take the stand first and then introduce a written statement which he had made to police officer that defendant had killed victim in self-defense, for purpose of corroborating what defendant was going to state on the stand, such statement was properly excluded at that time

as hearsay and as corroborating an exculpatory statement that was self-serving. D.C. Code §§ 22-2401, 22-2403. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

Defendant accused of homicide failed to sustain burden of proving that his prior statement was improperly admitted at trial on ground that it was made after committing magistrate had failed to comply with Rule relating to defendant's right to know charge against him and to retain counsel. Fed.Rules Crim.Proc. rule 5(b), 18 U.S.C.; D.C. Code 1961, §§ 22-2401. *Turberville v. U.S.*, 303 F.2d 411, 1962 U.S. App. LEXIS 6036 (C.A.D.C. 1962).

Murder defendant's claim that admitting only truncated version of his statement to police, denying ever having returned to neighborhood in which murder took place after having been involved in fight there, fostered misleading impression was sufficiently preserved for appellate review, despite defendant's failure expressly to assert that truncated statement would have been viewed by jury as false exculpatory admission in absence of additional portion of such statement purporting to account for defendant's whereabouts at time of murder, where trial court's ruling on issue indicated that it had accepted prosecution's position that allowing full statement into evidence would have effect of allowing defendant to testify without being subjected to cross-examination. *Reams v. United States*, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

— Declarations by third persons, admissibility of evidence.

Citizen provided police officers with reasonable suspicion to stop and frisk person who was subject of her tip; citizen unexpectedly approached officer when he was off duty, officer had known citizen for many years, citizen specifically asked officer whether he was familiar with a "homicide at [a certain intersection] a couple of days ago" and, after officer replied that he was, told him that "the guy who did the shooting is around the corner," and by identifying herself, citizen exhibited a willingness to be held accountable for her information. *Gamble v. United States*, 901 A.2d 159, 2006 D.C. App. LEXIS 425 (2006).

Remand was required in murder prosecution to determine whether third party statements contained in application for search warrant of residence of victim's nephew had been adopted by government to support affidavit's ultimate conclusion that probable cause existed to believe that nephew and other perpetrator conspired to kill defendant, and thus allow for other statements to be admissible as party admissions, where warrant application was based on numerous statements from several informants who individually may be more or

less trustworthy, and some of the statements incorporated multiple levels of hearsay. *Harris v. United States*, 834 A.2d 106, 2003 D.C. App. LEXIS 623 (2003).

Evidentiary hearing was not required in prosecution for murder and obstruction of justice to determine admissibility of statements made by witness whose murder gave rise to obstruction charge, but rather, trial court could properly consider this issue by means of proffer; government had to present same evidence at trial to prove obstruction count, trial court recognized explicitly that it would have to monitor evidence at trial to ensure that proffer was fulfilled and that equation of admissibility remained valid, government's proffer was extensive, and defense was afforded equally extensive opportunity to rebut proffer, but failed to proffer any significant evidence to counter government's factual allegations. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Eyewitness' prior statement to police, that she saw defendants shoot victim, was admissible at murder trial as statement of identification made after perceiving the persons. D.C. Code 1981, § 14-102(b)(3). *Mercer v. United States*, 724 A.2d 1176, 1999 D.C. App. LEXIS 12 (1999).

— Documentary or demonstrative evidence, admissibility of evidence.

In prosecution for homicide, arising out of assassination, brigade manual found in apartment occupied by one defendant was properly received in evidence in view of defendants' offer of entire manual on court's admission of certain pages which were plainly relevant and admissible. 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

In murder prosecution, trial court acted within its discretion in admitting two black and white photographs of inside of house showing where victim was standing when he was shot and where he fell, where photographs were probative of place where victim was shot, and were material on issues in the case. D.C. Code §§ 22-2401, 22-2403. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

In prosecution of three defendants jointly indicted on charge of murder in perpetration of robbery, where defendants suggested possibility that victim died of heart attack, exhibiting victim's clothing to jury and showing bullet hole in back of victim's coat was not improper. D.C. Code 1940, § 22-2401. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

Although murder defendant could not assert a Fifth Amendment privilege as to the contents of written statements allegedly coerced from

witness, defendant may have had an act of production privilege with respect to statements in attorney's possession, as admitting possession of the statements could be incriminatory because it would link defendant to the alleged witness intimidation. *In re Public Defender Serv.*, 831 A.2d 890, 2003 D.C. App. LEXIS 550 (2003).

Five .38 caliber cartridges found in defendant's apartment were admissible as non-Drew evidence that defendant had gun of caliber that fired bullet that killed victim, and that the silver-colored revolver that witnesses saw defendant wield was indeed that weapon. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Submission into evidence in murder case of description and photographs of sawed-off shotgun, taken from police inventory of weapons, which had been identified by witness as similar to weapon in possession of defendant several weeks prior to his alleged shotgun killing of victim was proper, even though defendant claimed that description and photographs were not factually linked to crime charged; witness had seen appellant with sawed-off shotgun and ammunition in home they shared, on night of murder shotgun shell similar to that possessed by defendant was found at scene, and another witness had identified defendant as person killing victim by use of shotgun. *Ali v. United States*, 581 A.2d 368, 1990 D.C. App. LEXIS 261 (1990), writ of certiorari denied by 502 U.S. 893, 112 S. Ct. 259, 116 L. Ed. 2d 213, 1991 U.S. LEXIS 5645, 60 U.S.L.W. 3265 (1991).

Trial court did not abuse its discretion in admitting into evidence photographs of victim at scene of his murder, in view of fact that photographs had probative value in confirming identity of victim, location of offense, cause of death, and defendants' malice and premeditation. D.C. Code 1981, § 22-2401. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

Trial court did not abuse its discretion in admitting postmortem photograph of robbery, rape, and murder victim, in view of fact that photograph identified victim and showed extent of her injuries and, hence, had probative value and was not introduced solely to inflame jury. D.C. Code 1981, §§ 22-2401, 22-2801, 22-2901. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

— Dying declarations, admissibility of evidence.

Incriminating statement by badly burned victim during hospital interview on day before she died, in course of which she said that she felt she was going to die, was admissible as dying declaration. *United States v. Barnes*, 464 F.2d 828, 1972 U.S. App. LEXIS 8718 (C.A.D.C.

1972), writ of certiorari denied by 410 U.S. 986, 93 S. Ct. 1514, 36 L. Ed. 2d 183, 1973 U.S. LEXIS 3060 (1973).

On a trial for murder, declarations of deceased not made in extremis cannot be given in evidence. *U.S. v. Woods*, 28 F.Cas. 762, 1834 U.S. App. LEXIS 277 (1834).

On a trial for murder, the declarations of the deceased, not made with a settled conviction that he is about to die, cannot be given in evidence. *U.S. v. Woods*, 28 F.Cas. 762, 1834 U.S. App. LEXIS 277 (1834).

On an indictment for murder, the declarations of the deceased, in extremis, and when sensible of approaching death, may be given in evidence as to facts, but not as opinions. *U.S. v. Woods*, 28 F.Cas. 762, 1834 U.S. App. LEXIS 277 (1834).

A declarant need not utter words acknowledging the certainty of death in order to make out a dying declaration. *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

Dying declaration exception to hearsay rule did not permit trial judge to admit victim's photo identifications of persons who purportedly shot him on basis that victim was in "critical condition" and "could die," rather than knowing he was "without hope of recovery." *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

Evidence was insufficient to support finding that victim had impending sense of death, so as to warrant admission photo identifications of defendants as those who shot him pursuant to dying declaration exception to hearsay rule; although victim had tubes and wires protruding from his body in hospital, there was no basis to conclude that victim's wounds suggested to him that he assuredly would die, or that anyone had appraised him of probability of death, at time when medical staff, and victim's family, offered victim encouragement so that he would not give up hope. *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

Only a declarant's state of mind, not physical condition per se, is relevant in satisfying the requirements of the dying declaration exception. *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

The fact that one knows he or she might die, compared to knowing with certainty that one is dying, does not satisfy the traditional rationale for the dying declaration exception: that no person, who is immediately going into the presence of his Maker, will do so with a lie upon his

lips. *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

Victim's statement that defendant "told them to shoot me" was admissible under dying declaration exception to hearsay rule where victim made statement after being shot in chest and victim asked responding officer not to move him because he had been shot too many times. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

In order to admit a statement as a dying declaration, there is no requirement that the declarant actually state that he knows he is going to die; such knowledge may be inferred from the nature and extent of the declarant's wounds. *Butler v. United States*, 614 A.2d 875, 1992 D.C. App. LEXIS 188 (1992), writ of certiorari denied by 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558, 1992 U.S. LEXIS 7611, 61 U.S.L.W. 3401 (1992).

Trial court had sufficient basis to admit shooting victim's statement as a dying declaration; statement was made when witness found declarant lying on his back, gravely wounded and asking for help, declarant told witness that "they shot me," and then died a few hours later. *Butler v. United States*, 614 A.2d 875, 1992 D.C. App. LEXIS 188 (1992), writ of certiorari denied by 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558, 1992 U.S. LEXIS 7611, 61 U.S.L.W. 3401 (1992).

Even though burned victim was not specifically informed that he would die because of his severe burns, his identification of defendant as person who set him afire was properly admitted as dying declaration in view of nature and extent of his wounds and other surrounding circumstances. *McFadden v. United States*, 395 A.2d 14, 1978 D.C. App. LEXIS 349 (1978).

Dying declarations are admissible in evidence if it satisfactorily appears in any way that they were made under the sanction of impending death; whether that fact be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical attendants stated to him, or from his conduct, or other circumstances of the case, all of which may be resorted to in order to ascertain the state of the declarant's mind. *U.S. v. Schneider*, 21 D.C. 381, 1893 U.S. App. LEXIS 3081 (D.C. Sup. 1893).

It appeared that deceased, who had received three pistol balls in her body on Sunday, and who had undergone a severe surgical operation on Monday asked for water stating that, as she could not live, it might be given to her, and during Monday night expressed the wish that she had been killed outright. On Tuesday her declaration was made after a formal statement that she did not expect to recover. Held, that the belief, on deceased's part, of impending

death, was sufficiently shown to make her declaration admissible. *U.S. v. Schneider*, 21 D.C. 381, 1893 U.S. App. LEXIS 3081 (D.C.Sup. 1893).

While a dying declaration is competent only as to the circumstances of the death, yet a mere interruption of a few moments in the conflict between deceased and accused will not exclude deceased's declarations as to the proceedings before the interruption, when it is apparent that the entire occurrence was one conflict. *U.S. v. Heath*, 20 D.C. 272 (D.C.Sup. 1891).

— **Evidence from prior proceedings, admissibility of evidence.**

Government's introduction at third murder trial of crucial testimony given by defendant at his first trial at which he did not have the constitutionally guaranteed right to assistance of counsel, impinged on defendant's constitutional rights requiring a reversal of his conviction for felony murder. D.C. Code 1961, §§ 22-2401, 22-2404; *U.S. Const. Amend. 6*. *Harrison v. United States*, 387 F.2d 203, 1967 U.S. App. LEXIS 6332 (C.A.D.C. 1967), reversed by 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047, 1968 U.S. LEXIS 1349 (1968).

There was no manifest prejudice from denial of defendant's motion in murder prosecution to sever second jury trial from that of codefendant so that jury would not hear tape recording relating to codefendant's jury tampering at first trial; prosecutor's opening and closing arguments at second trial mentioned evidence of jury tampering only in connection with codefendant, and trial court instructed second jury that evidence of codefendant's alleged involvement in an effort to obstruct justice concerning a juror in prior trial should only be considered as to codefendant's consciousness of guilt and not against defendant. *Fortson v. United States*, 979 A.2d 643, 2009 D.C. App. LEXIS 378 (2009), amended by 2009 D.C. App. LEXIS 692 (D.C. Sept. 3, 2009).

Defendant preserved appellate review of trial court's admission, after prosecution's redirect examination of government witness, of witness' second written statement to police and excerpts from witness' grand jury testimony, though defendant did not specifically request permission to recross-examine the witness, where defendant filed written motion during trial, after exhibits with written statement and excerpts of grand jury testimony had been introduced, asking trial court to reconsider their admissibility and to strike corresponding portions of witness' testimony. *Tyer v. United States*, 912 A.2d 1150, 2006 D.C. App. LEXIS 642 (2006).

State was entitled to use prior recorded testimony of three unavailable witnesses at retrial for murder and associated weapons offenses, where issues on retrial were substantially similar, as charges were identical, and witnesses

were subject to cross-examination in first trial. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Even assuming co-defendant's testimony at defendant's retrial contradicted witness's testimony at first trial, such contradiction did not preclude admission of witness's prior recorded testimony after witness was determined to be unavailable, at retrial for murder and associated weapons offenses. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Trial court's exclusion of evidence of witness's juvenile adjudication for second degree murder was not constitutional error subject to harmless error, rather than abuse of discretion, standard of review, absent showing of bias; although witness may have been under court supervision when first interviewed by police in murder investigation, witness had no current relationship to the court system when he took stand in defendant's trial, such as to provide a basis for him to curry favor with the government by lying. *Walls v. United States*, 773 A.2d 424, 2001 D.C. App. LEXIS 120 (2001), writ of certiorari denied by 534 U.S. 1149, 122 S. Ct. 1112, 151 L. Ed. 2d 1006, 2002 U.S. LEXIS 1111, 70 U.S.L.W. 3516 (2002).

— **Evidence incriminating others, admissibility of evidence.**

Evidence presented by murder defendants to support argument that third party committed murder was too speculative to indicate reasonable possibility that third party or someone else killed victim; in their allegations of evidence of alleged relationship between victim and third party, defendants failed to proffer what nature of relationship was, or that there was any evidence of antagonism between victim and third party, and in fact, defendants conceded that no proffer was made by them as to what third party could further offer or show to support third party perpetrator defense. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Murder defendants were not entitled to cross-examine witness and elicit that witness was biased because he had the motive and opportunity to kill victim; trial court permitted considerable questioning of witness, but properly excluded third-party perpetrator evidence on basis that prejudicial impact of cross-examination outweighed its probative value, as trial court determined proffered testimony was really counsels' attempt to introduce negative evidence about victim to distract jury from the guilt or innocence of defendants. *McCullough v.*

United States, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Defendant's Winfield evidence of other, similar crimes by a third party was relevant and exclusion of the evidence warranted a new murder trial; evidence established that co-defendant, with male accomplices, was involved with two similar robberies within two weeks, both robberies began with the victim meeting with co-defendant to exchange sex-for-money, in both cases co-defendant's accomplices arrived to effectuate the robbery, and first robbery victim testified that defendant was not one of co-defendant's accomplices during the first robbery. *Newman v. United States*, 810 A.2d 918, 2002 D.C. App. LEXIS 671 (2002), amended by 824 A.2d 40, 2003 D.C. App. LEXIS 468 (D.C. 2003).

Evidence that third party possessed motive to kill murder victim and had attempted to do so in recent past was improperly excluded at trial, despite absence of evidence placing third party at or near murder scene and of evidence that third party knew victim's whereabouts at the time or that she had testified before grand jury on day of her murder as to prior attempt to murder her, and despite fact that trial judge's decision was conscientious and not capricious; facts alleged by defendant constituting evidence of recent assault against victim by third party stemming from motive identical to motive for murder were substantial. *Winfield v. United States*, 676 A.2d 1, 1996 D.C. App. LEXIS 79 (1996).

Murder victim's belief that third party had killed others and recovery of pistol from third party more than six months after victim's murder did not establish sufficient nexus between third party and murder of victim for defendant to be entitled to present that evidence to show that third party, rather than defendant, had killed victim, where no evidence was proffered to show connection between other murders and victim's murder or to show that third party was on scene when victim was killed, and expert who examined pistol could not say for certain that it was the one used to kill victim. *Void v. United States*, 631 A.2d 374, 1993 D.C. App. LEXIS 226 (1993).

Testimony concerning assault on victim by her boyfriend prior to fatal weekend was admissible in prosecution of defendant for second-degree murder to show that someone other than defendant caused fatal blow; evidence of boyfriend's relationship with victim and fact that he had assaulted her in past was relevant to ultimate issue of cause of death, Government's theory of causation was based on circumstantial proof, and defense proffered medical evidence from which jury could conclude that defendant's slap of victim's face had not

caused her death. *Stack v. United States*, 519 A.2d 147, 1986 D.C. App. LEXIS 493 (1986).

— **Harmless or reversible error, admissibility of evidence.**

In prosecution for murder committed while attempting to perpetrate robbery, admitting evidence that defendant entered plea of not guilty at preliminary hearing before committing magistrate, and that when defendant was asked to plead he answered that he was guilty of robbing and shooting, but that it was not premeditated or that he had not committed premeditated murder, was not prejudicial error where the evidence added nothing prejudicial either to confession or to evidence given by defendant at trial. D.C. Code 1940, § 22-2401. *Mumforde v. U.S.*, 130 F.2d 411, 1942 U.S. App. LEXIS 3113 (1942).

In homicide prosecution, where doctor had been allowed to testify that victim had told doctor in daughter's presence, that victim had fallen downstairs, admission of testimony on cross-examination with respect to same conversation wherein victim had stated that she had been beaten and thrown downstairs by accused did not require reversal even if erroneous where testimony was merely cumulative and unimportant. *Guy v. U.S.*, 107 F.2d 288, 1939 U.S. App. LEXIS 2730 (1939).

Any error in admitting videotaped statement to police in which defendant described placing victim in the trunk of his car, driving to the location of the murder, digging a hole for victim's body, and shooting victim was harmless beyond a reasonable doubt in prosecution for first-degree felony murder while armed, first-degree premeditated murder while armed, kidnapping while armed, and other offenses; statement was so cumulative of other evidence that it could not have affected the outcome. *Dowtin v. United States*, 999 A.2d 903, 2010 D.C. App. LEXIS 412 (2010).

In murder case, any error in trial judge's admitting the gun found in security box was harmless because two eyewitnesses declared at trial that they saw defendant with a gun pointed at victim's stomach or side and, although there might be no evidence concerning whether this gun was the gun used in the crime, it still could be admitted as probative evidence. *Kidd v. United States*, 940 A.2d 118, 2007 D.C. App. LEXIS 683 (2007).

Trial court improperly redacted murder defendant's statement to police to remove his account of his whereabouts at time of murder, where portion of statement submitted to jury, namely, defendant's denial that he had been present at murder scene, could have left impression that defendant had made only a bald, unadorned denial of guilt without explanation.

Reams v. United States, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

Assuming that error inherent in redaction of murder defendant's statement to police, to remove defendant's references to his claimed innocuous reason for avoiding neighborhood in which murder occurred between date of fight alleged to have motivated murder and date of murder, should have been obvious to trial court, such error did not result in miscarriage of justice and did not amount to plain error requiring reversal, where five government witnesses testified that defendant avoided area in which fight and murder occurred because of fight, and eyewitness testimony supported strong inference that defendant returned to neighborhood to settle score with persons involved in fight. Reams v. United States, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

Although witness's testimony at murder trial regarding statement by non-testifying co-defendant that indicated that other defendant was in the car with him violated defendant's rights under the Confrontation Clause, the admission of the statement was harmless, where the trial court gave a curative instruction to the jury to disregard the statement as to defendant, and there was significant other evidence that defendant was in car with co-defendant, including the fact that his fingerprint was found on a bag in the car, his identification card was found in the car, two witnesses testified to seeing him in the car, and he was found hiding near the wrecked car. Johnson v. United States, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Trial court error in admitting hearsay testimony that identified defendant as one of two individuals that kidnapped victim was harmless, during prosecution for murder, kidnapping, and other offenses; witness heard defendant threaten to put three bullets in his girlfriend "because he had already used the other three" on victim, after hearing the threat witness called the police and defendant was arrested and a revolver was recovered, ballistic evidence established that revolver was used to kill victim, and defendant's girlfriend initially told police that defendant threatened to kill her and that he boasted about the murder of victim. Randolph v. United States, 882 A.2d 210, 2005 D.C. App. LEXIS 464 (2005).

Erroneous admission of out-of-court videotaped admissions and plea statement of non-testifying codefendants reasonably contributed to guilty verdict for defendant on charges of murder, assault, and possession of a firearm, and thus, was not harmless; prosecution stated that jury should consider deciding conspiracy count first, because if defendant was guilty of conspiracy, then he was guilty of substantive offenses, defendant's membership in conspiracy was established by videotape and plea statements, and prosecution used statements to es-

tablish motive for defendant's commission of substantive offenses. Williams v. United States, 858 A.2d 978, 2004 D.C. App. LEXIS 455 (2004).

Error in trial court's admission of defendant's statement, which was obtained in violation of Miranda, that defendant approached victim, that victim reached toward victim's waistband, that waistband had something shiny and silver, and that defendant then shot victim was not harmless, in murder trial; defendant asserted self-defense, government was required to discredit claim of self-defense by relying on defendant's statement, given testimony by eyewitnesses that victim kept advancing on defendant even after first shots were fired, and defendant's statement was focal point of prosecution. Williams v. United States, 858 A.2d 978, 2004 D.C. App. LEXIS 455 (2004).

Error in admitting non-testifying co-defendant's videotaped confession, as well as plea allocutions of non-testifying co-defendants, as declarations against penal interest, which implicated defendants as members of conspiracy to commit murder, and which violated their right of confrontation, was not harmless, with respect to convictions for murder and other offenses; just as co-defendants' statements were corroborative proof that conspiracy had existed, they were significant proof of defendants' motive to commit shootings, and codefendants' statements were significant part of government's presentation of evidence as to what occurred on days shootings took place. Morten v. United States, 856 A.2d 595, 2004 D.C. App. LEXIS 422 (2004).

Trial court's admission of irrelevant and inadmissible threats evidence through witness's direct examination testimony describing manner in which two trial spectators made throat-slashing gestures to him during his testimony during murder trial, absent evidence linking defendant to spectators, was not harmless error, but was rather prejudicial, likely having substantial influence on guilty verdict; case was close, dependent upon credibility of two witnesses whose testimony was impeached with prior inconsistent statements and motives for not telling the truth, and State relied on threats evidence throughout closing jury argument. Ebron v. United States, 838 A.2d 1140, 2003 D.C. App. LEXIS 755 (2003), writ of certiorari denied by 543 U.S. 939, 125 S. Ct. 347, 160 L. Ed. 2d 247, 2004 U.S. LEXIS 6901, 73 U.S.L.W. 3236 (2004).

Trial court's error in murder prosecution, in not admitting as a party admission statement in affidavit supporting search warrant for victim's nephew, which stated that probable cause existed to believe that nephew and other perpetrator conspired to murder defendant, could have substantially swayed jury verdict that found defendant guilty of voluntary man-

slaughter; corroboration of defendant's claims about nephew's involvement might have changed the outcome in which jury reached guilty verdict. *Harris v. United States*, 834 A.2d 106, 2003 D.C. App. LEXIS 623 (2003).

Testimony by detective about surviving victim's identification of defendant as one of the participants in charged incident, though at times offering more details of victim's description of defendant's role in the events than were necessary to make the identification understandable, did not warrant reversal of murder and armed robbery convictions; case against defendant was strong, detective's testimony was brief, and surviving victim had testified and been cross-examined at length on his account of the crimes. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Any error, in murder and armed robbery prosecution, in admitting into evidence a detective's notes showing a telephone number, assigned to a residence at which defendant sometimes stayed, at which surviving victim stated he had reached defendant to set up drug transaction at which charged crimes occurred was not so prejudicial as to warrant a new trial; evidence showed that surviving victim positively identified defendant and other assailants under circumstances tending to show reliability of identifications. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Mistrial was not required, in murder and armed robbery prosecution arising from incident in which witnesses described one of the assailants as having plats in his hair, when detective testified that a police identification photograph that showed defendant with plats in his hair was taken before defendant's arrest in present case; testimony was a brief reference in a lengthy trial, and trial court gave curative instruction that possession by police of a person's photograph does not mean the person has ever committed an offense. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Any error in admitting testimony about alleged gang-related motivation behind murder was harmless; testimony about defendant's purported "confession" could have been interpreted by jury either as defendant saying he was sorry that victim was killed, or that he was sorry he had killed victim, and evidence of defendant's guilt, including testimony of three eyewitnesses who knew him from the neighborhood, was considerable. *Plummer v. United States*, 813 A.2d 182, 2002 D.C. App. LEXIS 733 (2002).

The trial court's application of the legal standard of admissibility of evidence in support of its alternative holding that defendant's Winfield evidence, which suggested that someone other than the defendant perpetrated the charged crime, was inadmissible during mur-

der trial warranted reversal of defendant's conviction; the trial court overstated the risk of jury confusion and failed to consider the possible prejudice to the defense and to defendant's constitutional rights. *Newman v. United States*, 810 A.2d 918, 2002 D.C. App. LEXIS 671 (2002), amended by 824 A.2d 40, 2003 D.C. App. LEXIS 468 (D.C. 2003).

Error in admitting shooting victim's photo identifications as dying declaration of who shot him was not harmless, where, without the identifications, jury was left only with witness's repudiated pretrial identifications coerced by police, even though one of the defendants had also implicated himself by admitting that he was asleep in car from which shots were fired. *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

Even assuming that detective's testimony that he had been investigating other individuals associated with defendant's clothing store was improper in prosecution for first-degree premeditated murder, trial court's failure to act sua sponte to provide relief beyond asking prosecution to tell the witness not to make any similar comments was not plain error; it was defense counsel who had requested, during recess, that no extra attention be given to the testimony because further attention could emphasize the unfavorable evidence to the jury, and detective's answer was brief statement in context of multi-day trial. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Even assuming it was error to allow detective to refer not only to recovery of ammunition that was same brand and caliber as the ammunition used in the killing, but also to recovery of different caliber ammunition from bedroom of apartment of defendant's girlfriend, there was no plain error in prosecution for first-degree premeditated murder; detective's statement regarding other ammunition was made briefly during routine restatement of items recovered from search of the apartment, recovery of other ammunition was never alluded to at any other point in trial, and no evidence introduced at trial connected the other ammunition to any bad act of defendant. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Any error was harmless, in prosecution for armed premeditated murder, in admitting other crimes evidence that defendant chased victim with a gun the night before the murder; trial court provided instruction that jury could only consider the evidence to determine premeditation and malice once it determined beyond a reasonable doubt that defendant was the murderer, and instruction was reread in response to jury's inquiry during deliberations

as to whether it could use the evidence for identification purposes. *Gaither v. United States*, 759 A.2d 655, 2000 D.C. App. LEXIS 229 (2000), amended by, remanded by 816 A.2d 791, 2003 D.C. App. LEXIS 24 (D.C. 2003).

Erroneous admission of shooter's hearsay statement that he had just "bust his bitch ass" was not reversible error, in first-degree murder prosecution of defendant who was second shooter involved in street shooting, where shooter later testified at trial and admitted his role in killing victim. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Chapman constitutional error analysis, rather than *Kotteakos* nonconstitutional error analysis applied to trial court's error in excluding evidence of malice/provocation in trial on charge of assault with intent to murder while armed, in which court denied defendant right to present evidence that went directly to element of most serious crimes with which defendant and codefendant were charged and defendant was not allowed to present ample evidence on provocation/mitigation issue that would justify unconstitutional harmless error analysis. U.S. Const. Amends. 5, 6. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Any error in excluding evidence of other crimes committed by third party alleged by homicide defendant to have been actual shooter did not prejudice defense sufficiently to render defendant's conviction constitutionally infirm; much of proffered evidence was brought before jury through defense witness and, moreover, alleged shooter's culpability was not inconsistent with defendant's guilt as aider and abetter. *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Keeping evidence of victim's boyfriend's prior assault on victim from jury was not harmless error in murder prosecution in which boyfriend testified for prosecution, where evidence of parties' phlegmatic relationship was relevant to explain how new injury might have occurred, nature of that relationship was admitted by victim's boyfriend, prior incidents were not so remote in time as to be irrelevant to parties' relationship on date defendant slapped victim, and Government's evidence of causation was circumstantial. *Stack v. United States*, 519 A.2d 147, 1986 D.C. App. LEXIS 493 (1986).

Error in excluding testimony of acquaintance of homicide victim, who was also a friend of defendant, as to victim's purported threat against defendant, which fell within state-of-mind exception to hearsay rule and was more probative than prejudicial, was harmless in view of fact that record was replete with refer-

ences to victim's sometimes acrimonious behavior toward defendant and that there was considerable testimony concerning victim's violent nature. *Hairston v. United States*, 500 A.2d 994, 1985 D.C. App. LEXIS 532 (1985).

Even if testimony of murder and kidnapping defendant's mother, as to telephone conversation she had with defendant after defendant encountered murder victim on day of his kidnapping and death, was admissible to show defendant's prior consistent statement, any error in excluding such testimony was harmless, where defendant had already testified that she had recounted the day's events to her mother, and where testimony would have helped defendant little, if at all. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Admission of hearsay statement by murder victim that defendant had previously stabbed him in the arm and limiting instruction that statement was admissible to show defendant's state of mind were harmless errors where defendant was charged with second-degree murder and was convicted of lesser included offense of manslaughter, there was no issue of identity in that defendant admitted having stabbed victim to death, there was substantial evidence of hostile relations between defendant and victim over period of time and hearsay statement was not only testimony introduced which indicated defendant was psychologically capable of deliberately using force against victim and testimony was very brief and not inflammatory. *Giles v. United States*, 432 A.2d 739, 1981 D.C. App. LEXIS 322 (1981).

In murder case, assuming error in exclusion of decedent's threats against defendant, communicated only to third party, the exclusion was not prejudicial where the testimony was cumulative. *Kleinbart v. United States*, 426 A.2d 343, 1981 D.C. App. LEXIS 220 (1981), recalled by 553 A.2d 1236, 1989 D.C. App. LEXIS 22 (D.C. 1989).

In prosecution for murder, trial court's error in admission of hearsay statements of decedent concerning her fear of defendant, alleged threats and assaults made against her by defendant, and her intention of meeting defendant the morning of her death, which provided evidence that defendant was not only capable of murder but also had in fact committed a previous crime of violence toward the same victim, and placed defendant at murder scene, thereby effectively negating his alibi defense, was prejudicial. D.C. Code §§ 22-2401, 22-3202. *Clark v. United States*, 412 A.2d 21, 1980 D.C. App. LEXIS 256 (1980).

In prosecution for murder, any error in admission of evidence of planned robbery several hours before murder was harmless given properly admitted evidence of planned robbery im-

mediately preceding murder. D.C. Code §§ 22-2401, 22-3202. *Tabron v. United States*, 410 A.2d 209, 1979 D.C. App. LEXIS 538 (1979).

In view of overwhelming evidence of malice aforethought, premeditation and deliberation, error in allowing defendant's daughter to testify that she had stated to defendant, immediately following the killing, that defendant had threatened deceased before and he had meant to do it was harmless beyond a reasonable doubt. D.C. Code §§ 22-2401, 22-2403. *Butler v. United States*, 322 A.2d 279, 1974 D.C. App. LEXIS 248 (1974).

Where trial court examined witness, after prosecution claimed surprise, as to his reasons for changing his mind on issue of who had attacked victim and afforded defense counsel opportunity to cross-examine witness, and defense counsel made no objection to admission of witness' testimony on recall repudiating his previous testimony and asserting that defendant had beaten victim and that police detective had not influenced him to pick defendant's picture out of photographs shown to him, allowing witness to be recalled instead of declaring mistrial upon assertion of surprise by prosecution was not an abuse of discretion. D.C. Code § 22-2401. *In re D. S. A.*, 283 A.2d 829, 1971 D.C. App. LEXIS 236 (1971).

— Hearsay, admissibility of evidence.

Defendant's statement to his sister, that he and codefendant went up behind victim, that defendant killed victim, and that codefendant's gun jammed, was substantively admissible against codefendant without redaction in joint murder trial under penal interest exception to hearsay rule; statement was not blame-shifting or beneficial to defendant in any way, it underscored that he was the shooter and bore primary responsibility, and it was contrary to his penal interest because it corroboratively revealed significant details of crime, including the identity of a witness who could identify him as chief perpetrator. *Thomas v. United States*, 978 A.2d 1211, 2009 D.C. App. LEXIS 360 (2009), writ of certiorari denied by 131 S. Ct. 282, 178 L. Ed. 2d 185, 2010 U.S. LEXIS 6856, 79 U.S.L.W. 3203 (U.S. 2010), writ of certiorari denied by 131 S. Ct. 196, 178 L. Ed. 2d 118, 2010 U.S. LEXIS 6815, 79 U.S.L.W. 3200 (U.S. 2010).

Admission of out-of-court statement of eyewitness in murder prosecution violated Supreme Court decision of *Crawford v. Washington*, which held that out-of-court testimonial statements may not be admitted into evidence under Confrontation Clause without declarant's live in-court testimony unless declarant is unavailable and defendant had a prior opportunity to cross-examine; statement of eyewitness, who was killed several weeks after shooting of victim, identifying defendant

as shooter of victim was introduced under spontaneous utterance exception to hearsay rule, and defendant had no prior opportunity to cross-examine eyewitness. *Gathers v. United States*, 977 A.2d 969, 2009 D.C. App. LEXIS 346 (2009).

Admission of unredacted portion of out-of-court statement made by driver/defendant who drove two of the other defendants and two additional passengers who were not defendants in the trial to location where passerby was stabbed to death and another passerby assaulted, during prosecution's cross-examination of driver/defendant in order to impeach driver/defendant's trial testimony that he did not know that passengers in his car had knives, did not violate the Sixth Amendment confrontation right of passenger/defendant who claimed he was not carrying a knife, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, as the unredacted portion of the statement was used only after driver/defendant had taken the stand to testify in his own defense, and driver/defendant was available for cross-examination by passenger/defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Admission of redacted videotaped hearsay statement made by defendant who drove two of the other defendants and two additional passengers to location where passerby was stabbed to death and another passerby assaulted, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, in order to establish that the driver/defendant was a willing participant in the assaults because he knew that some his passengers, two of whom were not defendants at the trial, were armed with knives when they entered his car, did not violate the Sixth Amendment confrontation right of passenger/defendant who claimed he was not carrying a knife, as the statement as redacted did not implicate passenger/defendant, and trial court instructed jury that the statement could only constitute evidence against driver/defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Out-of-court statements made by victim to witness prior to murder, that he saw a gun in

defendant's waistband, that defendant told victim the reason defendant had car that was not defendant's was because the car's owner owed defendant some money, and that defendant told victim that he thought victim and his friends were "stepping to him," were admissible under the present sense impression exception to hearsay rule in trial for murder and other offenses; no more than a few seconds could have elapsed between the conversation between defendant and victim and the conversation between victim and witness, and thus victim's statements to witness were likely reliable. *Gardner v. United States*, 898 A.2d 367, 2006 D.C. App. LEXIS 205 (2006).

Witness's recorded testimony at first trial for murder and weapons offenses that victim told her he was going to something out of one of the rooms in her apartment came within state of mind exception to rule against hearsay. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Witness's prior recorded testimony at first trial for murder and weapons offenses that someone had told her to tell victim that defendant wanted him was not inadmissible hearsay, at retrial after determination that witness was unavailable, where statement was not offered to prove truth of matter asserted, but rather to show why victim went outside. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Witness's testimony at first trial regarding gun which victim had brought into her apartment was not inadmissible hearsay at retrial for murder and weapons offenses on grounds that witness had no first-hand knowledge of gun; witness's testimony at first trial that she knew victim had gun because he asked her to "put it up while [she] loosed his hair" and that she saw defendant take gun indicated she had sufficient personal knowledge to testify to events she observed. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Grand jury testimony by eyewitnesses was admissible hearsay under recorded recollection exception in first-degree murder prosecution; the eyewitnesses had firsthand knowledge of the shooting approximately five months before their testimony, the eyewitnesses repeatedly testified that they could not recall the incident or their grand jury testimony, and they acknowledged oath and never repudiated the grand jury testimony. *Isler v. United States*,

824 A.2d 957, 2003 D.C. App. LEXIS 291 (2003).

Defendant lacked opportunity to deny his girlfriend's false statements regarding his identity to officers who came to girlfriend's home to arrest him, and thus, the statements were not admissible under adoptive admission exception to hearsay rule in prosecution for first-degree premeditated murder; defendant had been barely clad while "up against the wall" in the presence of multiple arresting police officers who had valid warrant for his arrest. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Letters that defendant wrote to Government witness two years after the murder were admissible under "statements of the defendant" exception to hearsay rule, to show: (1) that a conspiracy existed to conceal murder; (2) that defendant made threats to enforce the concealment conspiracy and as evidence of consciousness of guilt; and (3) nature of relationship between defendant and witness, and their conversations. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Statements that codefendant made to Government witness and to another Government witness in letters after main conspiracy to kill victim was accomplished two years earlier were not made "in furtherance of" conspiracy, and therefore not admissible in joint trial as non-hearsay statements of co-conspirator, where there was no evidence of an express agreement to continue to act in concert to conceal the crime, particularly two years after its commission. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Defendant could not complain about the admission of victim's hearsay statements on the issues of identity, defendant's motive, and victim's state of mind; defendant waived confron-

tation rights to object to the hearsay, as he procured the victim's silence by murdering her. *Sweet v. United States*, 756 A.2d 366, 2000 D.C. App. LEXIS 118 (2000).

Testifying shooter's out-of-court statement that he had just "bust his bitch ass" was hearsay that was not admissible as declaration against penal interest, in first-degree murder prosecution of defendant who was second shooter involved in street shooting. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Defendant was not entitled to mistrial on basis of erroneous admission of shooter's hearsay statement that shooter had just "bust his bitch ass," in first-degree murder prosecution of defendant who was second shooter involved in street shooting, where shooter later testified at trial and admitted his role in killing victim, and thus, prejudicial impact of statement was minimal, and any harm that did result could have been cured by instruction offered by trial court. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

In murder and kidnapping prosecution, trial court properly refused to permit defendant's mother to testify, over state's hearsay objection, as to what defendant told her on the telephone after defendant encountered the murder victim on day of his death, despite defense counsel's argument that the statement was not being offered for its truth but rather to show defendant's state of mind. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

In prosecution for armed robbery and felony-murder, police detective was properly allowed to testify that he received over telephone the serial number of gun sold by defendant and what the serial number was, same being extremely reliable evidence such as that constituting extrajudicial identification testimony which is admissible as substantive evidence. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Tribble v. United States*, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

In prosecution for murder, wherein defendant was accused of shooting his former girl friend, and wherein defendant failed to raise any of the three defenses, including accident, self-defense, or suicide by decedent, which traditionally had been understood to call into question state of mind of deceased declarant, but rather defended on claim of mistaken identity and alibi, state of decedent-declarant's state of mind at time of her murder was not in issue; therefore, trial court erred in admitting hearsay testimony as to statements made by decedent-declarant in which she recounted her fear of defendant as well as threats and assaults that defendant had allegedly directed at

her. D.C. Code §§ 22-2401, 22-3202. *Clark v. United States*, 412 A.2d 21, 1980 D.C. App. LEXIS 256 (1980).

In prosecution for murder, trial court erred in admitting testimony as to decedent-declarant's statements that defendant had asked her to meet him on next morning, which was morning of the murder, under state-of-mind exception to hearsay rule as circumstantial evidence of subsequent conduct of defendant, who alleged that he had been mistakenly identified and presented alibi defense. D.C. Code §§ 22-2401, 22-3202. *Clark v. United States*, 412 A.2d 21, 1980 D.C. App. LEXIS 256 (1980).

Trial court's error, if any, in allowing witness to provide hearsay testimony which allegedly implicated defendant in robbery was harmless in prosecution for first-degree murder while armed, possession of a firearm during a crime of violence and carrying a pistol without a license (CPWL); witness's testimony regarding robbery and retaliation was not the only evidence presented in furtherance of government's theory of ongoing feud as motive for shooting, defense counsel seriously called into question witness's credibility on cross-examination, and evidence against defendant was strong and compelling. *Daniels v. United States*, 2 A.3d 250, 2010 D.C. App. LEXIS 494 (2010), writ of certiorari denied by 131 S. Ct. 806, 178 L. Ed. 2d 538, 2010 U.S. LEXIS 9561, 79 U.S.L.W. 3343 (U.S. 2010).

— Identity of accused, admissibility of evidence.

No error was shown, in homicide prosecution, in admission of evidence as to which defendants affirmatively stated they had no objection, but, in any event, testimony challenged on appeal analogous to evidence of prior identification by witness was admissible to corroborate identification made by witness in court. Fed. Rules Evid. Rule 801(d)(1)(C), 18 U.S.C.; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Evidence of defendant's prior act of drug trafficking was admissible in murder prosecution to establish identity and motive; evidence indicated defendant targeted members of rival drug organization in both prior incident and incident that resulted in victim's murder because of defendant's drug activities. *Dockery v. United States*, 853 A.2d 687, 2004 D.C. App. LEXIS 274 (2004).

Evidence that members of defendant's rival drug organization had previously been shot at was admissible in murder prosecution to establish identity and motive; victim was a rival drug organization member and his death occurred as result of group of individuals shooting at him and other rival drug organization members, and both nine and ten millimeter guns

were used in prior shooting of rival drug organization members and were same guns that defendant provided to three shooters for shooting that resulted in victim's murder. *Dockery v. United States*, 853 A.2d 687, 2004 D.C. App. LEXIS 274 (2004).

Photo array identification procedure used by police was not unnecessarily suggestive, nor conducive to irreparable misidentification, even though defendant's photo was the only one that appeared in both the first and second array, in prosecution for various offenses; defendant's appearance in first photo array was different from that in the second, and men depicted in each photo array were similar in size and appearance, and thus, defendant's picture exhibited in first array would not have directed witness's attention to his photo in second array, and defendant did not stand out dramatically in either photo array. *Jones v. United States*, 879 A.2d 970, 2005 D.C. App. LEXIS 409 (2005).

Whether identification was unduly suggestive did not have to be determined once trial court made a finding that identification was reliable. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

In prosecution for felony-murder while armed during commission of burglary in the first degree and first-degree burglary, government was not required to negate most reasonable explanation of fingerprint evidence which was consistent with innocence and to show that fingerprint was made during commission of crime, where it did not rely solely on fingerprint evidence to show that entry and theft had occurred. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3201. *Hawthorne v. United States*, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

Trial court's error in excluding murder defendant's proffered expert testimony on witness identification without first conducting required three-part test for determining admissibility of such testimony did not prejudice defendant, and thus did not deprive defendant of his constitutional right to present a defense, as expert's testimony, particularly on the phenomenon of "unconscious transference," would not have undermined the central strength of prosecution's case, which was that eyewitnesses independently identified defendant as one of the shooters without having communicated with each other and without having learned that defendant was a suspect, and exclusion of the testimony did not prevent defendant from mounting a vigorous challenge to eyewitness's identification of him. *Heath v. United States*, 26 A.3d 266, 2011 D.C. App. LEXIS 434 (2011).

— Insanity, admissibility of evidence.

Jury may consider whether a defendant's mental condition negated his ability to form the

requisite mental state for first-degree murder. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

In determining whether to admit evidence on issue whether a defendant's mental condition negated his ability to form the requisite mental state for first-degree murder, judge must determine whether the evidence is sufficiently grounded in scientific fact and whether it directly addresses the mental element at issue so that its introduction will not unduly distract or mislead the jury from the determination it must make. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

Before admitting medical testimony on issue whether a defendant's mental condition negated his ability to form the requisite mental state for first-degree murder, court should insist on a complete proffer of the medical testimony. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

In prosecution under indictment charging defendant with first degree murder and robbery of his victim wherein principal defense was insanity of accused, who had been found competent to stand trial after appropriate proceeding and who took stand and exhibited bizarre symptoms and abnormal behavior which if truly reflecting his mental state would have made a trial legally impossible, accused by his demeanor put his mental condition as of time of trial in issue and testimony of government witnesses concerning defendant's mental condition at a time appreciably after commission of crime was properly admitted to rebut impression of madness. *Stewart v. U.S.*, 275 F.2d 617, 1960 U.S. App. LEXIS 5365 (C.A.D.C. 1960).

In homicide prosecution, testimony of police officer who had had experience in observing insane persons was admissible for whatever it might be worth, regardless of fact that it might have little probative value because he had observed defendant for only a short time, during which time defendant did not appear to be of unsound mind. *Edmonds v. U.S.*, 273 F.2d 108, 1959 U.S. App. LEXIS 2922 (C.A.D.C. 1959).

Evidence of the finding, about a year after the homicide, of a saw in a cell occupied by accused and another prisoner, and to which others had access, is not admissible as tending to show his sanity, in that it indicates his capability of planning an escape, and was hence not insane. *Sabens v. U.S.*, 40 App.D.C. 440, 1913 U.S. App. LEXIS 2099 (1913).

In a prosecution for murder, where the defense is insanity, evidence of general reputation in the family as to the mental condition of a second cousin of the accused, or even of the accused himself, is inadmissible. *Snell v. U.S.*,

16 App.D.C. 501, 1900 U.S. App. LEXIS 5814 (1900).

Where the defense is insanity, proof of the actuating cause of an alleged paroxysm is inadmissible without substantial proof of latent insanity or latent tendency to insane paroxysm. *Taylor v. U.S.*, 7 App.D.C. 27, 1895 U.S. App. LEXIS 3616 (1895).

— **Intent or motive, admissibility of evidence.**

In prosecution for, inter alia, assassination of former Chilean ambassador to United States, testimony about his activities in opposition to government of Chile was admissible as tending to show motive for assassination, and decree revoking his citizenship was evidence that his activities were known to Chilean government. 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Where fact of killing by an accused is in issue, prosecution may prove that accused had a motive, and accused may prove that he had no motive, but where the killing is purposed and none of the established legal excuses for purposed killing is pleaded, motive is wholly immaterial. *Lebron v. U.S.*, 229 F.2d 16, 1955 U.S. App. LEXIS 3731 (C.A.D.C. 1955).

In prosecution of Puerto Rican defendant, whose companion shot and killed guard in front of dwelling of President of the United States, for first-degree murder, wherein defendant interposed defense that he and companion had no intent to kill anyone but merely wished to create an incident in order to bring to the attention of the American people conditions in Puerto Rico, defendant was properly allowed to testify as to his own intent. D.C. Code 1940, §§ 22-105, 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

If fact of killing by an accused is in issue, prosecutor is permitted as part of his effort to prove that accused committed the act, to prove that accused had a motive for killing the deceased, and accused as part of his effort to prove that he did not commit the act, is permitted to prove that he had no motive for killing the deceased. D.C. Code 1940, § 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

If killing is intended by accused and none of the established legal excuses for the killing is pleaded, the motive of the killer is wholly immaterial. D.C. Code 1940, § 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

In prosecution for drowning wife, evidence concerning prior procurement of accident policy on wife's life held admissible as indicating motive. *Dickerson v. U.S.*, 65 F.2d 824, 1933 U.S. App. LEXIS 3176 (1933).

In a prosecution for murder, where defendant's confession showed that the forgery of check in connection with which the murder was committed was the motive, evidence of defendant's financial condition at and prior to the time of the homicide was competent. *Ziang Sun Wan v. U.S.*, 289 F. 908, 1923 U.S. App. LEXIS 2067 (1923).

In a prosecution for the killing of defendant's wife, evidence of previous quarrels between defendant and his wife was admissible on the question of motive. *Murray v. U.S.*, 288 F. 1008, 1923 U.S. App. LEXIS 2254 (1923).

The question of the remoteness of evidence of previous quarrels between defendant and his wife goes to the weight to be given the evidence by the jury as evidence of motive for the subsequent killing of the wife. *Murray v. U.S.*, 288 F. 1008, 1923 U.S. App. LEXIS 2254 (1923).

In homicide cases, the trial court is allowed considerable latitude in admitting evidence on the question of motive. *McHenry v. U.S.*, 276 F. 761, 1921 U.S. App. LEXIS 2155 (1921).

As tending to show motive, it is competent for the prosecution in a murder case to prove that the deceased maintained illicit relations with a woman with whom the accused was also unduly intimate, especially where there is other evidence that the accused intended to be revenged on deceased for his attentions to the woman. *Fearson v. U.S.*, 10 App.D.C. 536, 1897 U.S. App. LEXIS 3189 (1897).

References to a gang feud can supply to the jury a motive for an otherwise unexplained killing or suggest witness intimidation. *Plummer v. United States*, 813 A.2d 182, 2002 D.C. App. LEXIS 733 (2002).

Evidence of defendants' friendly relationship with person who had shot victim in the past, as buttressed by other evidence tending to show that defendants may have assaulted victim in retaliation for victim's earlier testimony against their friend which led to his conviction, was relevant in defendants' prosecution for assault of victim to show motive for the assault; evidence of prior shooting explained the reason why there might be "bad blood" between defendants and victim, defendants' association with person who had shot victim was not the only evidence of defendants' participation in the assault, and trial court instructed jury that there was no evidence of defendants' involvement in prior shooting. *Freeman v. United States*, 689 A.2d 575, 1997 D.C. App. LEXIS 21 (1997).

Evidence that defendant had given handgun to victim which victim had failed to return was properly admitted in murder prosecution; evidence was relevant to charged crime and demonstrated circumstances surrounding crime and was also relevant to show motive for crime, and probative value of evidence outweighed its

prejudicial effect. *Thomas v. United States*, 685 A.2d 745, 1996 D.C. App. LEXIS 241 (1996).

Motive evidence was admissible to help establish identity of defendant as killer, regardless of particular defense defendant elected to present, where accused denied he committed the act and evidence showed defendant had motive to harm this particular victim. *Hill v. United States*, 600 A.2d 58, 1991 D.C. App. LEXIS 171 (1991).

Evidence of prior violent altercation between murder victim and defendant had probative value to both defendant's motive and issue of identification of defendant which outweighed any prejudice; testimony of murder victim's son concerning previous attack by defendant was relevant to alleged announced course of revenge and perceived necessity for silencing victim. *Green v. United States*, 580 A.2d 1325, 1990 D.C. App. LEXIS 254 (1990).

Evidence of prior altercation between homicide victim and defendant was admissible to demonstrate motive. *Mathis v. United States*, 513 A.2d 1344, 1986 D.C. App. LEXIS 403 (1986).

Presence of motive suggests purposeful or reasoned killing. D.C. Code 1981, §§ 22-2401, 22-3202. *Hall v. United States*, 454 A.2d 314, 1982 D.C. App. LEXIS 507 (1982).

Testimony concerning drugs and drug distribution was admissible in murder prosecution where it had a direct bearing on codefendant's previously being shot by the victim; such testimony was also admissible on question of defendant's motive to avenge codefendant's shooting. *Jackson v. United States*, 329 A.2d 782, 1974 D.C. App. LEXIS 331 (1974), writ of certiorari denied by 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74, 1975 U.S. LEXIS 2593 (1975).

— Intoxication, admissibility of evidence.

While intoxication was no defense at common law to crime of murder, when murder in first degree is defined by statute in such terms as to require deliberate premeditation for its commission, evidence of intoxication may be shown for purpose of proving lack of capacity to deliberate or premeditate. D.C. Code 1929, T. 6, § 21. *McAffee v. U.S.*, 111 F.2d 199, 1940 U.S. App. LEXIS 3609 (1940).

Voluntary immediate drunkenness, in particular, is not admissible to disprove the element of malice integral to the crime of murder. *Wheeler v. United States*, 832 A.2d 1271, 2003 D.C. App. LEXIS 569 (2003).

— Judicial notice.

Physician's disconnecting of respirator of crime victim, who twenty-four hours after admission to hospital exhibited only primitive reflexes to stimuli, who had not improved six days later, and who according to testimony of physician could never return to cognitive and

sapient life, did not as a matter of common knowledge constitute gross negligence or abnormal response such that expert testimony was not required to establish a standard by which jury could determine malpractice or intentional malpractice, which would have been necessary to support a verdict that physician's conduct constituted an intervening cause insulating defendant from homicide liability. D.C. Code § 22-2401. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

— Malice, deliberation, and premeditation, admissibility of evidence.

Premeditation and deliberation are facts susceptible of proof like any other facts in criminal trial. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

Whether or not decedent had pushed his wife through a window in October was totally immaterial to issue of death resulting from beating at her hands the following March. *Simms v. U.S.*, 248 F.2d 626, 1957 U.S. App. LEXIS 3842 (C.A.D.C. 1957).

In prosecution for drowning wife, evidence concerning prior procurement of accident policy on wife's life held admissible as indicating intent. *Dickerson v. U.S.*, 65 F.2d 824, 1933 U.S. App. LEXIS 3176 (1933).

In a homicide case, remark of defendant at the time of the killing that deceased was not the first white man he had killed, following defendant's statement that, if witness would say she was sorry he had killed defendant, he would shoot her, indicated the state of defendant's mind at the time of the killing; that is, that the killing was done deliberately and maliciously. *Bowman v. U.S.*, 267 F. 648, 1920 U.S. App. LEXIS 2220 (1920).

Remote threats may be as indicative of motive as those made immediately preceding the commission of the crime, and especially is this true where a threat, made nine months before the crime was committed, was accompanied by an attempt to use a deadly weapon, and where there is evidence tending to show that the threats were repeated throughout the intervening period between the time in question and the commission of the crime. *Lomax v. U.S.*, 37 App.D.C. 414, 1911 U.S. App. LEXIS 5686 (1911).

Where the accused in a homicide was a rejected, and the decedent a favored, suitor of a woman, it is competent for the prosecution, in order to show the state of mind of the accused towards the woman, and that his motive in assaulting the deceased was jealousy, to introduce evidence of previous threats made by the accused to kill her if she allowed still another rival to speak to her, and of a declaration made by the accused to a witness that he would kill such other rival if the latter did not stop talking

to her. *McUin v. U.S.*, 17 App.D.C. 323, 1900 U.S. App. LEXIS 5352 (1900).

Evidence that defendant had been in possession of .45 caliber pistol and had access to pistol was properly admitted in prosecution for murder of victim shot with .45 caliber pistol; evidence of defendant's access to and possession of weapon just weeks before murder constituted probative temporal connection to murder and was admissible to show intent, and constituted evidence of crime charged. *Thomas v. United States*, 685 A.2d 745, 1996 D.C. App. LEXIS 241 (1996).

In case of first-degree murder, elements of premeditation and deliberation may be established by evidence of accused's hostile purpose directed towards class of persons of which victim is a member. *Adams v. United States*, 502 A.2d 1011, 1986 D.C. App. LEXIS 261 (1986).

Entry in defendant's diary referring to defendant's stalking women other than victim was properly admitted to prove premeditation and deliberation elements of first-degree murder. D.C. Code 1981, §§ 22-2401, 22-3202. *Adams v. United States*, 502 A.2d 1011, 1986 D.C. App. LEXIS 261 (1986).

Evidence of defendant's gun possession during a recent period when he was threatening to kill his girl friend for keeping his money was probative of seriousness of defendant's threats and was admissible in homicide prosecution to show malice and intent even though probative value of prior gun evidence was diminished absent testimony to identify the murder weapon as defendant's gun, and it was not abuse of discretion to conclude that probative value of prior gun evidence outweighed its potential prejudice, especially as testimony of gun possession was connected with the prior offense and defense trial strategy lessened any prejudice from the gun possession evidence. D.C. Code 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

Hearsay testimony of prior violence by defendant against victim was inadmissible to show defendant's motive, malice, and intent where victim, and not defendant, was the declarant of the hearsay statement that defendant had stabbed him in the right arm and evidence of the prior specific act by the defendant was not admissible. *Giles v. United States*, 432 A.2d 739, 1981 D.C. App. LEXIS 322 (1981).

Evidence concerning prior incidents of hostility, prior assault, and the like is particularly relevant in marital homicide cases. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

There is no particular limit as to the time anterior to a homicide when evidence of threats made by defendant against deceased will be excluded, the admissibility of such evidence

depending on the circumstances of the case. *U.S. v. Neverson*, 12 D.C. 152 (D.C.Sup. 1880).

On a trial for homicide, evidence of threats made by defendant against deceased the summer before the murder is not inadmissible merely because the time of making them was too remote. *U.S. v. Neverson*, 12 D.C. 152 (D.C.Sup. 1880).

— Materiality, admissibility of evidence.

In view of remoteness in time of proffered evidence of homicide victim's violent character and fact that proffered evidence concerned instances of victim's violent behavior in special context of marital relationship, trial court did not abuse its discretion in refusing to admit proffered character testimony into evidence in homicide prosecution for killing of victim following a traffic dispute, despite defendant's assertion that he was entitled to introduce such evidence in connection with his claim of self-defense due to Government's presentation of evidence at trial that defendant had initially provoked attack upon him by victim. *Hawkins v. United States*, 461 A.2d 1025, 1983 D.C. App. LEXIS 385 (1983), writ of certiorari denied by 464 U.S. 1052, 104 S. Ct. 734, 79 L. Ed. 2d 193, 1984 U.S. LEXIS 707, 52 U.S.L.W. 3510 (1984).

A materiality requirement is implicit in the right to a meaningful opportunity to present a complete defense, just as it is in other constitutional rights to obtain and utilize evidence—in particular, the Sixth Amendment right to compulsory process to secure defense witnesses and the due process right to the disclosure by the prosecution of exculpatory evidence in its possession; at a minimum, this means defendant must demonstrate that the excluded evidence was important to his defense in order to show that the error was of constitutional magnitude, and therefore, the materiality inquiry focuses on prejudice with respect to the fairness of the trial as a whole. *Heath v. United States*, 26 A.3d 266, 2011 D.C. App. LEXIS 434 (2011).

— Means or instrument used, admissibility of evidence.

Testimony that revolver could not be discharged until hammer was pulled back held admissible to rebut accused's claim it was accidentally discharged. *Crawford v. U.S.*, 41 F.2d 979, 1930 U.S. App. LEXIS 2923 (1930).

Where a bloody ax and a piece of iron pipe, with which it is charged the crime was committed, are exhibited to the jury in a trial for murder, and a witness for the accused after testifying that the ax showed, in addition to blood marks, outlines of finger marks, is asked to describe such finger marks, counsel for the accused stating that he wishes to show that they were not those of the accused, the refusal of the trial court to allow the question to be asked upon the ground that it is "too far-

fetched" is not reversible error, especially where it is not distinctly claimed by the accused that the so called finger marks are capable of definite measurement and comparison with his hands and fingers. *Funk v. U.S.*, 16 App.D.C. 478, 1900 U.S. App. LEXIS 5313 (1900).

Evidence that assault victim had, on two prior occasions, seen defendant in possession of .32 caliber chrome-colored automatic pistol with black or brown handle was sufficiently linked to both defendant and the crimes charged to be admissible in prosecution for second-degree murder while armed and assault with intent to kill while armed, though no murder weapon was recovered and the sightings occurred as much as 11 months before the murder and assault; testimony established that bullets used to kill murder victim came from .32 caliber semi-automatic pistol, other evidence established that .32 caliber bullets and shell casings were recovered from areas where both murder victim and assault victim were shot, holster and box of .32 caliber ammunition of same make as shell casings were discovered in bedroom used mainly by defendant, and witness testified that the day after the shootings, she saw a silver gun hidden in the basement of the house where defendant lived. *McConaughy v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

Evidence that defendant possessed a revolver that might have been the murder weapon was admissible to establish identity of defendant as person who robbed and killed victim. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

— Nature of act and attendant circumstances, admissibility of evidence.

Where two witnesses testified that defendant in company of identified killer and a third person, entered apartment building where victim lived, the same three men were seen by three witnesses fleeing the scene just after a shot was fired and one witness testified that the three men were the same three he had seen inside building only moments earlier, there was enough evidence to link defendant with events occurring inside building so that testimony as to those events was admissible against him. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Evidence as to homicides committed by defendant held admissible in prosecution for murder committed in effort to avoid arrest therefor. *Copeland v. U.S.*, 2 F.2d 637, 1924 U.S. App. LEXIS 2130 (1924).

Testimony of eyewitness that she heard murder victim call man who shot him "Tony" was admissible in homicide prosecution. *Burgess v.*

United States, 608 A.2d 733, 1992 D.C. App. LEXIS 121 (1992).

In murder prosecution, testimony that during course of beating, which resulted in victim's death, defendant exclaimed, "bitch, been drunk all day and haven't even tried to make no money," was admissible to prove present state of mind. *Smith v. United States*, 381 A.2d 258, 1977 D.C. App. LEXIS 308 (1977).

— Other offenses, admissibility of evidence.

Testimony about assassination mission in Mexico constituted proof of intent, plan, preparation and motive in prosecutions arising out of assassination in Washington, D.C. 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

In murder prosecution, receiving evidence that revolver with which victim was shot had been stolen from house of certain person was not error on ground that it constituted evidence of offense other than that for which defendants were on trial, in absence of any evidence showing that any of the defendants had stolen the revolver or had received it knowing it to have been stolen. D.C. Code 1940, § 22-2401. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

Any error was harmless as to admission, in murder prosecution, of other-crime evidence regarding defendant selling drugs on the night of the murder and in the apartment in which the murder occurred, even if such evidence, which was offered to show defendant had a motive to kill the victim for failing to quell a turf war regarding sale of drugs, was cumulative of other evidence that defendant had such a motive, where defendant's drug dealing had already been well established. *Tyree v. United States*, 942 A.2d 629, 2008 D.C. App. LEXIS 31 (2008), writ of certiorari denied by 556 U.S. 1130, 129 S. Ct. 1612, 173 L. Ed. 2d 1000, 2009 U.S. LEXIS 2077, 77 U.S.L.W. 3528 (2009).

"Other crimes" evidence of defendant's drug dealing was relevant in murder prosecution to explain events leading up to murder, including why defendant came to home of victim's cousin and why victim gave defendant a ride to place where defendant allegedly stated drugs were hidden, and probative value of that evidence was not outweighed by prejudicial effect. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

"Other crimes" evidence that defendant solicited sex from government witness for \$8.00 was relevant, in prosecution for murder of that witness' cousin that occurred only a few hours later, to explain events surrounding charged crime, including how defendant came to be at

witness' home and to accept a ride from her cousin, and probative value of that evidence was not outweighed by prejudicial effect. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

Other crimes evidence, in the form of defendant's admission that he killed for codefendant in the past, was not admissible, in prosecution for conspiracy to commit first-degree murder while armed, without an analysis of whether it would be relevant for a substantial and legitimate purpose; evidence was not direct proof of charged crime, was not closely intertwined with the evidence of the charged offense, and was not necessary to place the charged crime in an understandable context. *Sweet v. United States*, 756 A.2d 366, 2000 D.C. App. LEXIS 118 (2000).

Witness's reference to prior drug dealings with defendant was admissible to show defendant's motive for committing the crimes, his intent in entering house, and his knowledge of where to find the hidden safe, in prosecution arising from double murder during a residential robbery. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Evidence that defendant sold drugs to victim for years, that defendant supplied crack cocaine to victim and roommate two days before fire, and had threatened to burn down apartment building if victim did not pay him for recent drug sale was admissible in prosecution for arson and murder to put arson in context, and as direct and substantial proof of crimes charged. D.C. Code 1981, §§ 22-401, 22-403, 22-2401, 22-2403. *Bonhart v. United States*, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Incidents of defendant's abuse, jealousy, and threats toward his wife, her family, and anyone who may harbor wife were admissible to show motive in prosecution of defendant for murder of third party; evidence suggested that defendant believed wife was hiding in apartment of third party. *Mitchell v. United States*, 629 A.2d 10, 1993 D.C. App. LEXIS 174 (1993), writ of certiorari denied by 510 U.S. 1138, 114 S. Ct. 1119, 127 L. Ed. 2d 429, 1994 U.S. LEXIS 1823, 62 U.S.L.W. 3553 (1994).

Evidence of prior instances of hostility, assaults, and the like is particularly relevant in marital homicide cases. *Hill v. United States*, 600 A.2d 58, 1991 D.C. App. LEXIS 171 (1991).

Evidence of uncharged misconduct involving dispute over heroin sale and whether payment had been made for that sale was relevant and admissible to prove that defendant had motive for killing that was allegedly precipitated by

drug operation and drug debt, even though motive was not element of first-degree murder. *Johnson v. United States*, 596 A.2d 980, 1991 D.C. App. LEXIS 248 (1991), writ of certiorari denied by 504 U.S. 927, 112 S. Ct. 1987, 118 L. Ed. 2d 585, 1992 U.S. LEXIS 2977, 60 U.S.L.W. 3781 (1992).

Probative value of testimony that defendant's parole papers were seen within defendant's possession within hours of crimes outweighed prejudicial effect in prosecution for rape and murder linked to defendant by discovery of defendant's wallet containing parole papers near scene of crimes, even though defendant had not opened door to alleged "other crimes" evidence contained in reference to parole papers, where trial court immediately issued cautionary instruction, and Government needed evidence to link defendant to crimes. D.C. Code 1981, §§ 22-2401, 22-2801. *Minick v. United States*, 506 A.2d 1115, 1986 D.C. App. LEXIS 298 (1986), writ of certiorari denied by 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 76, 1986 U.S. LEXIS 3635, 55 U.S.L.W. 3233 (1986).

Trial court was not required to wait until defendant actually introduced evidence impeaching credibility of Government's witnesses before ruling on admissibility of evidence that witnesses saw defendant's parole papers in defendant's possession within hours before rape and first-degree felony-murder which were linked to defendant by discovery of wallet with defendant's parole papers near crime scene. D.C. Code 1981, §§ 22-2401, 22-2801. *Minick v. United States*, 506 A.2d 1115, 1986 D.C. App. LEXIS 298 (1986), writ of certiorari denied by 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 76, 1986 U.S. LEXIS 3635, 55 U.S.L.W. 3233 (1986).

In prosecution for felony-murder, rape, and prison breach, prejudice to defendant from inference that could flow from evidence of his joint participation with witness in prior robberies far outweighed any enhancement of such witness' credibility from his testimony and its admission denied defendant a fair trial. D.C. Code §§ 22-2401, 22-2601, 22-2801, 22-2901. *Rindgo v. United States*, 411 A.2d 373, 1980 D.C. App. LEXIS 426 (1980).

In prosecution for felony-murder, second-degree murder, assault with intent to commit rape, and first-degree burglary, trial judge did not abuse his discretion in admitting evidence of defendant's prior conviction for assault and robbery where there were significant similarities in *modus operandi* which were probative of defendant's identity as attacker of victim, where the testimony was probative of defendant's motive and intent, and where eight-year gap between the two incidents did not so reduce probity of the evidence that it should have been

excluded. D.C. Code §§ 22-501, 22-1801(a), 22-2401, 22-2403. *Calaway v. United States*, 408 A.2d 1220, 1979 D.C. App. LEXIS 492 (1979).

— **Passion and provocation, admissibility of evidence.**

Fact that decedent, to whom defendants had wanted to talk concerning the rape of a mother of one of the defendants, tried to shut the door in defendant's face did not show sufficient provocation to reduce charges of felony-murder and second-degree murder to manslaughter. D.C. Code § 22-2401. *Harris v. United States*, 373 A.2d 590, 1977 D.C. App. LEXIS 475 (1977).

— **Personal relations of parties, admissibility of evidence.**

Defendant in murder prosecution failed to make clear showing that telephone conversation he had with his girlfriend, an attorney employed by federal government, fell within attorney-client privilege; only remark by girlfriend involving legal issues was that defendant did not have to give hair and blood samples to police, which he had already elected not to do, and his questions about possible presence of his fingerprints on drinking glasses in victim's apartment, which he admitted he had visited, or of his sperm in bathroom did not show intent to seek legal advice. *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434 (2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Testimony that defendant told 14-year-old to "watch the strip," after giving the minor drugs and a gun with which minor shot victim was relevant to defendant's control over minor, and, thus, supported theory that defendant was an aider and abettor of murder. *Smith v. United States*, 665 A.2d 962, 1995 D.C. App. LEXIS 201 (1995).

It was error to admit, as part of prosecution's case, testimony by decedent's former roommate that ten months prior to her shooting death she had seen defendant strike and "stomp" on decedent during a quarrel but error was harmless where defendant testified that decedent had attacked him first. *Fornah v. United States*, 460 A.2d 556, 1983 D.C. App. LEXIS 353 (1983).

Conduct, attitude and feelings of accused and deceased toward each other may be shown in a murder case to establish motive, malice or intent. *Gezmu v. United States*, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

— **Relevancy, admissibility of evidence.**

In light of dubious probative value of evidence offered by defense to show that it was Central Intelligence Agency, and not Chilean government or its intelligence agency, which had masterminded assassination of former Chilean ambassador to United States, out of

whose death prosecution arose, trial judge properly refused to allow defendants to "put the CIA on trial in this case." 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

In prosecution for, inter alia, murder of former Chilean ambassador to United States, trial judge properly excluded irrelevant testimony as to where prosecution witness had obtained his social security card. 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Probative value of threats evidence obtained through witness's testimony describing manner in which two trial spectators with whom murder defendant was associated made throat-slashing gestures to him during his testimony was not substantially outweighed by danger of unfair prejudice; evidence that defendant procured and participated in threats to a testifying witness was highly probative of his own consciousness of guilt as well as to the witness's manner of testifying that the jury would be called upon to assess. *Ebron v. United States*, 838 A.2d 1140, 2003 D.C. App. LEXIS 755 (2003), writ of certiorari denied by 543 U.S. 939, 125 S. Ct. 347, 160 L. Ed. 2d 247, 2004 U.S. LEXIS 6901, 73 U.S.L.W. 3236 (2004).

Threats evidence admitted by way of witness's direct examination testimony describing manner in which two trial spectators made throat-slashing gestures to him during his testimony during murder trial was inadmissible as irrelevant to defendant's conduct or behavior, absent evidence linking defendant to spectators; State throughout witness's testimony attributed to defendant threatening actions of the spectators based solely on their purported association with defendant in his neighborhood. *Ebron v. United States*, 838 A.2d 1140, 2003 D.C. App. LEXIS 755 (2003), writ of certiorari denied by 543 U.S. 939, 125 S. Ct. 347, 160 L. Ed. 2d 247, 2004 U.S. LEXIS 6901, 73 U.S.L.W. 3236 (2004).

Testimony of victim's mother, that after the shooting she ran outside late at night in her night clothes and saw her son lying in the street, and that she tried to speak to her son, but that he could only mumble in response, was relevant to the murder charge before the jury. *Plummer v. United States*, 813 A.2d 182, 2002 D.C. App. LEXIS 733 (2002).

Admission of audio recording of assault victim's grand jury testimony to impeach the victim, with redactions only of objectionable material and prior consistent statements, was not an abuse of discretion in prosecution for assault with intent to kill while armed; playing the tape line-by-line would have been difficult technically, victim was unable to read the transcript and refused to listen to the recording, and his

claim that he had been “forced” to give the grand jury testimony made the context of the prior inconsistent statements relevant. *McConaughy v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

Probative value was substantially outweighed by danger of unfair prejudice as to eyewitness’ testimony, in prosecution for first-degree premeditated murder, that she was scared by conversation she had with defendant’s girlfriend after the killing; defense was not questioning eyewitness’ delay in contacting police and issue of why eyewitness decided to contact police was only minimally relevant, but the testimony potentially implicated defendant in scheme to intimidate key witness in absence of any proof he sought to bring about such fear and it implied guilty knowledge by defendant without any evidentiary basis, merely because girlfriend’s acts suggested his culpability. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Probative value of medical examiner’s testimony and accompanying autopsy photographs outweighed risk of unfair prejudice to defendants, and thus testimony and photographs were admissible in murder prosecution arising from street shooting. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

— *Res gestae*, admissibility of evidence.

Testimony by accomplices as to statements which were made to them by defendant during commission of crimes charged in prosecutions for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary and which incriminated codefendants, were admissible under either exception to hearsay rule for contemporaneous declarations which partake of the event or exception for spontaneous declarations or excited utterances. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Federal Rules of Evidence, rule 803(2), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

— Self-defense, admissibility of evidence.

In prosecution for murder, where defense attempted to introduce evidence of deceased’s violent and dangerous character, specifically evidence that deceased had killed his own six-year-old son in 1965, through testimony of deceased’s wife and neither privilege of husband or wife not to testify for or against the other nor privilege not to reveal confidential marital communications was applicable, court erred in barring the testimony and where defendant’s sole defense was self-defense such error was prejudicial. D.C. Code § 14-306(a, b). *U.S. v. Burks*, 470 F.2d 432, 1972 U.S. App. LEXIS 7117 (C.A.D.C. 1972).

In prosecution for murder, deceased’s prior conviction based on plea of guilty to an indictment that charged that deceased did “beat, abuse and otherwise willfully maltreat” his six-year-old son was admissible to prove deceased’s violent character and court’s barring of the evidence was improper. D.C. Code § 22-901. *U.S. v. Burks*, 470 F.2d 432, 1972 U.S. App. LEXIS 7117 (C.A.D.C. 1972).

In prosecution for murder, evidence of the deceased’s violent character, including evidence of specific violent acts, is admissible where a claim of self-defense is raised and such evidence is relevant on the issue of who was the aggressor and, where there is evidence that defendant knew of deceased’s character, on the issue of whether or not defendant reasonably feared he was in danger of imminent great bodily injury. *U.S. v. Burks*, 470 F.2d 432, 1972 U.S. App. LEXIS 7117 (C.A.D.C. 1972).

Refusal to admit into evidence docket entry indicating that victim of shooting had been convicted of assault on a police officer was not improper on basis that the entry had relevance as showing victim’s propensity for violence and aggressive behavior thus bolstering defendant’s claim of self-defense, where the docket entry disclosed only that victim had been convicted under Code section making criminal nonviolent obstruction of police officer in performance of his duty as well as assault and physical interference. D.C.C.C.E. § 22-505. *Jones v. United States*, 385 F.2d 296, 1967 U.S. App. LEXIS 5004 (C.A.D.C. 1967).

In prosecution for homicide resulting in conviction of second degree murder where defendant claimed killing was necessary in order to repel sexual assault by deceased who was drunk at the time of killing, it was reversible error to refuse to admit testimony to the effect that deceased was aggressive when drunk. *Evans v. U.S.*, 277 F.2d 354, 1960 U.S. App. LEXIS 4997 (C.A.D.C. 1960).

On plea of self-defense evidence of deceased’s character and belligerency, though unknown to defendant, is admissible in corroboration of defendant’s testimony that deceased was the aggressor. *Evans v. U.S.*, 277 F.2d 354, 1960 U.S. App. LEXIS 4997 (C.A.D.C. 1960).

Where one accused of homicide claimed self-defense and testified that his victim jumped up, started around a table with his hand in his pocket and stated that he would kick accused’s teeth out of his head, evidence that morgue attendant found open pen knife in victim’s pocket, although playing cards were in his hand, was admissible to show what victim’s apparent conduct was, notwithstanding several eyewitnesses testified that accused was the aggressor and that victim made no move. *Griffin v. U.S.*, 183 F.2d 990, 1950 U.S. App. LEXIS 3032 (C.A.D.C. 1950).

In murder prosecution, where defendant pleaded self-defense, deceased's police record showing arrests but no convictions held inadmissible. *Preston v. U.S.*, 80 F.2d 702, 1935 U.S. App. LEXIS 3399 (1935).

In murder prosecution, under plea of self-defense, evidence that deceased had violent or dangerous character or habitually carried deadly weapons is admissible, but not proof of general character or proof of crimes other than crimes of violence. *Preston v. U.S.*, 80 F.2d 702, 1935 U.S. App. LEXIS 3399 (1935).

In prosecution for murdering wife and mother-in-law, excluding, as irrelevant, testimony that seven months before shooting, altercation had taken place between wife, defendant, and mother-in-law, held not error as against contention that purpose was to show accused was put in fear. *Bolden v. U.S.*, 69 F.2d 121, 1934 U.S. App. LEXIS 3459 (1934).

Where, according to the prisoner's testimony, he did not kill deceased, a woman, intentionally or under any apprehension that it was necessary to do so in order to save his own life or prevent serious bodily injury, it is not error for the trial court to exclude testimony to show the vicious and dangerous character of deceased. *Travers v. U.S.*, 6 App.D.C. 450, 1895 U.S. App. LEXIS 3603 (1895).

In making claim of self-defense, accused may introduce evidence of prior violent acts committed by decedent which were known to accused. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Past acts of victim's violence of which accused was unaware may be introduced as evidence supporting the objective question of who was the first aggressor. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Evidence of victim's prior bad acts, which were known to defendant, were admissible in prosecution for assault with intent to kill on issue of reasonableness of defendant's apprehension of danger at time of shooting. *Harris v. United States*, 618 A.2d 140, 1992 D.C. App. LEXIS 316 (1992).

Only in homicide cases may prior violent acts of victim be introduced as evidence to prove that victim was first aggressor. *Harris v. United States*, 618 A.2d 140, 1992 D.C. App. LEXIS 316 (1992).

In homicide trial where accused raises claim of self-defense, Government may properly introduce evidence of victim's past behavior toward defendant to show who was the initial aggressor and whether defendant was in reasonable fear of imminent great bodily harm.

D.C. Code 1981, §§ 22-2403, 22-3202. *Rawls v. United States*, 539 A.2d 1087, 1988 D.C. App. LEXIS 22 (1988).

When defense of self-defense is raised in homicide prosecution, it is generally recognized that hearsay evidence of prior threats is probative of whether defendant was likely to be aggressor in altercation and whether defendant reasonably apprehended imminent, serious bodily harm from decedent. *Hairston v. United States*, 500 A.2d 994, 1985 D.C. App. LEXIS 532 (1985).

Under state-of-mind exception to hearsay rule, evidence of uncommunicated threats of homicide victim against defendant is admissible when defendant claims self-defense, and there is substantial evidence, though it be only his own testimony, that victim attacked him. *Hairston v. United States*, 500 A.2d 994, 1985 D.C. App. LEXIS 532 (1985).

By raising self-defense in homicide trial, defendant was asserting that decedent had been the initial aggressor in the fatal conflict; therefore, evidence of decedent's peaceable or violent character was admissible as relative on issue of who was initial aggressor. *Carter v. United States*, 475 A.2d 1118, 1984 D.C. App. LEXIS 363 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1097, 53 U.S.L.W. 3599 (1985).

Once defendant opens door to reputation of deceased for peace or violence by claiming self-defense, prosecutor has corresponding right to rebut with evidence of noncombative nature of decedent. *Carter v. United States*, 475 A.2d 1118, 1984 D.C. App. LEXIS 363 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1097, 53 U.S.L.W. 3599 (1985).

Accused claiming self-defense in homicide prosecution may attempt to show that decedent was the aggressor by showing that he was a bellicose and violent individual. *Johnson v. United States*, 452 A.2d 959, 1982 D.C. App. LEXIS 482 (1982).

At least when a defendant is charged with homicide, she has right to present evidence of victim's violent character to support claim of self-defense and evidence of violent character may be testimony of specific acts, including acts of violence unrelated to crime at issue, or it may be evidence of general reputation for violence. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

Rebuttal testimony which related to good character of victim was admissible, even though defendant had not put victim's character in issue, where defendant claimed self-defense, a theory which she attempted to buttress by means of evidence that victim had assaulted her on a number of occasions, and trial court carefully limited the use of the testimony to the issue raised by the defense of

who was the aggressor. *Giles v. United States*, 432 A.2d 739, 1981 D.C. App. LEXIS 322 (1981).

In absence of substantial evidence that deceased had been the attacker, trial court properly excluded testimony of third party asserting uncommunicated threats made by deceased against defendant. *Kleinbart v. United States*, 426 A.2d 343, 1981 D.C. App. LEXIS 220 (1981), recalled by 553 A.2d 1236, 1989 D.C. App. LEXIS 22 (D.C. 1989).

Prior acts of violence are admissible in homicide cases where defendant raises claim of self-defense against decedent as the alleged first aggressor. *Ibn-Tamas v. United States*, 407 A.2d 626, 1979 D.C. App. LEXIS 457 (1979).

As a general rule, antecedent declarations that a homicide victim feared the accused are considered relevant to an accused's claim that he acted in self-defense, that is, that the victim was the aggressor in the first instance. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

Trial judge, at prosecution of defendant for second-degree murder, properly denied admission of certified copy of decedent's conviction for carrying pistol without license, as bare fact of proof of conviction for carrying pistol without license did not in and of itself prove a specific violent act which could be used to support defendant's claim of self-defense. *Carmichael v. United States*, 363 A.2d 302, 1976 D.C. App. LEXIS 356 (1976).

— Subsequent incriminating or exculpatory circumstances, admissibility of evidence.

Testimony of circumstances surrounding defendant's arrest by officers pursuant to a warrant for his arrest, not for the robberies and murder for which he was being tried, but for armed assault on police officer, offered as indicating consciousness of guilt or resistance to arrest, was admissible in context in which case was tried. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

In connection with evidence offered by the prosecution in a murder trial of the flight, concealment, and change of name of the accused, other attendant and incidental facts, such as a confession by the accused to an officer who had arrested him on another charge of a contemplated assault for the purpose of escaping, may be shown as relevant circumstances for the consideration of the jury. *Funk v. U.S.*, 16 App.D.C. 478, 1900 U.S. App. LEXIS 5313 (1900).

Trial court did not clearly err by finding that inmate's affidavit indicating that he, rather than defendant, had killed victim, was not admissible as statement against penal interest;

inmate admitted crime nine months after murder, only testimony linking inmate to murder was testimony by defendant's mother and sister that defendant physically resembled inmate and that inmate came to defendant's home around time of murder, and inmate was overheard saying that he only wanted "to get his boy off." *Harris v. United States*, 668 A.2d 839, 1995 D.C. App. LEXIS 247 (1995).

In prosecution for armed robbery and felony-murder, trial court properly admitted testimony concerning defendant's sale of revolver where such evidence constituted consciousness of guilt and where such testimony did not far outweigh its probative value. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Tribble v. United States*, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

Arguments and conduct of counsel.

In murder prosecution wherein sole defense was insanity, and defendant's gibberish testimony was such as to raise issues as to whether defendant feigned such testimony and whether at time of the third trial his mental condition represented his condition at time of act charged, cross-examination disclosing defendant's failure to take stand at two previous trials which resulted in convictions was erroneous and was not harmless but was sufficiently prejudicial to warrant the granting of a mistrial even though defense made no request for cautionary instructions. U.S. Const. Amend. 5; 18 U.S.C. § 3481; D.C. Code 1951, §§ 22-2401, 22-2404, 24-301. *Stewart v. U.S.*, 81 S.Ct. 941, 1961 U.S. LEXIS 1266 (U.S. Dist. Col. 1961).

Where only evidence linking defendant with homicides was testimony of confessed accessory who was granted immunity, defendant's theory that accessory committed the killings and lied about defendant to cover up his own guilt was supported by testimony of eyewitnesses who described a man fitting accessory's description as being near scene of crimes, and defense counsel's closing argument seeking to present such theory did not supplement or misstate the record but merely suggested that jury draw certain inferences, restriction of closing argument so as to prevent defense counsel from suggesting that accessory committed the murders impaired defendant's constitutional right to a closing argument in his behalf and was not harmless beyond reasonable doubt. D.C. Code §§ 22-2401, 22-2403; 18 U.S.C. § 6002; 18 U.S.C. § 2111; Fed. Rules Crim. Proc. rule 52(a), 18 U.S.C. *United States v. De Loach*, 504 F.2d 185, 1974 U.S. App. LEXIS 9849 (C.A.D.C. 1974).

In prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, unvariegated emphasis of word "they" by counsel for defendant in counsel's closing argument, in which he often re-

ferred to perpetrators as “they,” was not plain error prejudicing two codefendants where at least six men were in group which ransacked victim’s apartment at time of charged offenses. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

In prosecution of three defendants for homicide, request by counsel for one defendant that jury return lesser verdict than that charged in indictment was not prejudicial to another defendant who persistently denied any participation in offense, in view of subsequent instructions that evidence be considered separately as to each defendant and defendant’s failure to object to such remarks. D.C. Code 1961, § 22-2401. *Turberville v. U.S.*, 303 F.2d 411, 1962 U.S. App. LEXIS 6036 (C.A.D.C. 1962).

In prosecution for murder, where prosecution did not abide by the court’s ruling that it could not impeach its own witness and over repeated objections sought to convince jury that the witness had given a statement that was inconsistent with his sworn testimony at trial and made references to a prior statement of the witness not in evidence and improper conduct was renewed in summation to the jury, improper conduct of the prosecutor required reversal where conduct of the prosecutor might have affected the verdict on the issue of self-defense or the degree of homicide. D.C. Code 1951, §§ 14-104, 22-2401. *Belton v. U.S.*, 259 F.2d 811, 1958 U.S. App. LEXIS 4789 (C.A.D.C. 1958).

Prosecutor’s gang references were not excessive, and did not violate court order limiting references only to show identity and membership in a conspiracy, in trial of five defendants arising out of beating of homeless man following their eviction from nightclub and murder and assaults of passersby who tried to intervene; prosecutor in opening statement referred to government witness as a gang member and stated that one of the defendants flashed a sign at another group that resulted in a fight in nightclub and defendants’ eviction, investigator testified that he was assigned to a gang unit and concentrated on Hispanic gang activities, court sustained objection when prosecutor asked investigator about the informal nature of East coast gangs, and there was evidence that defendants’ association with each in a gang was an integral factor in their instant conspiracy to assault homeless man and passersby after they were evicted from nightclub. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Remarks by prosecutor, in opening statement describing stabbed passerby who intervened in beating of homeless man as a bloody corpse with his guts spilling out who died a premature and tragic death and stating that one of the kicks inflicted on passerby was so hard that second passerby did not believe anyone could survive it, and in closing argument describing the government witnesses’ testimony as screaming that defendants were guilty and accusing defendants of intimidating witnesses, to which defendants did not object at trial arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, did not constitute plain error; description of passerby’s injuries were supported by the evidence, remarks on witness intimidation was supported by the evidence, prosecutor was not prohibited from expressing reasonable indignation, and prosecution did not improperly vouch for government witnesses. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Prosecutor’s error in suggesting that prosecution witness, who had provided testimony at trial inconsistent with his prior statements, had lied to defense investigator out of fear of murder defendant, did not amount to harmful, reversible error, as comment could not have had effect on outcome of trial; witness testified that defendant was the shooter, another witness testified that defendant had admitted to committing the murder, and there was testimony that, before murder, defendant had threatened victim. *Simpson v. United States*, 877 A.2d 1045, 2005 D.C. App. LEXIS 328 (2005).

Prosecutor’s comment during rebuttal closing argument that prosecution witness’ grand jury testimony could be considered more reliable than his testimony at trial was not improper, in murder prosecution, as comment was merely recognition of possibility that, in this particular case, confrontation might not produce the more credible testimony; witness and defendant were good friends, and thus, witness might have been reluctant, in defendant’s presence, to say words which might send defendant to prison for remainder of his life. *Simpson v. United States*, 877 A.2d 1045, 2005 D.C. App. LEXIS 328 (2005).

Prosecutor’s comment during rebuttal closing argument that grand jury testimony of prosecution witness, who had provided testimony at trial inconsistent with his prior statements, was more credible than his in-court testimony, did not violate murder defendant’s right of confrontation; witness appeared at trial

and defendant was able to confront him face-to-face, while witness was on stand, he faced extensive cross-examination, during which he renounced his prior inculpatory statements, and, thus, cross-examination placed two irreconcilable accounts before jury. *Simpson v. United States*, 877 A.2d 1045, 2005 D.C. App. LEXIS 328 (2005).

Prosecutor's comments during rebuttal closing argument suggesting that prosecution witness, who had provided testimony at trial inconsistent with his prior statements, had lied to defense investigator out of fear of defendant constituted error, in prosecution for first-degree murder while armed; government had not elicited testimony that witnesses feared defendant and thus there was no factual basis for comments, and, given way prosecutor expressed it, no possible source of witness' fear other than defendant was readily inferable by jury. *Simpson v. United States*, 877 A.2d 1045, 2005 D.C. App. LEXIS 328 (2005).

Prosecutor's alleged expressions of personal opinion during closing arguments in prosecution for murder of one victim and assault of another victim, first, statement that it would be "ludicrous" to question assault victim's credibility on the basis asserted by defense counsel, i.e., assault victim's prior conviction for distribution of cocaine, and second, statement that defense counsel's suggestion to question assault victim's credibility on such basis was "troubling," did not so clearly prejudice defendant's substantial rights as to jeopardize the fairness and integrity of his trial, and thus, trial court was not required to intervene sua sponte; jury was instructed that closing arguments were not evidence and that jury was sole arbiter of witness credibility, and assault victim was not the only witness establishing defendant's guilt. *West v. United States*, 866 A.2d 74, 2005 D.C. App. LEXIS 9 (2005).

State's jury argument implying that witness's initial reluctance to identify murder defendants was due to his fear for his safety was fair comment on evidence and reasonable inference drawn therefrom; argument did not suggest that witness actually knew who the shooters were on night of incident, but failed to identify them only out of fear, and there was evidence showing that witness was thinking about his safety after the shooting and that he was not trying to determine the identities of the shooters. *Ebron v. United States*, 838 A.2d 1140, 2003 D.C. App. LEXIS 755 (2003), writ of certiorari denied by 543 U.S. 939, 125 S. Ct. 347, 160 L. Ed. 2d 247, 2004 U.S. LEXIS 6901, 73 U.S.L.W. 3236 (2004).

Defense counsel's failure to subpoena witness prior to murder trial did not suggest a lack of diligence that militated in favor of trial court's refusal to send marshals to secure witness's appearance, where witness was subpoenaed on

particular night, and defense counsel informed the court of witness's failure to appear at the next day court was in session. *Harris v. United States*, 834 A.2d 106, 2003 D.C. App. LEXIS 623 (2003).

Prosecutor's comment in opening statement at defendant's murder trial that the intruders entered the crack house through the back door was not improper, even though no evidence was presented at trial to show how the intruders gained access to the house, where the jury could infer that the intruders entered via the back door due to the fact that the front door was barricaded. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Prosecutor's comment in opening statement at defendant's murder trial that the hostages were unclear as to the amount of time that passed while they were being held hostage was not argumentative in that it set up excuses in advance for witness discrepancies that might have been brought out on cross-examination, where the statement did not assert or allude to any discrepancies, but rather noted that witnesses would not be able to give an accurate account of the time. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Prosecutor's characterization in opening statement at murder trial of police investigation as a "monumentally difficult task" due to the fact that the police had to focus on some false facts provided by defendant came close to the limits of permissible comment, but was not serious enough to warrant a mistrial; although the comment was a glorification of the investigation, the course of the investigation was not central to the government's case, and thus, the comment did not seriously prejudice the defense. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Prosecutor's comments in opening statement that evidence suggested that murders were drug-related and might have been related to drug debts resembled a closing argument more than an opening statement in that the comments were unduly argumentative and urged the jury to draw inferences based on the facts the prosecutor had recounted; however, the prejudice to the defense was slight given that the inferences argued by the prosecutor were ultimately supported by the evidence and that the prosecutor was attempting to explain in his opening how the police had zeroed in on defendant as a suspect. *Bailey v. United States*, 831

A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Prosecutor's description in opening statement in murder trial of alibis of two men who were originally arrested for the murders as being "airtight" was improper in that the strength of those alibis was a matter for the jury to decide; however, the comment was an isolated remark, and any resulting prejudice was negligible. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Prosecutor's comment in opening statement for the jurors to be attentive during the murder trial "out of respect for the three individuals who lost their lives" was an improper statement that appealed to the sympathy of the jury; however, in context the statement was not unduly prejudicial given that the prosecution only asked for the jurors' "undivided attention" and did not ask them to "send a message" to the defendant. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

The frequency and persistence of the prosecutor's leading questions in murder trial did not individually or collectively result in any meaningful prejudice to the defense; many of the questions concerned preliminary information that was not consequential, and the witnesses generally corroborated one another through their testimony, indicating that the prosecutor was not supplying the witnesses with false memories. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Prosecutor's recitation in closing argument during murder trial of the occupations and residences of individual jurors was improper and breached the anonymity that shields individual jurors from harassment; however, the statements were made during the rebuttal portion of a long closing argument, after a six-day trial, and they were not related to the evidence in the case, and thus, the impropriety was not severe enough to warrant reversal. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Cumulative effect of prosecutor's improper comments during murder trial did not warrant reversal; trial judge was very attentive to defense counsel's repeated objections, judge in-

structed jury that statements by lawyers during opening and closing arguments were not evidence, and government had a strong case against defendant given that he was seen the evening before the crime wearing the same clothing as one of the intruders, he possessed a gun similar to the one used in the crime, he made a 911 call with dubious information about the crime, and he was positively identified by one of the victims. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Any improper suggestion that defendants should present evidence if they had any, in prosecutor's closing argument comment that every defendant was entitled to strongest possible defense, was not substantially prejudicial in murder case; comment was single remark in lengthy trial and was made as prosecutor described advantages of justice system, prosecutor reminded jury immediately upon resuming argument that government had burden of proof at all times, court took strong corrective action by significantly expanding standard instructions on burden of proof, and government's case was strong. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Allegedly improper argument by prosecutor of aiding and abetting theory during rebuttal, following closing arguments in which none of the defendants directly addressed such a theory, did not require reversal of murder and armed robbery convictions; argument was not a surprise because government had addressed aiding and abetting theory in opening argument, and defense made rational judgment not to address that argument when it had opportunity to do so. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Prosecutor's improper comments during closing argument, highlighting emotional impact of testimony, reiterating testimony implying gang violence was motivation for murder, and exhorting the jury "as the conscience of the community," to find defendant guilty, did not substantially prejudice defendant's murder case; prosecutor did not expressly refer to gang violence as defendant's motive for killing victim, and did not request that the jury "send a message." *Plummer v. United States*, 813 A.2d 182, 2002 D.C. App. LEXIS 733 (2002).

Prosecutor should not have highlighted emotional impact of testimony during closing argument, particularly with respect to witness being "scared to death," should not have reiterated testimony implying gang violence was motivation for murder, and should not have appealed to "community conscience" during rebuttal argument. *Plummer v. United States*, 813 A.2d 182, 2002 D.C. App. LEXIS 733 (2002).

Trial court did not abuse its discretion in granting government's motion in limine in murder prosecution that prevented defendant from asking jury to infer that alleged perpetrator was source of unidentified DNA detected on knife blade used to stab victim, where no evidence in the record existed that alleged perpetrator sustained any injuries or that he was bleeding on the day of the stabbing that warranted an inference that the unidentified DNA could have been that of alleged perpetrator. *Umanzor v. United States*, 803 A.2d 983, 2002 D.C. App. LEXIS 390 (2002), writ of certiorari denied by 540 U.S. 871, 124 S. Ct. 198, 157 L. Ed. 2d 130, 2003 U.S. LEXIS 6952, 72 U.S.L.W. 3240 (2003).

Prosecutor's use of graphic photographs of murder victim during rebuttal, and prosecutor's accompanying comment that jury should return a verdict that it could "live with," were improper for purposes of prosecutorial misconduct, even though trial court had admitted the photographs into evidence, and photographs had been used in the trial; photographs were one and a half foot high and were described by the trial court as "gory," two jurors were compelled to divert their eyes because of photographs, prosecutor, in using photographs, was not making any point about ballistics or distances, and curative instruction was phrased in general terms, and gave a gentle caution to the jury that the nature of the charges should not affect the verdict, without specifically mentioning the prosecutor's objectionable use of the photographs and comment. *Chatmon v. United States*, 801 A.2d 92, 2002 D.C. App. LEXIS 359 (2002).

Defendant was not entitled to continuance of trial in prosecution for first-degree murder while armed, so that defense counsel could rework his opening statement, though the prosecution had not produced, until morning of trial, the transcript of grand jury testimony in which eyewitness had spoken of his desire for revenge against defendant; the testimony was not exculpatory evidence. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

Where murder defendant theorized that prosecution witness committed first three of four murders with which defendant was charged, prosecutor was entitled to respond in rebuttal closing argument by suggesting that only way one could believe that events transpired in that manner would be if witness had been secretly released from custody, killed fourth victim soon thereafter, gave murder weapon to government so that it could be planted on defendant, and returned to jail—none of which was supported by any evidence.

Crutchfield v. United States, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Assuming that undisclosed police report from another murder case was exculpatory, there was no reasonable probability that the result of trial would have been different, as was required to establish Brady violation, where, at best, assuming admissibility of evidence, it would have provided an additional motive for codefendant's involvement and solicitation of others to participate in homicide, and that additional motive, if disclosed, would not have cast doubt on Government's strong case. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Prosecutor's remarks, to effect that no evidence was adduced showing hostility of Government's key witness toward defendants or any reason for it, did not improperly shift burden of proof to murder defendants. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Comment by prosecutor in opening statement of prosecution for first-degree premeditated murder, asking jury the worth of human life, was not improper; comment was simply an attempt to focus the jury's attention on evidence from which they could infer defendant's state of mind. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

Comment by prosecutor in closing argument of prosecution for first-degree premeditated murder, asking jury the worth of human life, was rooted in the evidence and therefore permissible. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

Evidence is material and must be disclosed under Brady doctrine if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Black v. United*

States, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

There are three components of a true Brady violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the government, either willfully or inadvertently; and prejudice must have ensued. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Prosecutor did not engage in misconduct in presenting testifying shooter's hearsay statement, in first-degree murder prosecution of defendant who was second shooter involved in street shooting; on the contrary, it appeared that prosecutor had good faith, albeit erroneous, belief that statement was admissible to show state of mind. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Evidence did not support prosecutor's closing argument, in prosecution for first-degree murder of two children while armed, that defendant had murdered one victim in bedroom and then brought second victim into same room and killed him there; there was no evidence as to whether children were brought into bedroom separately or together or about order in which they had been assaulted. D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

Trial court's "on the spot" determination that prosecutor sought to draw legitimate inference from evidence when he argued that when child was brought into bedroom and killed with hammer before second child was brought into same room and killed was not reversible error; although prosecutorial speculation would have been impermissible even if it had been defended as "reasonable inference," there was ample evidence of premeditation and deliberation, so that it was unlikely that speculation influenced jury. D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

Prosecutor's closing argument to consider defendant before painting government witnesses "as to the low life that you might want to believe they are" was improper in prosecution for murder, burglary, and carrying of pistol without license. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *James v. United States*, 580 A.2d 636, 1990 D.C. App. LEXIS 223 (1990).

Prosecutor's representation of the evidence in prosecution for murder and homicide did not constitute misconduct. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Prosecutor's statement in closing argument in murder prosecution, to the effect that defendant got a gun from the trunk of his car before going to place where victim was kidnapped, was most likely an inadvertent, and under the circumstances, understandable mistake, despite fact that no such evidence was offered, where defendant's counsel had sought to obtain an admission from a witness that the witness had stated previously this very fact. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

In murder and kidnapping prosecution, prosecutor's comments to jury in closing argument as to statements made by one defendant to bystanders as he pushed murder victim into the car, including a statement that "signifying is worse than stealing," and "don't think this can't happen to you," did not fall within rule proscribing use of missing witness inference, where such statement was made to explain Government's lack of corroborative evidence, not to suggest there were witnesses whom defendants were afraid to call because their testimony would be adverse. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Prosecutor's remarks to jury in closing argument, in defendant's murder and kidnapping prosecution, regarding defendant's two prior murder convictions were not improper, where prosecutor's remarks came in the midst of a discussion concerning defendant's credibility, and where prosecutor correctly told jurors that they could consider defendant's prior convictions in determining whether he was telling the truth, but not to infer that "because he did those, he did these." D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Where defendant's objections to prosecutor's closing arguments in murder and kidnapping prosecution were not made at trial, Court of Appeals could reverse convictions only if there was misconduct so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Remarks made by prosecutor in closing argument in murder and kidnapping prosecution, reminding jurors of their obligation to avoid deciding the case on the basis of sympathy, and stating that defendant was not on trial for what she did all her life, but rather what she did on the day of the murder, were not so prejudicial as to jeopardize fairness of the trial. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v.*

United States, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Even if prosecutor's statement that there was no death penalty in the city anymore, made during closing argument in prosecution for felony-murder and first-degree burglary, was improper, any error was harmless, in view of government's strong case against defendants coupled with court's instructions that the jury disregard the comment and fact that jurors eventually were instructed by the court, at defense's request, on penalties for various offenses, including first-degree murder. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

Prosecutor's closing statement that defendant was exploiting his position at Narcotics Treatment Administration to make contacts in furtherance of his illegal drug activities did not constitute prejudicial error, notwithstanding that no evidence was introduced in homicide prosecution that defendant was actually using his position to make drug contacts, where considerable evidence had been introduced concerning extensive drug dealings of defendant and others and his counsel did not object to the remarks on the ground that they improperly suggested that his client was exploiting his position. D.C. Code § 22-2401. *Jackson v. United States*, 329 A.2d 782, 1974 D.C. App. LEXIS 331 (1974), writ of certiorari denied by 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74, 1975 U.S. LEXIS 2593 (1975).

Although evidence in homicide prosecution did not directly support prosecutor's opening assertion that victim had distributed drugs for defendant, defendant was not substantially prejudiced by such unproven allegation where the statement was not repeated in closing argument and the trial judge carefully instructed the jury that the statements of counsel were not evidence and that their recollection of the evidence controlled. D.C. Code § 22-2401. *Jackson v. United States*, 329 A.2d 782, 1974 D.C. App. LEXIS 331 (1974), writ of certiorari denied by 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74, 1975 U.S. LEXIS 2593 (1975).

Prosecutorial statements, in complex murder trial with numerous witnesses, to the effect that the government's version of the case was uncontested were not of such character that the jury would naturally and necessarily take them to be a comment on the failure of the accused to testify and court's allowing such statements did not amount to prejudicial error. D.C. Code § 22-2401. *Jackson v. United States*, 329 A.2d 782, 1974 D.C. App. LEXIS 331 (1974), writ of certiorari denied by 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74, 1975 U.S. LEXIS 2593 (1975).

Even if trial court's initial ruling restricting closing arguments to deny defense counsel opportunity to argue that defendant was mere bystander at scene of murder was error, it lost aura of harmful error when court did in fact allow substantial closing argument to be made as to the identity of the individual who in fact committed the murder. D.C. Code § 22-2401. *Jackson v. United States*, 329 A.2d 782, 1974 D.C. App. LEXIS 331 (1974), writ of certiorari denied by 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74, 1975 U.S. LEXIS 2593 (1975).

Collateral estoppel and res judicata.

Equal protection clause did not require that post-1970 collateral attack on 1963 District of Columbia first-degree murder conviction be treated as though brought under District of Columbia Court Reform and Criminal Procedures Act of 1970 and, thus, challenge to jury instructions was not required to be decided under local, rather than general federal, criminal law. 18 U.S.C. §§ 1254(1), 2255; D.C. Code 1973, § 11-101 et seq.; D.C. Code 1981, §§ 22-2401, 22-2403; U.S. Const. Amends. 5, 14. *U.S. v. Frady*, 102 S.Ct. 1584, 1982 U.S. LEXIS 95 (U.S. Dist. Col. 1982).

Acquittal of defendant on burglary charge, during original trial on felony murder and burglary charges, did not preclude, on collateral estoppel grounds, retrial of defendant on same charges, since jury's decision, convicting defendant on felony murder but acquitting him on predicate offense, was an inconsistent result. *Evans v. United States*, 987 A.2d 1138, 2010 D.C. App. LEXIS 13 (2010), writ of certiorari denied by 131 S. Ct. 1043, 178 L. Ed. 2d 867, 2011 U.S. LEXIS 932, 79 U.S.L.W. 3434 (U.S. 2011).

Under principle of collateral estoppel, defendant's acquittal of second-degree murder as lesser included offense of felony-murder barred second prosecution for second-degree murder as lesser included offense of premeditated murder, at least where second trial would involve same issues, and no more, that were presented to jury in first trial, that is, that acts of defendant caused death of victim and that defendant acted with malice and not in heat of passion. D.C. Code 1973, §§ 22-103, 22-2401, 22-2403, 22-3202; U.S. Const. Amend. 5. *Turner v. United States*, 459 A.2d 1054, 1983 D.C. App. LEXIS 355 (1983).

Conflict of interest, counsel for accused.

Trial court disqualification of defense counsel from defendant's first murder trial due to a conflict of interest was not an abuse of discretion; counsel sought to call a former client to testify that he had committed the murders that counsel's current client was charged with committing, and counsel's duties to his current and former clients were in conflict in that counsel

would have to elicit an inculpatory confession from former client in order to zealously represent current client, however counsel was prohibited from exploiting any privileged information or information gained during his representation of former client. *Freeman v. United States*, 971 A.2d 188, 2009 D.C. App. LEXIS 176 (2009).

—Adequacy of representation, counsel for accused.

Defendant was not prejudiced by any deficient performance of counsel in failing to introduce additional mitigation evidence during penalty phase of capital murder trial, and thus, defendant was not deprived of effective assistance of counsel on that basis; counsel presented substantial mitigating evidence, including testimony from nine witnesses regarding his terrible childhood and the abuse he suffered, and his religious conversion, some proposed additional mitigating evidence would have been cumulative, expert testimony or other mitigation evidence as to defendant's non-violent character or propensity would have triggered admission of evidence that defendant committed a prior, brutal murder, which counsel had been successful in excluding, but which trial court stated would be admissible for rebuttal purposes, and the aggravating evidence was overwhelming. *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 175 L. Ed. 2d 328, 2009 U.S. LEXIS 8117 (2009).

Assistance of defense counsel was not inadequate because of refusal, on tactical and other grounds, to cross-examine the Government's principal witness who was 15 years old at time of offense and 16 at time of trial, where it was apparent that had such witness testified further, there was a strong likelihood she would have testified to additional facts that would have supplied factual elements from which jury might have found both defendants guilty of first-degree felony murder or premeditated murder as well as armed robbery and robbery instead of only second-degree murder. D.C. Code §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Assistance of defense counsel in prosecution for first-degree murder and robbery was not inadequate for failure to cross-examine the Government's principal witness who was 15 years old at time of offense and 16 at time of trial which failure was attributable to a failure to interview the witness or do adequate research, where record disclosed that counsel had adequate knowledge of the facts, counsel were skilled and experienced, and their tactics were highly successful in that they secured acquittals on two first-degree murder charges for each defendant and also acquittals on both robbery

charges. D.C. Code §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Trial counsel's failure to object to use of stun belts on defendants during jury voir dire, request on-the-record findings justifying their use, or ask the court to consider other security options was not ineffective assistance of counsel; stun belts were not legally established as physical restraints requiring findings justifying their use, counsel's willingness to accept the use of stun belts so that defendant could participate in jury selection in jury room was a tactical decision, and there was no showing that stun belts affected jury's verdict or negatively impacted defendants' ability to participate in their defense. *Mungo v. United States*, 987 A.2d 1145, 2010 D.C. App. LEXIS 26 (2010), writ of certiorari denied by 131 S. Ct. 964, 178 L. Ed. 2d 793, 2011 U.S. LEXIS 20, 79 U.S.L.W. 3401 (U.S. 2011).

Defendant did not show that his trial counsel's performance in a murder prosecution was adversely affected by an actual conflict of interest based on codefendant's payment of the majority of counsel's legal fees, and thus defendant did not establish a Sixth Amendment violation, given that defendant did not object at trial, even though defendant argued that counsel advised him to not testify and that such advice appeared to serve codefendant's interest despite defendant's own contrary inclination; counsel's advice was not unsound, in that defendant's testimony, which would have included an admission that he owned and drove the car in which the murder weapons were found, would have been devastating to his defense. *McCraney v. United States*, 983 A.2d 1041, 2009 D.C. App. LEXIS 604 (2009).

Notwithstanding any waiver by defendant, trial court did not abuse its discretion in murder prosecution in finding a serious conflict of interest warranting disqualification of counsel who had represented defendant at first jury trial, where defendant had been indicted in connection with alleged jury tampering scheme with his wife during first trial, and defense counsel was going to be called as a witness because of alleged references by defendant's wife, during tape-recorded conversations with defendant, to discussions that wife had purportedly had with counsel about jury selection and jury deliberations. *Fortson v. United States*, 979 A.2d 643, 2009 D.C. App. LEXIS 378 (2009), amended by 2009 D.C. App. LEXIS 692 (D.C. Sept. 3, 2009).

Trial counsel's failure to withdraw as counsel during defendant's third murder trial, due an alleged conflict of interest based on counsel's prior representation of a witness, did not constitute deficient performance, and therefore was not ineffective assistance of counsel; only a

potential conflict of interest existed, there was no danger that defending defendant zealously would have caused counsel to rely upon confidences or secrets from his prior representation of witness, and the subject matters of the representations were unrelated. *Freeman v. United States*, 971 A.2d 188, 2009 D.C. App. LEXIS 176 (2009).

Decision by trial counsel, for defendant who was not identified by female eyewitness as one of the attackers, to not call witnesses who could allegedly impeach testimony of the eyewitness, did not prejudice defendant as required in order to establish ineffective assistance of counsel claim in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; defendant contended that impeaching eyewitness's account that she saw the attackers would also undermine the credibility of her testimony that the day after the assaults defendant threatened to kill her if she cooperated with police, but eyewitness was impeached for bias because her boyfriend cooperated with the prosecution and for her delay in reporting defendant's threat, jury believed eyewitness despite such impeachment, and it was unlikely that calling additional witnesses to impeach eyewitness would have swayed the jury otherwise. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Decision by trial counsel, for defendant who was not identified by female eyewitness as one of the attackers, to not call witnesses who could allegedly impeach the eyewitness, was a reasonable trial strategy and thus did not constitute deficient performance, as required in order to establish an ineffective assistance of counsel claim in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; defendant contended that impeaching eyewitness's account that she saw the attackers would also undermine the credibility of eyewitness's testimony that the day after the assaults defendant threatened to kill her if she cooperated in police investigation, but defendant's counsel and the attorneys for the other defendants concluded after interviewing the witnesses that such witnesses would not be credible and would likely hurt the defendants more than help. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S.

975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Even if counsel's performance was deficient in pressing codefendant on cross-examination on whether he had seen his client attack passerby, which resulted in testimony that client hit passerby in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, counsel's client was not prejudiced as required for an ineffective assistance claim, as counsel quickly recovered by impeaching codefendant with grand jury testimony in which codefendant did not identify client as one of the attackers, and two other government witnesses had identified client as participating in the attack on passerby. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Risk that defense counsel took during cross-examination of codefendant by pressing codefendant on whether counsel's client was present at scene of attack, which resulted in codefendant testifying that he saw client hit passerby who subsequently died from stab wounds, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, fell within the range of reasonable conduct and thus did not constitute deficient performance as required for an ineffective assistance claim; codefendant had not identified counsel's client as one of the attackers in codefendant's grand jury testimony, codefendant had not identified counsel's client as one of the attackers in his trial testimony until counsel's cross-examination, and it was not unreasonable for counsel to suspect that codefendant had not seen client attack passerby and take calculated risk in pressing codefendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Trial counsel's decision not to call witnesses who allegedly would have provided exculpatory testimony for his client was a reasonable strategic choice and thus did not constitute ineffective assistance, in trial of five defendants including counsel's client arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, where counsel interviewed the witnesses, proffered testimony of two witnesses who were interviewed more than once repeatedly changed with one

witnesses parroting the other, proffered testimony of such two witnesses even if true would have placed defendant at the scene of the assaults, and two other witnesses, who would have allegedly impeached testimony of government witness, had provided inconsistent statements to the police, and calling such witness posed the risk of making government witness more credible. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Defendant did not show that he was prejudiced by defense counsel's alleged failure to pursue six supposed exculpatory witnesses and, thus, was not denied effective assistance of counsel in murder prosecution; assuming that those witnesses existed, government's case against defendant included testimony about extended drug dispute between defendant and victim before murder, statements by defendant of his intention to kill victim, eyewitnesses to murder, admissions by defendant after murder, and a ballistics match between bullet that killed victim and pistol found in defendant's pocket only a few days after murder. *Gamble v. United States*, 901 A.2d 159, 2006 D.C. App. LEXIS 425 (2006).

Counsel's failure to call alibi witness at retrial for murder and weapons who, based on her testimony at first trial, would have testified that she heard "popping sounds" which may have come from her television, did not prejudice defendant, as required to support claim of ineffective assistance of counsel, where witness's proposed testimony as to source of gunshots did little to rebut statements of numerous witnesses who observed live gunshots in front of building. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Defendant's general allegation that counsel failed to share certain discovery documents with him, without more, did not state claim for ineffective assistance of counsel, in trial for murder and weapons offenses. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Allegation that counsel was ineffective for not being prepared for retrial for murder and weapons offenses because he assumed that second trial would be "mirror image" of first trial was not supported by record; major difference in second trial was that co-defendant from first trial testified at second trial, and counsel was

adequately prepared for co-defendant's testimony. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

Defense counsel's failure to make reasonable investigation into claim that murder defendant's statement was product of unwarned custodial interrogation constituted deficient conduct for purposes of claim of ineffective assistance. *United States v. Little*, 851 A.2d 1280, 2004 D.C. App. LEXIS 337 (2004).

Defense counsel's failure to make reasonable investigation into claim that murder defendant's incriminating statement was product of unwarned custodial interrogation prejudiced defendant, and thus constituted ineffective assistance; only two witnesses testified at trial who could identify defendant as being present when victim was killed, both witnesses were possible accomplices and had incentives to shape their testimony to government's liking, or so jury could have reasonably believed, and thus there was reasonable probability that, but for counsel's deficient performance, result of proceeding would have been different. *United States v. Little*, 851 A.2d 1280, 2004 D.C. App. LEXIS 337 (2004).

Defense counsel was not ineffective in failing to cross-examine witness in murder trial regarding the identification of defendant; discrepancies in witness testimony might have weakened witness's identification of defendant, but they did not undermine the identification to such a degree that there was a significant chance of a different outcome at trial given the other evidence at trial. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Defense counsel was not ineffective for failing to cross-examine several government witnesses at murder trial regarding their bias against defendant, where enough information regarding potential bias had been brought out in direct examination. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Defense counsel was not ineffective in failing to question witness about whether murder victims were indebted to other individuals besides defendant, where such evidence was not admissible. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Defense counsel was not ineffective in failing to request a second-degree murder instruction

for jury; evidence was sufficient to support defendant's conviction for felony murder. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Defendant failed, in moving on ineffective assistance grounds to vacate convictions for offenses including murder and armed robbery, to demonstrate that trial counsel performed deficiently in failing to present alibi witnesses; trial counsel hired investigators to follow up on all leads as to alibi witnesses, there were many inconsistencies among alibi witnesses and defendant as to defendant's whereabouts on night of charged incident, and defendant admitted to counsel that he was present at crime scene when told that his fingerprint was on magazine of gun found at scene of shootings. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Any deficiency in trial counsel's performance in failing to present alibi witnesses in murder and armed robbery prosecution was not prejudicial and thus did not support ineffective assistance claim, particularly considering government's strong case against defendant and the many defects in his claimed alibi defense. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Defendant failed to establish that trial counsel was ineffective due to counsel's failure to contact a defense alibi witness, in prosecution for murder; defense counsel testified that he remembered defendant's case and denied that defendant had ever informed him of the identity of an alibi witness, and appellate counsel for defendant informed the court that the alibi witness was available to testify but appellate counsel and defendant agreed that they were not planning on calling her to testify. *Newman v. United States*, 810 A.2d 918, 2002 D.C. App. LEXIS 671 (2002), amended by 824 A.2d 40, 2003 D.C. App. LEXIS 468 (D.C. 2003).

Any deficiency on part of trial counsel in failing to report that a juror was sleeping did not prejudice defendant in murder prosecution and thus did not support claim of ineffective assistance of counsel; chances were slim that juror, who dozed off for no more than five minutes, would have missed testimony so vitally important that failing to hear it not only would have swayed the juror's decision but enabled that juror also to sway the decisions of the other eleven jurors who found defendant guilty. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

Defense counsel's questioning of detective in murder prosecution, which led detective to

state that a witness had identified defendant from a suggestive photographic array but believed defendant had longer hair, and led detective to state that, upon being asked by prosecutor, that defendant admitted he had cut his hair subsequent to commission of robbery, both of which had been deemed inadmissible at pretrial, was deficient, for purposes of ineffective assistance of counsel claim; introduction of witness's identification eviscerated the defense strategy to isolate and create doubt about the government's key witness against defendant. *Chatmon v. United States*, 801 A.2d 92, 2002 D.C. App. LEXIS 359 (2002).

Defendant's claim that trial counsel was ineffective, in prosecution for first-degree murder while armed, in failing to call an expert witness to refute witness' claim that witness could identify co-defendants' faces in the flash of gunfire, was vague and conclusory, and thus, defendant was not entitled to a hearing on the claim; defendant did not submit any affidavit, nor even an unsworn statement, summarizing the expected testimony of such an expert. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

Even assuming that trial counsel performed deficiently by failing to state the reasons for objecting to detective's "opinion" testimony explaining why detective had not believed witness' initial statements that he had not seen the shooting, defendant was not prejudiced, in prosecution for first-degree murder while armed; the prosecutor articulated why the question was proper, and the judge understood the reasoning behind counsel's objection. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

Defendant was not prejudiced by counsel's failure to call paramedic who claimed to have seen two other men run from murder scene and drive away and, thus, was not denied effective assistance of counsel; although defendant claimed that paramedic's testimony would have corroborated another witness's similar prior statements by undermining credibility of his trial testimony, defendant disclaimed any intent to use paramedic's testimony to support a third-party perpetrator defense, and thus, paramedic's testimony would have had minimal benefit to defendant's case. *Walls v. United States*, 773 A.2d 424, 2001 D.C. App. LEXIS 120 (2001), writ of certiorari denied by 534 U.S. 1149, 122 S. Ct. 1112, 151 L. Ed. 2d 1006, 2002 U.S. LEXIS 1111, 70 U.S.L.W. 3516 (2002).

Trial counsel's failure to secure testimony of eyewitness who had testified unequivocally,

and apparently with credibility, in prior proceeding that defendant was not involved in the murder was ineffective assistance of counsel, even if defendant, who had been subject of pretrial incarceration for well over three and one-half years, apparently decided to go ahead without eyewitness. U.S.C. Const.Amend. 6; D.C. Code 1981, §§ 22-2401 to 22-3202. *Fredrick v. United States*, 741 A.2d 427, 1999 D.C. App. LEXIS 277 (1999).

— **Number of counsel, counsel for accused.**

Defense counsel's prior representation of client who was suspected of involvement in murders for which defendant stood trial did not create "actual conflict of interest," where prior representation concerned unrelated criminal charges, client was not a defendant at defendant's trial, there was no indication that counsel was ever in a position to use confidential information obtained from client in defendant defense, and client was not called as witness. U.S. Const.Amend. 6; D.C. Code 1981, §§ 22-2401, 22-3202. *Veney v. United States*, 738 A.2d 1185, 1999 D.C. App. LEXIS 203 (1999).

Fact that there was not more extensive plea bargaining did not demonstrate that defense counsel's representation of defendant was actually affected by alleged conflict of interest arising from alleged payment of counsel's fees for representing defendant by counsel's former client who was suspected of involvement in murders for which defendant stood trial, and thus, no violation of right to counsel free from conflict occurred; plea bargaining negotiations did occur, it appeared from record that it was defendant who did not follow through with regard to plea bargain, and counsel was concerned over collateral litigation concerning terms of any oral plea offer. U.S. Const.Amend. 6; D.C. Code 1981, §§ 22-2401, 22-3202. *Veney v. United States*, 738 A.2d 1185, 1999 D.C. App. LEXIS 203 (1999).

Defense counsel's failure to pursue "blame-shifting" strategy did not demonstrate that counsel's representation of defendant was actually affected by alleged conflict of interest arising from alleged payment of counsel's fees for representing defendant by counsel's former client who was suspected of involvement in murders for which defendant stood trial, and thus, no violation of right to counsel free from conflict occurred, where, if counsel pursued strategy that highlighted former client's involvement in murders, that would have drawn defendant further into chain of inferences created by Government tending to show that defendant conspired with former client to kill victim. U.S. Const.Amend. 6; D.C. Code 1981, §§ 22-2401, 22-3202. *Veney v. United States*, 738 A.2d 1185, 1999 D.C. App. LEXIS 203 (1999).

Defense counsel's closing argument addressing former client's alleged involvement in mur-

ders did not demonstrate that counsel's representation of defendant was actually affected by alleged conflict of interest arising from former client's alleged payment of counsel's fees for representing defendant, and thus, no violation of right to counsel free from conflict occurred, where Government presented evidence connecting defendant to former client and argued that former client was involved in murders, and thus, counsel had to address former client's involvement in murders in closing to be persuasive to jury. U.S. Const.Amend. 6; D.C. Code 1981, §§ 22-2401, 22-3202. *Veney v. United States*, 738 A.2d 1185, 1999 D.C. App. LEXIS 203 (1999).

Defense counsel's cross-examination of government witnesses did not demonstrate that counsel's performance was actually affected by alleged conflict of interest arising from alleged payment of counsel's fees for representing defendant by counsel's former client who was suspected of involvement in murders for which defendant stood trial, and thus, no violation of right to counsel free from conflict occurred, where counsel highlighted discrepancies between police officers' identifications and their grand jury testimony, counsel emphasized confusing circumstances surrounding shootings, and counsel attempted to discredit government witnesses. U.S. Const.Amend. 6; D.C. Code 1981, §§ 22-2401, 22-3202. *Veney v. United States*, 738 A.2d 1185, 1999 D.C. App. LEXIS 203 (1999).

Defense counsel's failure to call former client as witness did not demonstrate that counsel's representation of defendant was actually affected by alleged conflict of interest arising from alleged payment of counsel's fees for representing defendant by former client who was suspected of involvement in murders for which defendant stood trial, and thus, no violation of right to counsel free from conflict occurred, given that former client had Fifth Amendment privilege that he would surely have invoked. U.S. Const.Amend. 5, 6; D.C. Code 1981, §§ 22-2401, 22-3202. *Veney v. United States*, 738 A.2d 1185, 1999 D.C. App. LEXIS 203 (1999).

Constitutional rights of accused.

Equal protection clause did not require that post-1970 collateral attack on 1963 District of Columbia first-degree murder conviction be treated as though brought under District of Columbia Court Reform and Criminal Procedures Act of 1970 and, thus, challenge to jury instructions was not required to be decided under local, rather than general federal, criminal law. 18 U.S.C. §§ 1254(1), 2255; D.C. Code 1973, § 11-101 et seq.; D.C. Code 1981, §§ 22-2401, 22-2403; U.S. Const.Amend. 5, 14. *U.S. v. Frady*, 102 S.Ct. 1584, 1982 U.S. LEXIS 95 (U.S. Dist.Col. 1982).

Defendant accused of murdering police officer is not entitled to jury free of policemen's relatives. U.S. Const. Amend. 6; D.C. Code § 22-2401. *United States v. Caldwell*, 543 F.2d 1333, 1974 U.S. App. LEXIS 5417 (C.A.D.C. 1974), writ of certiorari denied by 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97, 1976 U.S. LEXIS 1234 (1976).

Reindictment of defendants for first-degree murder, after their first trial on charge of second-degree murder had ended with a declaration of mistrial granted on motion of defense counsel, denied defendants due process of law, absent any showing of justification for the increase in the degree of the crime charged. D.C. Code §§ 22-2401, 22-2403. *United States v. Jamison*, 505 F.2d 407, 1974 U.S. App. LEXIS 6511 (C.A.D.C. 1974).

That District of Columbia felony murder statute was broader than coverage of federal felony murder statute did not deny equal protection to accused who was prosecuted under such D.C. statute for murder committed during commission of offense of rescuing a federal prisoner. D.C. Code § 22-2401; 18 U.S.C. § 752(a). *United States v. Greene*, 489 F.2d 1145, 1973 U.S. App. LEXIS 7659 (C.A.D.C. 1973).

District of Columbia statute which requires accused to prove insanity defense by preponderance of evidence did not deny due process to defendant who was accused of violation of D.C. statute pertaining to felony murder, in that sanity was not an element of such offense. D.C. Code §§ 22-2401 et seq., 24-301 et seq.; U.S. Const. art. 1, § 8, cl. 17. *United States v. Greene*, 489 F.2d 1145, 1973 U.S. App. LEXIS 7659 (C.A.D.C. 1973).

Defendant's convictions for robbery and felony-murder would not be deemed secured through information obtained in violation of rule requiring prompt arraignment, or in violation of due process and speedy trial amendments to the federal Constitution, where defendant was presented in court on day he surrendered, no confession by defendant was introduced against him, evidence established all basic elements of the crimes, and defendant took the stand and described his participation in the robbery and fatal shooting. U.S. Const. Amends. 5, 6; D.C. Code 1951, § 22-2401. *Coleman v. U.S.*, 295 F.2d 555, 1961 U.S. App. LEXIS 3632 (C.A.D.C. 1961).

The due process of law clause of Fifth Amendment would be invokable if authorities in District of Columbia charged with duty of selecting jurors had systematically excluded Negroes from jury panel in prosecution of three Negroes jointly indicted on charge of murder in perpetration of robbery. D.C. Code 1940, § 22-2401; U.S. Const. Amend. 5. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

Fact that 19 members of jury panel selected in prosecution of three Negroes jointly indicted on charge of murder in perpetration of robbery were members of Negro race indicated that Negroes had not been systematically excluded from panel in violation of Fifth Amendment, and defendants could not complain that thereafter Government peremptorily challenged every Negro juror who had been called to sit in the panel. D.C. Code 1940, § 22-2401; U.S. Const. Amend. 5. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

Trial court admission of testimony from police detective that during murder investigation unidentified witnesses informed him that co-defendant was with defendant on the night that victim was murdered violated the confrontation clause; the testimony was very damaging to co-defendant, and co-defendant had no opportunity to confront or cross-examine the witnesses who made the statements. *Randolph v. United States*, 882 A.2d 210, 2005 D.C. App. LEXIS 464 (2005).

Profoundly hearing-impaired defendant knowingly, intelligently, and voluntarily waived his Miranda rights prior to confessing to two murders; defendant had voluntarily approached police and was then given his full Miranda rights at police headquarters through skilled interpreters trained in giving Miranda rights in American Sign Language, defendant was a college student who readily understood English, and he signed a PD-47 waiver form. *Mesa v. United States*, 875 A.2d 79, 2005 D.C. App. LEXIS 256 (2005).

Exclusion of children when jury was in the courtroom was not a denial of defendant's right to public trial, in prosecution for murder; the courtroom was not closed to the general public, even assuming the trial court excluded all children instead of specific children. *McConaughy v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

In order to overcome the defendant's right to object to the slain declarant's statements on confrontation clause grounds, the government need only establish by a preponderance of the evidence that the defendant procured the declarant's unavailability and that the declarant qualifies as a witness. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

In prosecution for first-degree felony-murder while armed, second-degree burglary while armed, carrying a pistol without a license, second-degree burglary and grand larceny, pre-trial publicity concerning defendant's prior arrests and criminal history and cache of property recovered from defendant's home that had probable connections with similar offenses was not of such an extreme nature as to deprive defendant of a fair trial. D.C. Code 1981, §§ 22-1801(b), 22-2201, 22-2401, 22-3202, 22-3204;

U.S. Const. Amend. 6. *Welch v. United States*, 466 A.2d 829, 1983 D.C. App. LEXIS 484 (1983).

Construction with federal law.

The District of Columbia is not within the "special maritime and territorial jurisdiction of the United States" within meaning of federal homicide statute, and murder prosecution and sentence predicated upon acts assertedly committed within District of Columbia is properly under district statute and not federal statute. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 5; Fed. Rules Crim. Proc. rules 25, 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Habeas petitioner's evidence of actual innocence, coming by way of affidavits that placed petitioner across town at around the time of victim's murder, did not make it more likely than not that no reasonable juror would have convicted petitioner of murder, as required to permit federal court to entertain habeas action despite the petitioner's failure to show cause for procedural default; none of the affiants stated that he or she was with petitioner for any extended period of time, and petitioner arguably could have committed the offenses for which he was convicted and traveled across town afterwards. *Adams v. Middlebrooks*, 810 F.Supp.2d 119, 2011 U.S. Dist. LEXIS 101407 (2011).

Federal murder-for-hire statute did not vest district court with jurisdiction over defendants charged jointly under local District of Columbia criminal code provisions with conspiracy and attempted first-degree murder, where defendants' alleged actions concerned a single, isolated criminal venture, involving a \$200 contract to kill which had no connection with organized crime activity. 18 U.S.C. § 1952A; D.C. Code 1981, §§ 22-103, 22-2401. *United States v. Dickson*, 645 F. Supp. 727, 1986 U.S. Dist. LEXIS 19445 (1986), reversed by 816 F.2d 751, 259 U.S. App. D.C. 447, 1987 U.S. App. LEXIS 5054 (1987).

Counsel for accused.

— Deprivation or allowance of counsel.

Defendant was not denied his Sixth Amendment right to assistance of counsel because the court's refusal to admit defendant's statements at start of his testimony regarding what he had stated to police officer shortly after the murder made it impossible for the defendant to present his case "in the best light legally possible." D.C. Code §§ 22-2401, 22-2403; U.S. Const. Amend. 6. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

Police interrogation of defendant, who was represented by counsel on charge of assault with intent to kill while armed, about unrelated

murder of corrections officer did not violate defendant's Sixth Amendment right to counsel, though he was subsequently charged with the murder; defendant's right to counsel did not attach, as no murder prosecution was initiated against him at the time of the interrogation. *Sweet v. United States*, 756 A.2d 366, 2000 D.C. App. LEXIS 118 (2000).

That defendant attempted to obtain a deal that would dismiss charge of assault with intent to kill while armed, for which he was represented by counsel, in exchange for aiding police in murder investigation did not create an exception to rule that right to counsel attached upon commencement of prosecution, and thus, interrogation regarding the murder was not precluded on Sixth Amendment grounds, though defendant was charged with the murder after the interrogation, where there was no known relationship between the assault and the murder at the time of questioning. *Sweet v. United States*, 756 A.2d 366, 2000 D.C. App. LEXIS 118 (2000).

Where defendant was described by companions and another on night of murder as tall man with plaid shirt and where eyewitness to murder described gunman as taller of two assailants and as wearing a plaid shirt, court's restricting defense counsel from arguing that defendant was not the gunman did not amount to denial of the effective assistance of counsel or constitute prejudicial error. D.C. Code § 22-2401. *Peoples v. United States*, 329 A.2d 446, 1974 D.C. App. LEXIS 324 (1974).

Defenses.

— Aggression or provocation to attack, defenses.

Generally, defense of self-defense is not available to one who provokes difficulty. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

One cannot support a claim of self-defense by a self-generated necessity to kill; right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Fact that deceased struck the first blow, fired the first shot or made the first menacing gesture does not legalize a self-defense claim if in fact claimant was the actual provoker. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation; only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Notwithstanding that deceased provoked the original quarrel, and accused cannot, after that quarrel has ended or deceased has withdrawn, invoke the right of self-defense in a subsequent difficulty which he himself causes or brings on. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

In a murder case in order to admit of the application of the law of self defense, it must be shown that the assault upon the defendant was imminently perilous. If it appears that the conflict was in any way premeditated by the defendant, that defense can no longer be set up. He must show that he was attacked and that he had good reason to believe that he was in imminent peril of his life or of great bodily harm. *Hopkins v. U.S.*, 4 App.D.C. 430, 1894 U.S. App. LEXIS 3349 (1894).

The plea of self-defense is not available to one who is not wholly free from fault in bringing on the difficulty. *Hopkins v. U.S.*, 4 App.D.C. 430, 1894 U.S. App. LEXIS 3349 (1894).

Self-defense is not available to a defendant who deliberately puts himself in position where he has reason to believe that his presence will provoke trouble, even if his purpose in putting himself in that position was benign. *Sams v. United States*, 721 A.2d 945, 1998 D.C. App. LEXIS 229 (1998), writ of certiorari denied by 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 928, 2000 U.S. LEXIS 832, 68 U.S.L.W. 3479 (2000), writ of certiorari denied by 531 U.S. 1015, 121 S. Ct. 575, 148 L. Ed. 2d 492, 2000 U.S. LEXIS 7864, 69 U.S.L.W. 3363 (2000).

Defendant cannot claim self-defense in homicide case, where defendant was the aggressor, or if he or she provoked the conflict. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant in homicide case is not precluded from asserting imperfect self-defense even if defendant placed himself in position likely to provoke the trouble. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant cannot raise legitimate self-defense claim when he went out of his way to look for trouble. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

On occasion, where defendant claims self-defense, defendant's subjective belief of danger can be determined from objective circumstances of killing; it is possible, therefore, for defendant to rely on self-defense, based on circumstantial evidence of reasonable fear of imminent serious bodily injury, without defendant's own testimony. *Gray v. United States*, 589 A.2d 912, 1991 D.C. App. LEXIS 80 (1991).

— Apprehension of danger, defenses.

The essence of self-defense situation is a reasonable and bona fide belief of the imminence of death or great bodily harm, and heat of passion may or may not be present. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

Before any one is justified in taking life under the apprehension that he is in danger of his own life or of serious bodily harm from the violence of another, it must appear that he had a reasonable right to believe from all the facts and circumstances presented to his mind that he was in such danger. The test is not the actual belief of the accused, but whether a reasonably prudent person, similarly situated, would have believed that he was in such danger. *Sacrin v. U.S.*, 38 App.D.C. 371, 1912 U.S. App. LEXIS 2136 (1912).

Use of deadly force is lawful only if the user actually and reasonably believes, at the time such force is used, that he or she (or a third person) is in imminent peril of death or serious bodily harm. *Smith v. District of Columbia*, 882 A.2d 778, 2005 D.C. App. LEXIS 472 (2005).

Defendant is justified in the use of deadly force in self-defense if he actually and reasonably believed at the time of the incident that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against the assailant. *Herbin v. United States*, 683 A.2d 437, 1996 D.C. App. LEXIS 188 (1996).

In order to make out legally cognizable claim of self-defense, accused using deadly force must at time of incident actually believe and reasonably believe that he is in imminent peril of death or serious bodily harm. *Binion v. United States*, 658 A.2d 187, 1995 D.C. App. LEXIS 94 (1995).

To be acquitted for self-defense in homicide case, defendant must have had actual belief both that he or she was in imminent danger of serious bodily harm or death, and that use of deadly force was needed in order to save himself or herself, and both of those beliefs must be objectively reasonable. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

To invoke legitimate claim of self-defense, defendant must satisfy the following conditions: there was actual or apparent threat; threat was unlawful and immediate; defendant

honestly and reasonably believed that he was in imminent danger of death or serious bodily harm; and defendant's response was necessary to save himself from danger. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Defendant must have honestly and reasonably believed that he was in imminent danger of death or serious bodily harm in light of surrounding circumstances to be entitled to self-defense instruction in homicide prosecution. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

To support self-defense claim, accused may show prior acts of violence committed by victim about which accused knew; such evidence is relevant to reasonableness of accused's fear of victim. *Harris v. United States*, 618 A.2d 140, 1992 D.C. App. LEXIS 316 (1992).

Right of self-defense, and especially degree of force victim is permitted to use to prevent bodily harm, is premised substantially on victim's own reasonable perceptions of what is happening; victim's perceptions may include, for example, an enhanced sense of peril based on personal knowledge that attacker has committed prior acts of violence. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Victim's personal perceptions are so significant that they may justify use of reasonable, including deadly, force in self-defense even though it may afterwards have turned out that appearances were false. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Victim's subjective perceptions are prime determinative of right to use force, and degree of force required, in self-defense, subject only to constraint that such perceptions be reasonable under the circumstances. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

— Defense of another, defenses.

For a viable defense of deadly force to exist, the evidence must permit a reasonable inference that: (1) there was an actual or apparent threat; (2) the threat was unlawful and immediate; (3) the defendant honestly and reasonably believed that the third party was in imminent danger of death or serious bodily harm; and (4) the defendant's response was necessary to save the third party from the danger. *Fisher v. United States*, 779 A.2d 348, 2001 D.C. App. LEXIS 180 (2001), writ of certiorari denied by 534 U.S. 1095, 122 S. Ct. 844, 151 L. Ed. 2d 722, 2002 U.S. LEXIS 72, 70 U.S.L.W. 3428 (2002).

A defender is entitled to use a degree of force reasonably necessary to protect another person reasonably believed to be in imminent danger of death or serious bodily harm. *Fisher v.*

United States, 779 A.2d 348, 2001 D.C. App. LEXIS 180 (2001), writ of certiorari denied by 534 U.S. 1095, 122 S. Ct. 844, 151 L. Ed. 2d 722, 2002 U.S. LEXIS 72, 70 U.S.L.W. 3428 (2002).

Intervenor defending third person may use degree of force reasonably necessary to protect third person, as judged by intervenor's, and not third person's, reasonable perception of the facts. *Graves v. United States*, 554 A.2d 1145, 1989 D.C. App. LEXIS 37 (1989).

Right to use force in defense of a third person is predicated upon that other person's right of self-defense. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

When use of force in defense of a third person is justified, intervenor is entitled to use degree of force reasonably necessary to protect other person on basis of facts as intervenor, not victim, reasonably perceives them. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Although trier of fact will find relevant victim's own perceptions in attempting to determine what intervenor's perceptions actually and reasonably were, determining whether, and to what degree, force is reasonably necessary to defend a third person under attack ultimately must focus on intervenor's, not on victim's reasonable perceptions of situation. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Where defendant could have saved third person being beaten by victim by striking victim with blunt side of hatchet somewhere other than on victim's head, with less damaging results, defendant, who allegedly struck victim 13 times on head with sharp side of hatchet, used excessive force; it was not necessary for defendant to use amount of deadly force that was likely to kill victim. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

In view of fact that defendant's companion could not justifiably return the fire of a security guard who was attempting to prevent a felony and who had been fired on first, defendant likewise had no right to shoot and, therefore, defendant charged with assault with intent to kill while armed was not entitled to an instruction of the defense of another based on theory that he drew his own gun and shot at security guard only after his companion fell to the ground and the security guard continued to fire. D.C. Code §§ 22-501, 22-502, 22-3202. *Taylor v. United States*, 380 A.2d 989, 1977 D.C. App. LEXIS 284 (1977).

— Defense of habitation, defenses.

"Home" as used in connection with legal principle that man has right to repel intruder, particularly one bent on violence, is not term of art, but is a simple one of common understand-

ing. *Byrd v. U.S.*, 312 F.2d 357, 1962 U.S. App. LEXIS 3286 (C.A.D.C. 1962).

— Defense of property, defenses.

Deliberate killing of another to prevent mere trespass is murder. *Holmes v. U.S.*, 11 F.2d 569, 1926 U.S. App. LEXIS 2541 (1926).

— Duty to retreat, defenses.

Under District of Columbia law, one seeking to justify homicide on ground of self-defense must have retreated to the wall before using deadly force. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Self-defense doctrine of retreat to the wall was not intended to enhance risk to the innocent; its proper application does not require a faultless victim to increase his assailant's safety at the expense of his own; the faultless victim can stand his ground and use deadly force otherwise appropriate if the alternative were perilous or if to him it reasonably appeared to be. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

The self-defense doctrine of retreat to the wall recognizes the principle that there is no duty to retreat from an assault producing an imminent danger of death or grievous bodily harm. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One who through no fault of his own is attacked in his home is under no duty to retreat therefrom before he may use deadly force in his self-defense. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Any rule of no retreat which may protect an innocent victim of affray would, like other incidents of the forfeited right of self-defense, be unavailable to the party who provokes or stimulates the conflict; the "castle" doctrine of no retreat from attack in one's home can be invoked only by one who is without fault in bringing the conflict on. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Where homicide defendant could not be found without fault in bringing conflict on, in that following prior verbal exchange he had obtained pistol from his house and, while dis-

playing weapon by back fence, dared victim to come in and threatened to kill victim if he did, defendant, who asserted that fatal shooting was in self-defense but who did not retreat when victim came at him with lug wrench, was not so blameless that he was entitled to fall back on the "castle" doctrine of no retreat before resorting to use of deadly force in repelling attack on one in his home. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Before a person can avail himself of the plea of self-defense against a charge of homicide, he must do everything in his power consistent with his safety to avoid the danger, and avoid the necessity of taking life. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

A defendant claiming the right of self-defense is not required to retreat, when he is assailed in a place where he has a right to be, unless by so doing an affray can be clearly avoided. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

The right of a defendant when in imminent danger to take life does not depend upon whether there was an opportunity to escape. One under such circumstances is not compelled to step aside or flee. *Marshall v. U.S.*, 45 App.D.C. 373, 1916 U.S. App. LEXIS 2700 (1916).

Mortal wounding of person by another, prevented from retreating by fierceness of former's attack, is justifiable homicide. *U.S. v. Herbert*, 26 F.Cas. 287, 1856 U.S. App. LEXIS 615 (1856).

A man is bound to retreat from the moment danger becomes apparent, unless, from the fierceness of the attack, he is prevented from doing so. *U.S. v. Herbert*, 26 F.Cas. 287, 1856 U.S. App. LEXIS 615 (1856).

Whether "castle doctrine" required one who was attacked in his home, through no fault of his own, by invitee whose invitation was withdrawn, to retreat was unresolved under current law, and thus court's failure to instruct on that issue was not plain error. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

— In general.

One has the right to resist unlawful arrest, but may use only reasonable force in doing so, and such right to resist arrest does not extend to killing the officer, though it may reduce a homicide from murder to manslaughter. *Abrams v. U.S.*, 237 F.2d 42, 1956 U.S. App. LEXIS 2857 (C.A.D.C. 1956).

Officer did not have reasonable, articulable suspicion that defendant had been involved in

criminal activity relating to pursue snatching or shooting to seize defendant; at time defendant he was seized, only information known by officer was that he knew shooting occurred at particular location, that there had been robbery at a store, that employees of store had seen two black males wearing a black and yellow T-shirts get on a bus going westbound on particular street, that defendant was last person to get off bus that had been stopped, that several black males were on the bus but none wore a yellow or black T-shirt, and that defendant had left area of bus once and had returned, and walked away again and had come back. *United States v. McMillian*, 898 A.2d 922, 2006 D.C. App. LEXIS 215 (2006).

It is every man's business to foresee what wrong or mischief may happen from that which he does with an ill-intention, and it shall be no excuse for him to say that he intended to kill another, and not the person killed. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

Street level drug dealer's statements about the defendant's payment dispute with the murder victim, another drug runner, lacked guarantees of trustworthiness and were inadmissible under the confrontation clause and the hearsay exception for statements against penal interest; part of the police officer's narration of the statements and related conversations centered on the dispute between the victim and defendant and did not tend to expose the dealer to criminal liability, the defendant's alleged debt to the dealer revealed a bias, and the trial court improperly looked at the results of the police investigation, rather than circumstances that would prompt the dealer to deflect attention from himself. *Doret v. United States*, 765 A.2d 47, 2000 D.C. App. LEXIS 285 (2000), writ of certiorari denied by 532 U.S. 1030, 121 S. Ct. 1980, 149 L. Ed. 2d 772, 2001 U.S. LEXIS 3750, 69 U.S.L.W. 3729 (2001).

Erroneous admission of a street level drug dealer's hearsay statements indicating that a debt was the defendant's motive for killing a fellow dealer was not harmless in a prosecution for first-degree murder and possession of a firearm during a crime of violence; no direct evidence indicated that the defendant murdered the victim. *Doret v. United States*, 765 A.2d 47, 2000 D.C. App. LEXIS 285 (2000), writ of certiorari denied by 532 U.S. 1030, 121 S. Ct. 1980, 149 L. Ed. 2d 772, 2001 U.S. LEXIS 3750, 69 U.S.L.W. 3729 (2001).

— Insanity, defenses.

Denial of motion of one of the two defendants jointly indicted on charge of killing another in perpetrating robbery for a mental examination was not error, where moving defendant did not

make prima facie showing of mental incapacity. D.C. Code 1940, §§ 22-2401, 24-301. *Wheeler v. U.S.*, 165 F.2d 225, 1947 U.S. App. LEXIS 2054 (1947).

The law does not recognize emotional insanity as a defense in a homicide case. *Taylor v. U.S.*, 7 App.D.C. 27, 1895 U.S. App. LEXIS 3616 (1895).

— Intoxication, defenses.

Voluntary intoxication will not excuse murder, but may negative ability of defendant to form specific intent to kill or deliberation and premeditation necessary to constitute first-degree murder, in which event the crime is reduced to second-degree murder. *Bishop v. U.S.*, 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

A slayer who voluntarily got drunk for the purpose of nerving himself for the crime, cannot, where the statute required an intent to commit murder at the time of the commission of the offense, be convicted of murder in the first degree, if, at the time of the killing, he was so drunk as to be unable then to premeditate the murder. *Sabens v. U.S.*, 40 App.D.C. 440, 1913 U.S. App. LEXIS 2099 (1913).

Voluntary intoxication may negate the ability of a defendant to form the specific intent to kill or the deliberation and premeditation necessary to constitute first-degree murder, in which event there is a reduction to second-degree murder. *Wilson-Bey v. United States*, 903 A.2d 818, 2006 D.C. App. LEXIS 424 (2006), writ of certiorari denied by 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089, 2007 U.S. LEXIS 5173, 75 U.S.L.W. 3607 (2007).

Voluntary intoxication will not excuse murder, but it may negative ability of defendant to form specific intent to kill, or deliberation and premeditation necessary to constitute first-degree murder, in which event there is a reduction to second-degree murder. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

— Prevention of commission of offense, defenses.

Deadly force cannot be employed to arrest or prevent the escape of a misdemeanor. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

The setting of spring guns in open fields or outbuildings, and not within the privilege of the domicile, without notice, will not excuse or justify the killing of a person in the act of committing a felony. *U.S. v. Gilliam*, 25 F.Cas. 1319, 1882 U.S. App. LEXIS 2913 (1882).

— Self-defense, generally, defenses.

Defendant who threatened one individual with bodily harm and who was being pursued

by uniformed special police officer had no right of self-defense to stand his ground and mortally wound the officer; situation between defendant and officer was of defendant's creation and placed him under obligation to indicate withdrawal from or abatement of confrontation. *United States v. Taylor*, 510 F.2d 1283, 1975 U.S. App. LEXIS 15297 (C.A.D.C. 1975).

Instigator of an encounter that ultimately proves fatal may claim self-defense if, prior to fatal blow, he has attempted in good faith to disengage himself from the altercation and has communicated his desire to do so to his opponent. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

Effect of disengagement of parties from altercation which had occurred one hour prior to fatal shooting was to restore them to status quo ante, deceased's privilege of self-defense as to earlier assault by defendant had dissipated at time of fatal shooting and any attack he might have launched upon defendant would have constituted unlawful retaliation; thus, any disability of defendant due to his prior aggression had been lifted at time of the fatal shooting and he was not precluded from raising defense of self-defense with respect to the fatal shooting. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

Doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help and the settlement of potentially fatal personal conflicts. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Right of self-defense arises only when the necessity begins and equally ends with the necessity; never must the necessity be greater than when the force employed defensively is deadly; the necessity must bear all semblance of reality and appear to admit no other alternative. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One may deliberately arm himself for purposes of self-defense against a pernicious assault which he has good reason to expect. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

To kill or maim in self-defense there must have been a threat, actual or apparent, of the use of deadly force against the defender; the threat must have been unlawful and immediate and the defender must have believed that he was in imminent peril of death or serious bodily

harm and that his response was necessary to save himself therefrom; such beliefs must not only have been honestly entertained but also objectively reasonable in light of surrounding circumstances; no less than a concurrence of these elements will suffice. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Claim of self-defense is not necessarily defeated because the accused, acting in heat of passion brought on by an assault, used more force than would have seemed necessary to a calmer mind. *Perry v. United States*, 422 F.2d 697, 1969 U.S. App. LEXIS 10809 (C.A.D.C. 1969).

Self-defense may not be successfully claimed by one who deliberately places himself in position where he has reason to believe his presence will provoke trouble. *Rowe v. United States*, 370 F.2d 240, 1966 U.S. App. LEXIS 4197 (C.A.D.C. 1966).

One cannot provoke fight and then rely on claim of self-defense when such provocation results in counterattack unless he has previously withdrawn from fray and communicated such withdrawal. *Harris v. United States*, 364 F.2d 701, 1966 U.S. App. LEXIS 5634 (C.A.D.C. 1966).

One who is attacked may repel attack with whatever force he reasonably believes is necessary under circumstances, but only if he has not provoked fight. *Harris v. United States*, 364 F.2d 701, 1966 U.S. App. LEXIS 5634 (C.A.D.C. 1966).

Defender may use only force which is reasonable in protecting against attack, and even if defendant was victim of unprovoked attack with a deadly weapon, he had no right to use excessive force in self-defense. *Inge v. United States*, 356 F.2d 345, 1966 U.S. App. LEXIS 7635 (C.A.D.C. 1966).

It is reasonable to use deadly weapon in defense against an attack with deadly weapon though, in general, defender must use weapon in reasonable manner, i.e., only to extent he reasonably thinks is required to save his own life or to avert serious bodily harm. *Inge v. United States*, 356 F.2d 345, 1966 U.S. App. LEXIS 7635 (C.A.D.C. 1966).

A belief which may be unreasonable in cold blood may be actually and reasonably entertained in heat of passion, and claim of self-defense is not necessarily defeated if, for example, more knife blows than would have seemed necessary in cold blood were struck in heat of passion generated by unsought altercation. *Inge v. United States*, 356 F.2d 345, 1966 U.S. App. LEXIS 7635 (C.A.D.C. 1966).

One who provokes a conflict may thereafter withdraw and if he does so in good faith and is thereafter pursued by deceased, he is justified

in killing deceased if necessary to save his own life. *Parker v. U.S.*, 158 F.2d 185, 1946 U.S. App. LEXIS 2356 (1946).

One may defend his domicile or his property to the extent of taking life, when necessary in the defense of his property, or to protect himself or those in his charge from death or bodily injury. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

Where a person voluntarily participated in a contest or mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary on the ground of self-defense. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

The killing, by stabbing, of a woman, is not justifiable as an act of self-defense, where she struck the accused on the nose, and, on pushing her away, grabbed his privates, in the absence of anything to show he suffered pain from the assault, or was apprehensive of bodily injury so serious as to suggest the use of a deadly weapon instead of ordinary superior physical force; although such an assault might reduce the homicide from murder to manslaughter. *Grant v. U.S.*, 28 App.D.C. 169, 1906 U.S. App. LEXIS 5230 (1906).

Defendant cannot successfully claim self-defense when he left apparently safe haven to arm himself and return to the scene. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Self-defense may not be claimed by one who deliberately places himself in position where he has reason to believe his presence would provoke trouble. *Mitchell v. United States*, 399 A.2d 866, 1979 D.C. App. LEXIS 296 (1979).

One who commits an armed robbery forfeits his right to claim the right of self-defense against either the intended victim or any person intervening to prevent the crime. *Taylor v. United States*, 380 A.2d 989, 1977 D.C. App. LEXIS 284 (1977).

"Self-defense" is the use of reasonable force to repel a danger which a person reasonably believes may cause him imminent bodily harm. *Gezmu v. United States*, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

Imperfect self-defense is a mitigation defense which, unlike perfect self-defense, does not result in full exoneration. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

— Third party perpetrator, defenses.

Evidence proffered by defendants did not show a reasonable possibility that victim was murdered by victim's girlfriend or the girlfriend's brother, such that defendants could not present a third-party perpetrator defense at a joint trial for murder; the proffer identified no

witness who actually would testify that the brother received the murder weapons as defense counsel alleged, no testimony or other proof that the girlfriend or the brother robbed victim of his alleged drugs, no evidence that either of them had any motive to kill or rob victim, and no incriminating statements attributed to either of them. *McCraney v. United States*, 983 A.2d 1041, 2009 D.C. App. LEXIS 604 (2009).

Degrees of murder.

— Elements common to both, degrees of murder.

Malice aforethought is an element of both first and second degrees of murder. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Malice aforethought is an element common to first and second-degree murder; the distinguishing feature between the crimes being that first-degree murder includes the elements of premeditation and deliberation while second-degree murder does not. D.C. Code §§ 22-2401, 22-2403. *Butler v. United States*, 322 A.2d 279, 1974 D.C. App. LEXIS 248 (1974).

— Elements distinguishing first and second degree murder, degrees of murder.

Murder in the first degree is intentional homicide done deliberately and with premeditation, and homicide that is intentional but "impulsive," not done after "reflection and meditation", is murder in the second degree. *U.S. v. Brawner*, 471 F.2d 969, 1972 U.S. App. LEXIS 8824 (C.A.D.C. 1972).

Sole difference between first- and second-degree murder is premeditation and deliberation. *Howard v. United States*, 389 F.2d 287, 1967 U.S. App. LEXIS 4276 (C.A.D.C. 1967).

Intentional murder is in the first degree if committed in cold blood and is murder in the second degree if committed on impulse or in the sudden heat of passion. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

The distinguishing characteristic of first degree murder is that it is a deliberate, premeditated, intentional killing, while killing in second degree murder may be intentional or unintentional, but it must, in either event, result from a willful and malicious act. D.C. Code 1961, §§ 22-2401 to 22-2403. *Hansborough v. U.S.*, 308 F.2d 645, 1962 U.S. App. LEXIS 4033 (C.A.D.C. 1962).

Murder in first degree, in addition to intent to kill, requires premeditation and deliberation, but murder in second degree does not require any premeditation or deliberation and not even an intent to kill, if killing is accompa-

nied with malice. *U.S. v. Wilson*, 178 F.Supp. 881, 1959 U.S. Dist. LEXIS 2601 (D.D.C.1959).

Where defendant was aware of the risk of harm, but acted in conscious disregard of it, the killing is murder or "voluntary manslaughter," and where the defendant is not aware of the risk of harm, but should have been, the killing will be "involuntary manslaughter." *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

Primary distinction between first and second-degree murder is that first degree murder, with its requirement of premeditation and deliberation, covers calculated and planned killings, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second-degree. *Bates v. United States*, 834 A.2d 85, 2003 D.C. App. LEXIS 624 (2003).

First-degree murder is distinguished from second-degree murder in that it requires premeditation and deliberation. D.C. Code 1981, § 22-2401. *Bussey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Premeditation and deliberation distinguish first-degree murder from second-degree murder. D.C. Code 1981, § 22-2401. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

First-degree murder, with its requirement of premeditation and deliberation, covers calculated and planned killings, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second degree. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

— First degree, degrees of murder.

Though deliberate intent to take life, together with malice, are essential elements of "murder in the first degree", an accidental or unintentional killing will constitute "murder in the second degree" if accompanied by malice. D.C. Code 1929, T. 6, §§ 21-23. *Lee v. U.S.*, 112 F.2d 46, 1940 U.S. App. LEXIS 4220 (1940).

No particular length of time is necessary for deliberation, and it is not the lapse of time which constitutes deliberation necessary to convict for first-degree murder but the reflection and turning over in mind of accused concerning his design and purpose to kill. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

No particular length of time is necessary for deliberation, and it is not the lapse of time which constitutes deliberation necessary to convict of first-degree murder but the reflection and turning over in mind of accused concerning his design and purpose to kill. *Austin v. United*

States, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

Premeditation and deliberation are necessary elements of first degree murder. *Mergner v. U.S.*, 147 F.2d 572, 1945 U.S. App. LEXIS 2170 (1945).

As respects conviction for murder first degree, deliberation and premeditation may be instantaneous. *Aldridge v. U.S.*, 47 F.2d 407, 1931 U.S. App. LEXIS 3454 (1931).

With respect to first-degree murder, it is not the length of time but the reflection in the mind of the accused concerning his design and purpose to kill which supplies the requisite premeditation and deliberation. *Byrd v. United States*, 388 A.2d 1225, 1978 D.C. App. LEXIS 483 (1978).

In a murder prosecution, it is not a question of how long defendant may have deliberated before the homicide, since no particular length of time is necessary for deliberation and premeditation which will make the homicide, first-degree murder. *Weakley v. U.S.*, 198 F.2d 940, 1952 U.S. App. LEXIS 3260 (C.A.D.C. 1952).

Deliberation and premeditation are necessary elements of first-degree murder. D.C. Code 1940, § 22-2401. *Fisher v. U.S.*, 66 S.Ct. 1318, 1946 U.S. LEXIS 2178 (U.S. Dist. Col. 1946).

First-degree murder requires premeditation and deliberation and covers calculated and planned killings while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second degree. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

"Deliberation" element of first-degree murder requires evidence that defendant acted with consideration and reflection upon preconceived decision to kill. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

First-degree murder is a calculated and planned killing while second-degree murder is unplanned or impulsive. D.C. Code 1981, § 22-2401. *Watson v. United States*, 501 A.2d 791, 1985 D.C. App. LEXIS 549 (1985).

No fixed time is required for a finding of deliberation and evidence that defendant threatened to kill decedent only seconds before shooting her was not dispositive of that issue in first-degree murder prosecution. D.C. Code 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

Although no specific amount of time is necessary to demonstrate premeditation and deliberation necessary for first-degree murder conviction, evidence must demonstrate that defendant did not kill impulsively, in heat of passion, or in orgy of frenzied activity. D.C. Code 1981, § 22-2401. *Bussey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

"Deliberation" required for first-degree premeditated murder requires proof that defendant acted with consideration and reflection upon preconceived design to kill, turning it over in his mind, giving it a second thought. D.C. Code 1981, §§ 22-2401, 22-3202. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

Evidence and premeditation in respect to first-degree murder must show that determination to kill was reached calmly and "in cold blood" rather than under impulse or heat of passion. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

No particular length of time is necessary for deliberation in context of first-degree murder; it is not a lapse of time itself which constitutes deliberation, but reflection and turning over in mind of accused concerning his existing design and purpose to kill. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

— In general.

Single offense cannot be both first and second degree murder. D.C. Code 1961, §§ 22-2401 to 22-2403; 18 U.S.C. § 1111. *Naples v. U.S.*, 344 F.2d 508, 1964 U.S. App. LEXIS 3943 (C.A.D.C. 1964).

Any reasonable doubt as to nature and degree of homicide should inure to defendant's benefit. *U.S. v. Hamilton*, 182 F.Supp. 548, 1960 U.S. Dist. LEXIS 3027 (D.D.C.1960).

Defendant cannot be convicted of both first-degree felony murder and second-degree murder of the same victim. *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434 (2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Unlike circumstances of justification or excuse, legally recognized mitigating factors do not constitute total defense to murder charge but they may serve to reduce the degree of criminality of a homicide which was otherwise committed with an intent to kill, an intent to injure, or in conscious and wanton disregard of life. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

— Second degree, degrees of murder.

With certain statutory exceptions, when there is unjustified intentional killing, not premeditated but with malice, the offense is murder in the second degree and the same is true when there is unintentional killing which results from a willful and malicious act other than those specified in the first degree murder statute. D.C. Code 1961, §§ 22-2401 to 22-2403. *Hansborough v. U.S.*, 308 F.2d 645, 1962 U.S. App. LEXIS 4033 (C.A.D.C. 1962).

First-degree murder, with its requirement of premeditation and deliberation, covers calculated and planned killings, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in second degree; premeditation and deliberation may be inferred from sufficiently probative facts and circumstances. D.C. Code 1981, §§ 22-2401, 22-3202. *Hall v. United States*, 454 A.2d 314, 1982 D.C. App. LEXIS 507 (1982).

Different offenses in same transaction.

Conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape so that consecutive punishments for killing in the course of rape and rape are not authorized under District of Columbia law. D.C. Code §§ 22-2401, 22-2404, 22-2801, 23-112. *Whalen v. U.S.*, 100 S.Ct. 1432, 1980 U.S. LEXIS 15 (U.S. Dist. Col. 1980).

While dual convictions of defendant for first-degree murder and premeditated murder arising out of one killing was permissible, defendant could not be given consecutive sentences for both. D.C. Code §§ 22-2401, 23-112. *United States v. Ammidown*, 497 F.2d 615, 1974 U.S. App. LEXIS 8696 (C.A.D.C. 1973).

There is no legal obstacle to either indicting, convicting, or imposing concurrent sentences for crimes of both felony-murder and premeditated murder, where crimes arise from single act. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Defendant committing single homicide cannot be given consecutive sentences for both first-degree murder and another crime of homicide, but fact that punishments may not be cumulative plainly does not mean that multiple convictions are impermissible; disapproving in part *Naples v. United States*, 120 U.S.App.D.C. at 132, 344 F.2d at 508. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

When there is only one killing, the defendant may not be convicted of more than one murder. *Jacobs v. United States*, 861 A.2d 15, 2004 D.C. App. LEXIS 582 (2004), vacated by 886 A.2d 510, 2005 D.C. App. LEXIS 545 (D.C. 2005).

Remand to vacate two of defendant's murder convictions was required, where defendant was convicted of premeditated murder and two counts of felony murder based on the same killing. *Jacobs v. United States*, 861 A.2d 15, 2004 D.C. App. LEXIS 582 (2004), vacated by 886 A.2d 510, 2005 D.C. App. LEXIS 545 (D.C. 2005).

Defendant could not be convicted of both armed first-degree felony murder and armed first-degree premeditated murder of same victim. D.C. Code 1981, §§ 22-2401, 22-3202. *Lane v. United States*, 737 A.2d 541, 1999 D.C. App. LEXIS 209 (1999).

Defendant could not be convicted of both first-degree murder while armed and second-degree murder while armed where there was only one killing. D.C. Code 1981, §§ 22-2401, 22-3202. *Henderson v. United States*, 678 A.2d 20, 1996 D.C. App. LEXIS 107 (1996).

Trial court's submission of each of three counts of first-degree murder of single victim to jury and entry of conviction and sentence on each pending appellate review was not error. D.C. Code 1981, § 22-2401. *Byrd v. United States*, 510 A.2d 1035, 1986 D.C. App. LEXIS 348 (1986).

Trial court's submission of each of three counts of first-degree murder, D.C. Code 1981, § 22-2401, of single victim to jury and entry of conviction and sentence on each pending appellate review was not error. *Byrd v. United States*, 500 A.2d 1376, 1985 D.C. App. LEXIS 564 (1985), vacated by 505 A.2d 51 (D.C. 1986).

Defendant may be convicted of both first-degree premeditated murder and first-degree felony-murder, D.C. Code § 22-2401, for a single killing if court imposes concurrent sentences. *Byrd v. United States*, 500 A.2d 1376, 1985 D.C. App. LEXIS 564 (1985), vacated by 505 A.2d 51 (D.C. 1986).

In prosecution for first-degree murder, felony-murder and rape, separate convictions and sentences for first-degree premeditated murder and felony-murder were proper; however, remand for resentencing was necessary where concurrent prison term was imposed for rape conviction. D.C. Code 1973, §§ 22-2401, 22-2801. *Doepel v. United States*, 434 A.2d 449, 1981 D.C. App. LEXIS 345 (1981), writ of certiorari denied by 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483, 1981 U.S. LEXIS 4463, 50 U.S.L.W. 3376 (1981).

Defendant, convicted of pouring flammable liquid accelerant over victim and lighting it, could properly be prosecuted and convicted for both first-degree premeditated murder and felony-murder. D.C. Code §§ 22-2401, 23-112. *McFadden v. United States*, 395 A.2d 14, 1978 D.C. App. LEXIS 349 (1978).

There is no legal obstacle to either indicting or convicting a person of both felony-murder and premeditated murder, where those charges arise from a single homicide. D.C. Code § 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

Discovery.

In homicide prosecution arising out of assassination of former Chilean ambassador to

United States, no error was shown in denial of discovery of materials to which defendants claimed to be entitled. 18 U.S.C. §§ 1111, 1116, 1117, 3500; D.C. Code § 22-2401; Fed. Rules Cr. Proc. Rule 16(a), 18 U.S.C. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Where statements given by witnesses to police during murder investigation did not include evidence that was relevant or material or that would be helpful in the defense or tend to exculpate accused and the disclosure to accused prior to trial would not have led to evidence that was relevant or material or that would tend to be exculpatory, accused was not denied due process of law because the statements were withheld from the defense. D.C. Code §§ 22-501, 22-2401. *United States v. Bowles*, 488 F.2d 1307, 1973 U.S. App. LEXIS 7108 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 991, 94 S. Ct. 1591, 39 L. Ed. 2d 888, 1974 U.S. LEXIS 778 (1974).

Government's failure to disclose two witnesses until four days before trial did not amount to a Brady violation, in murder prosecution; each witness's testimony contradicted the other's testimony as it related to whether they saw defendant or defendant's truck at the murder scene on the night in question, which would have only added to the conflicting and confusing defense accounts of what vehicle was at the scene and who was in that vehicle. *Williamson v. United States*, 993 A.2d 599, 2010 D.C. App. LEXIS 207 (2010).

Any Brady violation by the prosecution in failing to disclose to defense counsel witnesses who could allegedly impeach testimony of government eyewitness by testifying that eyewitness had drunk a large amount of alcohol and left nightclub before incident occurred, in prosecution of defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, did not prejudice defendants, as required in order for defendants to obtain a new trial, as one of such witnesses nonetheless testified during the trial, such witnesses had provided inconsistent statements to police, and testimony of the eyewitness was almost completely corroborated by other government witnesses, with the exception of eyewitness's testimony that one of the defendants threatened and assaulted her following the incident. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Prosecution's violation of Brady, in trial of defendants arising out of beating of homeless man and murder and assaults of passersby who

tried to intervene, by disclosing just before eyewitness testified the grand jury transcript of witness's testimony and information indicating that witness met with prosecution multiple times before acknowledging he had a memory of the incident, did not prejudice defendants, as required in order for defendants to obtain a new trial, as defense counsel were still able to conduct an effective cross-examination, counsel exploited many other available grounds to attack witness's credibility, prosecution on redirect brought out witness's prior statements that he had no memory, it was obvious that witness had resisted prosecution's persistent questions regarding his knowledge of the incident, and the jury was made aware through other witnesses that the government's investigation of the incident had been heavy-handed. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Any Brady violation resulting from prosecution's failure to disclose to defendant prior to trial, in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, that there was a pending neglect proceeding against government eyewitness, did not prejudice defendant, as required in order for such defendant to obtain a new trial, as witness's testimony did not incriminate such defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Evidence was sufficient to establish, at Brady violation hearing, that even if the government violated Brady, in prosecution of defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by not disclosing that eyewitness made false statements regarding her illegal immigration status when she was being considered for a witness protection program prior to trial, such violation did not prejudice defendants, as required in order for defendants to obtain a new trial; witness had been living in the country since she was nine, there was evidence that witness's status only became an issue after she had provided a statement to the police and testified before grand jury and that witness did not seek to use her statement or grand jury testimony to secure her immigration status, and other witnesses corroborated almost all of such witness's trial testimony. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App.

LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Defendant's undocumented speculation about alleged "common understanding" that schools "like" the school for students with learning disabilities which government witness had attended nearly 20 years earlier require "competency-like exams" of their students did not establish that witness' school records were relevant to his competency to testify, and thus, defendant was not entitled to subpoena duces tecum for witness' school records, in prosecution for murder. *Tyer v. United States*, 912 A.2d 1150, 2006 D.C. App. LEXIS 642 (2006).

Error in the government's failure to timely disclose complete Brady/Giglio impeachment evidence on three of four eyewitnesses who testified at murder trial was not reversible error, even though defendant argued that he was particularly prejudiced by being unable to use impeachment evidence in his opening statement; trial court delayed trial to give the government time to make its required disclosures, defendant was then able to make effective use of impeachment evidence during cross examinations of eyewitnesses, trial court instructed jury not to hold it against any party that trial had been delayed, and opening statements placed jury on notice of credibility issues with witnesses. *Lindsey v. United States*, 911 A.2d 824, 2006 D.C. App. LEXIS 630 (2006), writ of certiorari denied by 552 U.S. 1077, 128 S. Ct. 804, 169 L. Ed. 2d 607, 2007 U.S. LEXIS 12987, 76 U.S.L.W. 3303 (2007).

State's delay in disclosing to murder defendants Brady/Giglio material showing that State's witnesses benefitted financially by cooperating and testifying through witness protection program did not result in prejudice warranting remand for evidentiary hearing; defendants did not object to State's procedure in waiting to disclose such information until jury was selected and sworn, and defendants, despite delayed disclosure, were able to use the information extensively in cross-examination to challenge the credibility of witnesses. *Ebron v. United States*, 838 A.2d 1140, 2003 D.C. App. LEXIS 755 (2003), writ of certiorari denied by 543 U.S. 939, 125 S. Ct. 347, 160 L. Ed. 2d 247, 2004 U.S. LEXIS 6901, 73 U.S.L.W. 3236 (2004).

Brady violation occurred in murder case when government, in response to defendant's Jencks Act request, was allowed to redact portions of eyewitness's grand jury testimony showing that she lied either to the police or the grand jury with respect to another murder that she allegedly observed; the impeachment evidence was material, as question of defendant's

innocence or guilt turned entirely on the credibility of the witnesses, eyewitness was arguably government's most important witness, and redacted material would have informed the jury that eyewitness was willing to lie. *Bennett v. United States*, 797 A.2d 1251, 2002 D.C. App. LEXIS 108 (2002).

Witness' grand jury testimony that he had a desire for revenge against the co-defendants was not "exculpatory evidence," and thus, co-defendants did not have a Brady due process right, in prosecution for first-degree murder while armed, to have the prosecution produce a transcript of the grand jury testimony at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case. *Bennett v. United States*, 797 A.2d 1251, 2002 D.C. App. LEXIS 108 (2002).

Prosecution's production, on first morning of trial and shortly before prosecutor's opening statement, of transcript of grand jury testimony of sole eyewitness did not violate defendant's Brady due process right to disclosure of exculpatory material at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, in prosecution for first-degree murder while armed; defense counsel had sufficient opportunity to make effective use of that grand jury testimony in his cross-examination of witness, had he chosen to do so. *Bennett v. United States*, 797 A.2d 1251, 2002 D.C. App. LEXIS 108 (2002).

Defendant did not establish that disclosure of name and address of the only eyewitness to the shooting was "material," as element for a Brady due process violation relating to prosecution's failure to disclose exculpatory evidence; defendant did not show how pre-trial knowledge of witness' name and address could have led to discovery of any exculpatory evidence, nor did he show that earlier disclosure of witness' identity would have been reasonably likely to produce a different outcome in the prosecution for first-degree murder while armed. *Bennett v. United States*, 797 A.2d 1251, 2002 D.C. App. LEXIS 108 (2002).

Detective's general testimony during suppression hearing that witness gave possibly deceptive answers on lie detector test required remand for further inquiry to determine whether such answers were material and subject to disclosure under Brady doctrine. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Court had power to order Government in first-degree murder prosecution to produce names of alleged eyewitnesses to crime for use by the defense, where eyewitnesses were passersby on street, defense counsel satisfied requirement of materiality by establishing that he was unable to locate eyewitnesses, such

witnesses were necessary for preparation of defense, discovery of eyewitnesses was not so burdensome as to be unreasonable, Government was given opportunity to oppose discovery motion, and safeguards for witnesses were provided in conditions imposed in court's order. D.C. Code § 22-2401. *United States v. Holmes*, 343 A.2d 272, 1975 D.C. App. LEXIS 228 (1975).

Court's order that Government in first-degree murder prosecution produce the names of alleged eyewitnesses to crime for use by defense was not unreasonable, arbitrary, or prejudicial, and Government's interest in the protection of witnesses was not so great as to outweigh defendant's interest in obtaining their names, where eyewitnesses were passersby to crime which occurred on the street. D.C. Code §§ 22-2401, 23-104(a)(1). *United States v. Holmes*, 343 A.2d 272, 1975 D.C. App. LEXIS 228 (1975).

Double jeopardy.

Where jury was authorized to find defendant guilty of either first degree murder or alternatively of second degree murder and jury found him guilty of second degree murder, defendant, by appealing, did not prolong his original jeopardy, and when his conviction for second degree murder was reversed and case remanded he could not be tried again for first degree murder without placing him in new jeopardy. D.C. Code 1951, §§ 22-401, 22-2401, 22-2404; U.S. Const. Amend. 5. *Green v. U.S.*, 78 S.Ct. 221, 1957 U.S. LEXIS 1 (U.S. Dist. Col. 1957).

Where jury was authorized at first trial to find defendant guilty of either first degree murder or second degree murder, and jury found defendant guilty of second degree murder, but on appeal that conviction was reversed and the case was remanded for a new trial, second trial of defendant for first degree murder placed him in jeopardy twice for same offense in violation of the constitutional prohibition against double jeopardy and defendant had not waived that defense by making successful appeal of erroneous conviction of second degree murder. D.C. Code 1951, §§ 22-401, 22-2401, 22-2404; U.S. Const. Amend. 5. *Green v. U.S.*, 78 S.Ct. 221, 1957 U.S. LEXIS 1 (U.S. Dist. Col. 1957).

Concurrent sentences for arson, felony murder, and second-degree murder violated double jeopardy, in action in which one victim died in burning building; underlying felony was lesser offense included within offense of felony murder, and concurrent sentences for second-degree murder and felony murder constituted dual punishment for just one offense. U.S. Const. Amend. 5; D.C. Code 1981, §§ 22-401, 22-2401, 22-2403. *Bonhart v. United States*, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Defendant's convictions for burglary, premeditated murder, and robbery arising from single

criminal transaction did not merge, so as to trigger double jeopardy protection; the three convictions required separate and distinct elements of proof. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-2901, 22-3202; U.S.C. Const.Amend. 5. *Bennett v. United States*, 620 A.2d 1342, 1993 D.C. App. LEXIS 44 (1993).

Including evidence wrongfully admitted in violation of the confrontation clause, evidence was sufficient to withstand motion for judgment of acquittal; therefore, the double jeopardy clause did not prevent retrial after conviction was reversed based on the erroneous admission of evidence, in prosecution for felony-murder, armed robbery, and carrying a pistol without a license. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202, 22-3204; U.S. Const.Amend. 5, 6. *Thomas v. United States*, 557 A.2d 599, 1989 D.C. App. LEXIS 61 (1989).

Punishment for both first-degree burglary while armed and first-degree felony-murder predicated on armed robbery did not violate double jeopardy clause, where armed burglary charge required government to prove at least one fact that felony-murder did not, i.e., that defendant entered dwelling or other building, apartment or room, and felony-murder charge required proof of at least one fact that armed burglary did not, i.e., that defendant killed another person. D.C. Code 1981, §§ 22-1801(a), 22-3202, 22-2401, 23-112; U.S. Const.Amend. 5. *Waller v. United States*, 531 A.2d 994, 1987 D.C. App. LEXIS 456 (1987).

Defense counsel did not waive defendant's right to assert double jeopardy claim merely by agreeing to two proposed second-degree murder instructions, one as lesser included offense of first-degree murder and other as lesser included offense of felony-murder, in absence of any statement or implication by defendant that if he was acquitted on one, he would not thereafter argue collateral estoppel or double jeopardy as to the other and in view of fact that case involved single course of conduct which could be prosecuted only as one offense, except to extent of prosecution for lesser-included offense. D.C. Code 1973, §§ 22-103, 22-2401, 22-3202; U.S. Const.Amend. 5. *Turner v. United States*, 459 A.2d 1054, 1983 D.C. App. LEXIS 355 (1983).

Although defendant did not affirmatively consent to Government's oral motion to dismiss original second-degree murder indictment, which motion was made after first trial was aborted and indictment for first-degree murder filed, such dismissal did not act as an acquittal barring retrial on subsequent second-degree murder indictment, on ground that double jeopardy attached in the first trial before mistrial was declared due to defense error in opening remarks; dismissal of first indictment was not an acquittal since effect of request for a mistrial nullified any attachment of jeopardy and Gov-

ernment was free to proceed as though no trial had ever begun. D.C. Code §§ 22-2401, 22-2403, 22-3204. *Jamison v. United States*, 373 A.2d 594, 1977 D.C. App. LEXIS 477 (1977).

Examination of witnesses.

— Compelling calling of witness, examination of witnesses.

Accused in murder prosecution was required to plead and prove his own case and was responsible for the production in court of witnesses necessary to do so, and failure of the government to produce certain witnesses could not be regarded as prejudicial. D.C. Code 1940, §§ 22-2401, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

— Competency of witnesses, examination of witnesses.

Trial court, which denied a defense motion during trial to have key prosecution witness, who was a chronic alcoholic, subjected to a psychiatric examination with respect to his competency, did not abuse its discretion in refusing to treat the witness as a person of actual or potential incompetency, notwithstanding the claims of defendants, in support of their motion, that the testimony given by the witness was highly confusing and that hospital records indicated he had a clinical history which rendered him wholly unreliable. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

In prosecution for first-degree murder while armed and firearms offenses, the trial court did not abuse its discretion by excluding proffered expert testimony on bullet bunter-marks, a manufacturer's stamping on a bullet, since proposed expert witness did not have sufficient expertise in ballistics and tool marks to provide jury with opinion that would have aided it in the search for truth; proposed witness lacked experience with firearms, had no published articles regarding any experiments he conducted on firearms or tool mark evidence, and he had not testified in a case on the subject of bunter-marks. *High v. United States*, 972 A.2d 829, 2009 D.C. App. LEXIS 184 (2009).

— Confrontation of witnesses, examination of witnesses.

Error in admitting reports of DNA and serology tests through testimony of forensics experts who were not involved in testing or preparing reports, in violation of defendant's right of confrontation, was not harmless beyond reasonable doubt, in trial for murder; without reports, circumstantial evidence was not sufficient, in that there were no witnesses to crime, defendant's fingerprints were not found on murder weapon, and alleged confession to government informant was highly suspect after

informant was impeached with ample reward he received in exchange for his testimony. *Gardner v. United States*, 999 A.2d 55, 2010 D.C. App. LEXIS 351 (2010).

Nontestifying defendant's statement to sister, that he and codefendant went up behind victim, that defendant killed victim, and that codefendant's gun jammed, was not "testimonial" so as to implicate codefendant's confrontation rights when it was admitted at joint trial; defendant was not acting as a witness, and what he said was not a weaker substitute for live testimony at trial. *Thomas v. United States*, 978 A.2d 1211, 2009 D.C. App. LEXIS 360 (2009), writ of certiorari denied by 131 S. Ct. 282, 178 L. Ed. 2d 185, 2010 U.S. LEXIS 6856, 79 U.S.L.W. 3203 (U.S. 2010), writ of certiorari denied by 131 S. Ct. 196, 178 L. Ed. 2d 118, 2010 U.S. LEXIS 6815, 79 U.S.L.W. 3200 (U.S. 2010).

Out-of-court statements made by victim to witness prior to murder, that he saw a gun in defendant's waistband, that defendant told victim the reason defendant had car that was not defendant's was because owner of the car owed defendant some money, and that defendant told victim that he thought victim and his friends were "stepping to him," admitted under present sense impression exception to hearsay rule, did not violate defendant's right to confrontation, in trial for murder and other offenses, as statements were not testimonial in nature. *Gardner v. United States*, 898 A.2d 367, 2006 D.C. App. LEXIS 205 (2006).

Admission of non-testifying co-defendant's videotaped confession, as well as plea allocutions of non-testifying co-defendants, as declarations against penal interest, violated defendants' right of confrontation, in murder prosecution; statements in question were "testimonial" and thus could not properly have been admitted without opportunity for defendants to cross-examine non-testifying co-defendants. *Morten v. United States*, 856 A.2d 595, 2004 D.C. App. LEXIS 422 (2004).

Trial court's refusal to send marshals to enforce subpoena that defense had served on witness violated defendant's constitutional right to compulsory process to secure witness's presence at murder trial; while trial court found that witness's testimony would be unnecessary because jury would believe defendant's account, defendant's testimony was uncorroborated, and trial court did not enough evidence to predict that witness would not have been located had the marshals been sent for him. *Harris v. United States*, 834 A.2d 106, 2003 D.C. App. LEXIS 623 (2003).

Admitting grand jury testimony by eyewitnesses under recorded recollection exception to hearsay rule did not violate confrontation clause in first-degree murder prosecution; the

defendant had the opportunity to cross-examine both witnesses and probe their assertions that they could not recall the shooting or testimony before the grand jury. *Isler v. United States*, 824 A.2d 957, 2003 D.C. App. LEXIS 291 (2003).

Prosecution showed by preponderance of evidence that witness to prior triple murder qualified as "witness" within meaning of *Devonshire*, and that defendant murdered witness to prevent her testimony, and thus, defendant waived his confrontation clause objection to statements witness made between time of triple murder and her own demise; evidence showed that witness had knowledge of relevant facts immediately surrounding triple murder, and it was largely irrelevant that witness had not cooperated with authorities investigating that murder, and that she had made statements to friends denying any knowledge, as defendant had reasonable expectation that witness might be called to testify, given defendant's awareness of witness's knowledge of relevant facts and his continued contact with her. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Murder defendant's confrontation clause rights were not violated by decision to allow witness to testify for government while denying defendant opportunity to cross-examine witness for bias after witness had invoked his Fifth Amendment privilege against testifying concerning previous altercation in which witness and victim had allegedly shot at defendant, where defense counsel made rather weak showing of why cross-examination was necessary, only real bias issue related to witness' hostility toward defendant arising out of his involvement in shooting, jury was made fully aware of witness' role in previous shooting incident, witness was subject to extensive cross-examination on all other subjects, and prosecution presented another witness to shooting incident whose Fifth Amendment rights were not implicated and who was subject to unlimited cross-examination. *U.S.C. Const. Amends. 5, 6; D.C. Code 1981, §§ 22-2401, 22-3202. McClellan v. United States*, 706 A.2d 542, 1997 D.C. App. LEXIS 136 (1997), writ of certiorari denied by 524 U.S. 910, 118 S. Ct. 2073, 141 L. Ed. 2d 149, 1998 U.S. LEXIS 3677, 66 U.S.L.W. 3773 (1998).

Trial judge's actions in murder and kidnapping prosecution in cutting off defense counsel before she completed her questioning of a witness as to what the witness had told her at jail on a previous occasion, in order to keep defense counsel from putting herself in a position where she could be called to testify, did not violate defendant's right to confront witnesses against him. *D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202; U.S. Const. Amend. 6. Ford v. United*

States, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

— Credibility and impeachment, examination of witnesses.

Where because of circumstances of agreement between government and prosecution witness, penalties that would fall upon him if he gave untruthful testimony and magnitude of his admission that he was principal person in United States who actively organized assassination there was reason to conclude that witness had no motive to lie when he made extrajudicial statement, and defendants had introduced prior inconsistent statement, prior consistent statement by witness was properly admitted under rule in accordance with wide discretion vested in the trial court by rule and decisions. Fed. Rules Evid. Rule 801(d)(1)(B), 18 U.S.C.; 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Refusal, in criminal prosecution, to admit testimony regarding effect of drug use on perception for purposes of impeaching testimony of accomplice, who testified for government and who was a heroin user, unless it was established that accomplice had used narcotics on day of offenses was not error. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Though the statute allows an exception to the general rule that one cannot impeach his own witness by use of previously made contradictory statements, to come within the exception, actual surprise must be found. D.C. Code 1951, §§ 14-104, 22-2401. *Belton v. U.S.*, 259 F.2d 811, 1958 U.S. App. LEXIS 4789 (C.A.D.C. 1958).

Witness's statement to police that they could not believe a word that she said because she was a "pathological liar" was not material to defendant's guilt in murder prosecution, and thus government's failure to disclose witness's statement to defendant was not a Brady violation; defendant, who called witness, his girlfriend, as his sole witness, knew she had been convicted of perjury with respect to events in the case, and even if defendant had decided not to call witness, result of proceeding would not have been different, as government presented compelling evidence of guilt. *Tyler v. United States*, 975 A.2d 848, 2009 D.C. App. LEXIS 252 (2009), writ of certiorari denied by 131 S. Ct. 157, 178 L. Ed. 2d 94, 2010 U.S. LEXIS 6756, 79 U.S.L.W. 3199 (U.S. 2010).

State had good faith basis to believe that codefendants and defense witness were members of rival gangs competing for territory covering scene of alleged murder, and could thus impeach defense witness's testimony that he

was not intended target of shooting; State's proffer in response to defendant's sustained objection demonstrated that information resulted from months of investigation by police. *Ebron v. United States*, 838 A.2d 1140, 2003 D.C. App. LEXIS 755 (2003), writ of certiorari denied by 543 U.S. 939, 125 S. Ct. 347, 160 L. Ed. 2d 247, 2004 U.S. LEXIS 6901, 73 U.S.L.W. 3236 (2004).

Grand jury testimony of government's eyewitness in murder case, showing that she lied either to the police or the grand jury with respect to another murder that she allegedly observed, would have been relevant impeachment material for defendant's use on cross-examination, as it could have lessened the jurors' trust in her testimony regarding the murder that defendant allegedly committed. *Bennett v. United States*, 797 A.2d 1251, 2002 D.C. App. LEXIS 108 (2002).

Grand jury testimony of government's eyewitness in murder case, showing that she lied either to the police or the grand jury with respect to another murder that she allegedly observed, would not be cumulative if defendant were allowed to use it for impeachment purposes, even though eyewitness was otherwise impeached with prior convictions and evidence of drug-related activities. *Bennett v. United States*, 797 A.2d 1251, 2002 D.C. App. LEXIS 108 (2002).

Even assuming that detective's testimony, that detective had not believed witness' initial statements that he had not witnessed the shooting, was opinion testimony, such opinion testimony was admissible in prosecution for first-degree murder while armed; it was helpful to jury because it explained why detective questioned witness a second time for information about the murder, detective's testimony was based on detective's personal observations of witness' demeanor during interview and on fact that detective had received contradictory information from another witness, and detective did not offer an opinion on witness' credibility as a witness. *Bennett v. United States*, 797 A.2d 1251, 2002 D.C. App. LEXIS 108 (2002).

Defendant charged in triple murder was not entitled to cross-examine prosecution witness concerning her earlier arrest on charges related to gun possession, even though those charges were dropped after police officer amended charges on police report, thus creating confusion as to proper charges, and even though same officer was on scene of triple murder when victim gave police witness's name; while defendant theorized that witness may have falsified testimony in return for continued favorable treatment in triple murder investigation, defendant failed to proffer any evidence of any ongoing relationship between witness and officer or of how witness might have benefitted from her earlier contact with him. *Crutchfield*

v. United States, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Murder defendant was not entitled to impeach prosecution witness's testimony that she had never owned certain automobile by introducing into evidence Department of Motor Vehicle (DMV) document in witness's name which was registered on day after murder; DMV procedures would have permitted another person to register car under witness's name. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

There was sufficient inconsistency between murder defendant's omission to tell police of her encounter with murder victim on day of his death when she waived her Miranda rights and talked to police and her testimony at trial to make it permissible for the state to impeach defendant on the basis of her omission, since under the circumstances it would have been natural for defendant to mention fact that she had been with the victim on the day of his death, and since defendant knew that the murder victim had been killed only hours after she saw him alive. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Trial court in prosecution for felony-murder and first-degree burglary erred in admitting previous statements of three prosecution witnesses during redirect to rehabilitate their testimony after defense counsel suggested that witnesses had a motive to lie at trial, where prior statements were made to law enforcement officials at a time when witnesses were under arrest and knew that they could be tried for first-degree murder, and thus, had a motive to lie to the detective who took the statements. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

Through cross-examination of witnesses in prosecution for felony-murder and first-degree burglary on subject of their plea agreement, defense counsel suggested that witnesses had a motive to lie at trial, and thereby triggered application of rules which permit admission of prior consistent statements, for purposes of determining whether such prior consistent statements were properly admitted. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

In prosecution for attempted robbery, burglary, assault, and murder, trial court did not err in denying defendant's pretrial motion to limit his impeachment to fact but not nature of

his prior convictions. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Trial court did not abuse its discretion by refusing to strike testimony of witness, that witness had seen defendant with "numerous guns," in prosecution for first-degree murder while armed, possession of a firearm during a crime of violence and carrying a pistol without a license (CPWL); defense counsel, during cross-examination and closing, made full use of statement in an attempt to discredit witness, testimony was not admitted to establish criminal propensity, witness was not only person who had seen defendant with guns prior to murder, and comment was not referenced by government during closing argument. *Daniels v. United States*, 2 A.3d 250, 2010 D.C. App. LEXIS 494 (2010), writ of certiorari denied by 131 S. Ct. 806, 178 L. Ed. 2d 538, 2010 U.S. LEXIS 9561, 79 U.S.L.W. 3343 (U.S. 2010).

— Cross-examination and re-examination, examination of witnesses.

Defendants at joint trial for murder were not entitled to cross examine victim's girlfriend and her father for testimonial bias based on the girlfriend's alleged involvement in drug dealing with victim on the day of the murder, even though defendants made a sufficient factual proffer, based on a reported statement of the mother of victim's child, that victim went to the murder location to sell drugs; defendants could not proffer any factual basis to believe that the girlfriend sold drugs or assisted victim in doing so, and no such basis materialized when trial court put the question to the girlfriend herself under oath. *McCraney v. United States*, 983 A.2d 1041, 2009 D.C. App. LEXIS 604 (2009).

Trial court error in restricting defense counsel's bias cross-examination of police sergeant was harmless error, in prosecution for murder; sergeant's testimony on direct had a very weak impact on the outcome of the case, the proposed bias cross-examination would not have appreciably weakened whatever impact his testimony would have had, and the defense was able to expose the inconsistencies and weaknesses in the identification testimony of eye witness, who sergeant allegedly influenced. *Martinez v. United States*, 982 A.2d 789, 2009 D.C. App. LEXIS 546 (2009).

Murder defendants were not entitled to cross-examine witness and elicit that witness was biased because he had the motive and opportunity to kill victim; trial court permitted considerable questioning of witness, but properly excluded third-party perpetrator evidence on basis that prejudicial impact of cross-examination outweighed its probative value, as trial court determined proffered testimony was really counsels' attempt to introduce negative

evidence about victim to distract jury from the guilt or innocence of defendants. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Prior sworn, grand jury testimony of witness, whose daughter was killed two days after shooting that gave rise to murder charge against defendant, sufficed to give prosecution a good faith basis to ask defendant question on cross-examination about his purported statement to witness that he was “sorry” his daughter was killed. *Plummer v. United States*, 813 A.2d 182, 2002 D.C. App. LEXIS 733 (2002).

Exclusion of defendant’s mother from being re-called to witness stand in murder trial, to corroborate defendant’s testimony that defendant and his mother had not discussed his alibi or any other aspect of the case, was not warranted as sanction for mother’s violation of witness sequestration rule; it had not been evident that mother would be re-called to witness stand, there was no evidence that mother or defense counsel had acted in bad faith, and trial court did not consider lesser sanctions. *Benn v. United States*, 801 A.2d 132, 2002 D.C. App. LEXIS 364 (2002), remanded by 978 A.2d 1257, 2009 D.C. App. LEXIS 384 (D.C. 2009).

Prosecution should not have been allowed to cross-examine defense witness, in prosecution for first-degree premeditated murder, about her prior stabbing of defendant and defendant’s failure to press charges, even if such evidence suggested witness’ bias; there was already evidence of witness’ bias, including her love for defendant, their child together, and possibility that defendant might contribute to support of child, so that additional evidence of bias was relatively unimportant, and evidence that witness, who was member of National Guard with no criminal record, would stab defendant may have implied to jury that defendant was bad actor who did something violent to provoke her anger on that occasion and that he was, therefore, capable of the egregious acts for which he was on trial. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Probative value was substantially outweighed by danger of unfair prejudice as to cross-examination of defense witness, in prosecution for first-degree premeditated murder, with letters witness had written to defendant declaring his affinity for defendant; witness had admitted he was “very close” to defendant, using letters to show that witness was in fact defendant’s “best friend” was only marginally relevant to showing bias, and letters contained highly inflammatory references to defendant as a killer and suggested defendant was capable of killing even those individuals who were closest to him if he believed they were disloyal. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Probative value was substantially outweighed by danger of unfair prejudice as to cross-examination of defendant, in prosecution for first-degree premeditated murder, regarding letter he had written to witness, offered to show that defendant and witness had close relationship; jury already knew that defendant had a child with witness, that defendant had been in her home on “thousands” of occasions, and that he had written her while incarcerated on unrelated charges, and letter suggested that defendant was well-connected to criminal elements as a person who knows “who is dying” and “who’s doing the killing.” *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Trial court properly limited murder defendant’s cross-examination of police officer about a purported violation of police department order governing high speed chases, as officer was extensively cross-examined and line of questioning had little, if any, relevance to issues in case. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

Trial court properly limited murder defendant’s cross-examination of police officer about a purported violation of police department procedure that required an officer to interview a witness before videotaping a statement, as officer was extensively cross-examined and line of questioning had little, if any, relevance to issues in case. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

Trial court properly restricted murder defendant’s cross-examination of police officer about his lay opinion regarding defendant’s guilt, where defendant, when arrested, had a copy of victim’s car keys in his pocket and officer previously testified at trial that it was a “distinct possibility” that whoever had victim’s vehicle was the perpetrator, and defense counsel advocated at closing argument that officer’s actions were clouded by his belief in defendant’s guilt and his desire to secure a conviction. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

During the defense’s case, trial court appropriately precluded murder defendant from recalling police officer in order to demonstrate his bias through extrinsic evidence of his allegedly untruthful statement in arrest warrant affidavit, as defendant had the opportunity to cross-examine officer on the issue during the government’s case-in-chief. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

Prior uncharged robberies of drug dealers were not sufficiently similar to instant offenses to warrant cross-examination of witness concerning such uncharged robberies in prosecution for, inter alia, murder, obstruction of justice and burglary, arising from drug-related triple murder and subsequent murder of potential prosecution witness; uncharged robberies

occurred more than three years before triple murder, and beyond fact that victims were believed to be drug dealers, defense counsel proffered no similarities between those earlier robberies and triple homicide. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Evidence that testimony of Government's key eyewitness to fatal shooting might have been motivated by his effort to cover up his own involvement in shooting, and perhaps to downplay culpability of his partner in criminal activity, was highly relevant to jury's assessment of witness's credibility, and should have been admitted on cross-examination as third-party culpability evidence. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

That eyewitness testified on redirect examination that he received collect calls from an inmate who told him not to testify against defendant did not warrant a mistrial of murder prosecution, where the matter was first raised by defense counsel on cross-examination. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

Defense counsel was properly precluded in murder prosecution from asking eyewitness on recross-examination whether an inmate told him in a collect call to "stop lying and tell the truth," where defense counsel acknowledged that recross-examination would be either irrelevant or repetitious. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

Defense counsel in murder prosecution could not impeach police detective on cross-examination as to possible inconsistency in eyewitness's written statement, which detective typed, that eyewitness grabbed victim before he fled from defendant, where defense counsel did not confront eyewitness with that supposed inconsistency when he was on the stand. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

Testimony about assault in which defendant pointed gun at Government witness and pulled trigger was admissible on redirect examination of witness, despite the risk of prejudice, where defendant attempted, on cross-examination of witness, to discredit witness's more limited testimony about having merely seen defendant

with a gun prior to robbery and murder of victim. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Prosecutor's opening questions on cross-examination of defendant's character witnesses in prosecution for murder and kidnapping, as to whether the witnesses had been with defendant on day of the murder, were a proper attempt to establish the limitations of the character testimony. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

— Harmless or reversible error, examination of witnesses.

Refusal, in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, to permit cross-examination of accomplice, who testified for government and whose counsel had been informed that government would be willing, with regard to unrelated narcotics and robbery charges against accomplice, to accept plea of guilty to one misdemeanor, as to whether government had made any disposition of such unrelated charges was reversible error when considered in conjunction with other errors. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Trial court's admission of deputy medical examiner's autopsy notes was not plain error in murder prosecution, even if admission violated defendants' rights under the Confrontation Clause; victims' cause of death was not in dispute, testimony based on such notes was largely cumulative of testimony based on non-testimonial photographs, counsel sought to use the notes to defense advantage, and defendant could have subpoenaed deputy medical examiner to testify had they wanted to challenge his findings. *Mungo v. United States*, 987 A.2d 1145, 2010 D.C. App. LEXIS 26 (2010), writ of certiorari denied by 131 S. Ct. 964, 178 L. Ed. 2d 793, 2011 U.S. LEXIS 20, 79 U.S.L.W. 3401 (U.S. 2011).

Any denial of murder defendant's constitutional right to cross-examine police witness occasioned by redaction of his statement to police to remove his account of his whereabouts at time of murder did not rise to level of plain error requiring reversal, where testimony of four eyewitnesses contradicted defendant's hearsay account. *Reams v. United States*, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

Although witness's testimony at murder trial regarding statement by non-testifying co-defendant that indicated that other defendant was in the car with him violated defendant's rights under the Confrontation Clause, the admission of the statement was harmless, where the trial court gave a curative instruction to the jury to

disregard the statement as to defendant, and there was significant other evidence that defendant was in car with co-defendant, including the fact that his fingerprint was found on a bag in the car, his identification card was found in the car, two witnesses testified to seeing him in the car, and he was found hiding near the wrecked car. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Trial court's error in murder prosecution, in failing to send marshals to secure witness's appearance, was not harmless beyond a reasonable doubt; witness's corroboration of defendant's claims that victim's nephew was involved in a plan to murder defendant might have changed the outcome of jury's verdict that found defendant guilty of voluntary manslaughter. *Harris v. United States*, 834 A.2d 106, 2003 D.C. App. LEXIS 623 (2003).

Prosecutor's question to detective as to date of photograph of defendant that detective had volunteered was a police identification photograph, to which detective responded that photograph was from a date prior to charged offenses, was not prosecutive error in murder and armed robbery prosecution; it was not apparent that prosecutor acted with intent to prejudice defendant by showing that police secured photograph before his arrest in present case, and question helped show that defendant's hairstyle near time of offenses matched witnesses' descriptions of one assailant. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Prosecutor's repeated use of leading questions did not require reversal of murder and armed robbery convictions, where almost all of defendant's objections to the leading nature of the questions were sustained. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Permitting prosecution to cross-examine defendant about his purported statement to witness that he was "sorry" witness's daughter was killed was not plain error in murder trial; questioning was limited and the prosecution did not mention defendant's purported "confession" to witness in closing argument. *Plummer v. United States*, 813 A.2d 182, 2002 D.C. App. LEXIS 733 (2002).

Trial court's error in excluding defendant's mother from being re-called to witness stand in murder trial to corroborate defendant's testimony that defendant and his mother had not discussed his alibi or any other aspect of the case, as sanction for mother's violation of witness sequestration rule, was not harmless beyond a reasonable doubt; because of lack of physical evidence, a confession, or the like, the case turned entirely on jury's credibility determinations, jurors might reasonably have inferred that mother was not re-called because she could not truthfully corroborate defendant's

testimony, and trial court did not take measures to mitigate the prejudice to defendant, such as defendant's suggestion to instruct the jury on witness sequestration, so they would understand why mother was unable to be re-called to testify. *Benn v. United States*, 801 A.2d 132, 2002 D.C. App. LEXIS 364 (2002), remanded by 978 A.2d 1257, 2009 D.C. App. LEXIS 384 (D.C. 2009).

The "harmless beyond a reasonable doubt" test, for errors of constitutional magnitude, applied to trial court's exclusion of defendant's mother from being re-called to witness stand in murder trial, to rebut prosecutor's inference that her testimony would differ from defendant's testimony that defendant and his mother had not discussed his alibi or any other aspect of the case, as sanction for mother's violation of witness sequestration rule. *Benn v. United States*, 801 A.2d 132, 2002 D.C. App. LEXIS 364 (2002), remanded by 978 A.2d 1257, 2009 D.C. App. LEXIS 384 (D.C. 2009).

Improper exclusion of third-party culpability evidence on cross-examination was harmless error, where, in spite of ruling, defendants were able to present their theory that Government's key eyewitness, who committed another murder, also participated in murder at issue, and defendants were able to elicit evidence, and to argue, that eyewitness was himself a willing participant in murder at issue, had a motive and opportunity to commit it, was biased to protect his own interests and thus, sought to shift blame to others. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Error arising when prosecutor was permitted to impeach its own witnesses with prior inconsistent statements in prosecution for first-degree murder while armed was harmless, where testimony of other prosecution witnesses, if believed, established that defendant was armed and shot victim. D.C. Code 1981, §§ 6-2361, 14-102, 22-2401, 22-3202, 22-3204. In re D.A., 597 A.2d 1331, 1991 D.C. App. LEXIS 291 (1991).

Trial court's action in murder and kidnapping prosecution in allowing prosecutor to establish through cross-examination that one defendant had not told anyone except her mother about her encounter with murder victim on day of his death did not cause serious prejudice to

defendant, since such impeachment did not encroach upon defendant's constitutional right against self-incrimination, since prosecutor made no mention of it in closing, and in light of strong evidence in the case. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Error of trial court, in prosecution for felony-murder and first-degree burglary, in admitting previous statements of three prosecution witnesses to rehabilitate their testimony after defense counsel suggested that the witnesses had a motive to lie at trial was harmless, in view of government's evidence of defendant's active participation in the crimes, in conjunction with court's detailed charge to jury regarding limited use of prior consistent statements. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

— Immunity.

In first-degree murder trial, trial court was not required to sua sponte inquire as to whether government could obtain order of use immunity for prosecution witness after witness invoked his Fifth Amendment privilege against testifying concerning previous altercation in which witness and victim had allegedly shot at defendant, where neither party suggested use immunity and defense counsel made rather weak showing of why cross-examination of witness about previous altercation was necessary. U.S.C. Const. Amends. 5, 6; D.C. Code 1981, §§ 22-2401, 22-3202. *McClellan v. United States*, 706 A.2d 542, 1997 D.C. App. LEXIS 136 (1997), writ of certiorari denied by 524 U.S. 910, 118 S. Ct. 2073, 141 L. Ed. 2d 149, 1998 U.S. LEXIS 3677, 66 U.S.L.W. 3773 (1998).

Felony-murder.

— Burglary, felony-murder.

If homicide is committed within *res gestae* of burglary or housebreaking, killing constitutes felony murder. *U.S. v. Naples*, 192 F.Supp. 23, 1961 U.S. Dist. LEXIS 3087 (D.D.C.1961).

Killing of deceased by defendant as he was securing loot and preparing to leave premises into which he had broken was a homicide committed in perpetration of housebreaking. D.C. Code 1951, § 22-2401. *U.S. v. Naples*, 192 F.Supp. 23, 1961 U.S. Dist. LEXIS 3087 (D.D.C.1961).

— Causal connection, felony-murder.

Mere temporal and locational coincidence is not enough for felony-murder conviction; it must appear that there was such actual legal relation between killing and crime that killing

can be said to have occurred as part of perpetration of crime. *Johnson v. United States*, 671 A.2d 428, 1995 D.C. App. LEXIS 149 (1995).

Where evidence at trial tends to show that defendant has committed arson, and that fire was sole cause of victim's death, defendant is either guilty of first degree murder or he is to be acquitted. D.C. Code 1951, § 22-401, 22-2401. *Green v. U.S.*, 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

— Continuing offenses, felony-murder.

Mere coincidence in time between murder and robbery is insufficient to support a felony-murder conviction. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Under District of Columbia murder-during-robbery statute, the crime of robbery is still in progress so long as the essential ingredient of asportation continues. D.C. Code 1951, § 22-2401. *Carter v. U.S.*, 223 F.2d 332, 1955 U.S. App. LEXIS 3964 (C.A.D.C. 1955).

Under District of Columbia murder-during-robbery statute, asportation continues during continuous pursuit immediately organized and begun, and the robber is guilty of first degree murder if, in those circumstances, he kills a pursuer. *Carter v. U.S.*, 223 F.2d 332, 1955 U.S. App. LEXIS 3964 (C.A.D.C. 1955).

A killing subsequent to a burglary does not negate the fact of the burglary or invasion of the societal interests; the burglary is a separate and distinct act from the succeeding killing, yet may be deemed to be a "continuing offense" for purposes of the felony-murder statute. D.C. Code §§ 22-1801(a), 22-2401. *Blango v. United States*, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

— Dangerous or deadly weapon, felony-murder.

Government's evidence that, when arrested, shortly after strangled victim was discovered, defendant had small pen knife in his pocket was not sufficient to meet the "dangerous weapon" provision of felony-murder, first-degree murder, statute. D.C. Code § 22-2401. *Cooper v. United States*, 368 A.2d 554, 1977 D.C. App. LEXIS 403 (1977).

— Furtherance of common design, felony-murder.

If the lethal act is in furtherance of the common purpose, accomplice is guilty of felony murder even though there was an express agreement not to kill, and even if he actually attempted to prevent the homicide. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

When one of the parties to a felony commits a killing outside the scope of felonious crime which the parties undertook to commit, aiders and abettors of the felony cannot be convicted of

felony murder. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Requirement that the killing take place "in furtherance of" the underlying felony, as opposed to "during" or "in the course of" the underlying felony, applies only to aiders and abettors of the actual killer. D.C. Code 1981, § 22-2401. *Butler v. United States*, 614 A.2d 875, 1992 D.C. App. LEXIS 188 (1992), writ of certiorari denied by 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558, 1992 U.S. LEXIS 7611, 61 U.S.L.W. 3401 (1992).

— In general.

Indictment and conviction on underlying felony are not requisites of felony-murder conviction under District of Columbia Code; rather, Government need only prove all positive elements of underlying felony beyond reasonable doubt, and thus, vacation of conviction on underlying felony did not require vacation of felony-murder conviction. D.C. Code 1981, § 22-2401. *United States v. Greene*, 834 F.2d 1067, 1987 U.S. App. LEXIS 16241 (C.A.D.C. 1987), writ of certiorari denied by 487 U.S. 1238, 108 S. Ct. 2908, 101 L. Ed. 2d 940, 1988 U.S. LEXIS 3135, 56 U.S.L.W. 3895 (1988).

National felonies, including offense of rescuing a federal prisoner, constituted "any offenses" within District of Columbia statute providing in effect that "Whoever, being of sound memory and discretion, kills another purposely, .. in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary" commits felony murder. D.C. Code § 22-2401; 18 U.S.C. § 752(a). *United States v. Greene*, 489 F.2d 1145, 1973 U.S. App. LEXIS 7659 (C.A.D.C. 1973).

Elements of felony murder under District of Columbia statute are that a felony was attempted or being perpetrated and that during the course of action the deceased was purposely killed. D.C. Code § 22-2401 et seq. *United States v. Greene*, 489 F.2d 1145, 1973 U.S. App. LEXIS 7659 (C.A.D.C. 1973).

In the District of Columbia "malice" exists, sufficient to support murder conviction, where the killing results from the commission of a penitentiary offense which is reasonably calculated to cause death or inflict serious bodily injuries. D.C. Code 1929, T. 6, §§ 21-23. *Lee v. U.S.*, 112 F.2d 46, 1940 U.S. App. LEXIS 4220 (1940).

Requirements for felony murder conviction are that defendant or an accomplice must have inflicted injury on decedent from which she died, and injury must have been inflicted in perpetration of a specified felony. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Essential elements of felony-murder while armed are that defendant, while perpetrating

or attempting to perpetrate a specified felony while armed, inflicted injury on victim from which he died; requirement of underlying felony operates as mechanism by which jury can infer state of mind required for first-degree murder. D.C. Code 1973, §§ 22-2401, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

The essential elements of the charge of felony-murder do not include proof of sanity. D.C. Code § 22-2401. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

— Persons liable, felony-murder.

To support conviction of aiding and abetting a felony-murder, the homicide must have been committed in the course of the felony and in furtherance of the common purpose to commit the felony, rather than merely coincidental with it. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

By its terms, the first-degree murder statute imposes felony murder liability solely on the person who does the killing, and other participants in the felony are exposed to first-degree murder liability only by virtue of the aiding and abetting statute. *Tyree v. United States*, 942 A.2d 629, 2008 D.C. App. LEXIS 31 (2008), writ of certiorari denied by 556 U.S. 1130, 129 S. Ct. 1612, 173 L. Ed. 2d 1000, 2009 U.S. LEXIS 2077, 77 U.S.L.W. 3528 (2009).

No distinction is made between principals and aiders and abettors for purposes of felony murder liability. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Under felony murder standard, all accomplices are culpable for the resulting death, because the intent requirement for murder, in the case against an aider and abettor, is satisfied solely by the aider and abettor's participation in the felony that resulted in the killing. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Under felony murder rule, accomplice who aids and abets is criminally liable for a killing by the principal only if the killing is done in furtherance of the common design or plan to commit the underlying felony, or is the natural and probable consequence of acts done in the perpetration of the felony. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

No distinction is made between principals and aiders and abettors for purposes of felony-murder liability; all accomplices are culpable for resulting death if intent to commit underlying felony is proved. *Prophet v. United States*, 602 A.2d 1087, 1992 D.C. App. LEXIS 26 (1992).

To convict aider and abettor of first-degree felony-murder, Government was not required

to prove that aider and abettor intended to commit the homicide. D.C. Code §§ 22-105, 22-2401. *Waller v. United States*, 389 A.2d 801, 1978 D.C. App. LEXIS 482 (1978), writ of certiorari denied by 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253, 1980 U.S. LEXIS 2108 (1980).

The two elements requisite for conviction of felony-murder are that defendant or accomplice must have inflicted injury on decedent from which he died and that injury must have been inflicted in perpetration of specified felony, but no distinction is made between principals and aiders and abettors for purposes of felony-murder liability and only intent to commit underlying felony need be proved. D.C. Code §§ 22-105, 22-2401. *Waller v. United States*, 389 A.2d 801, 1978 D.C. App. LEXIS 482 (1978), writ of certiorari denied by 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253, 1980 U.S. LEXIS 2108 (1980).

— Purposeful and intentional homicide, felony-murder.

Fact that a robbery is being perpetrated by one who killed another, without purpose to do so and without deliberate or premeditated malice, supplies the element necessary to constitute the crime of first degree murder under District of Columbia murder-during-robbery statute. D.C. Code 1951, § 22-2401. *Carter v. U.S.*, 223 F.2d 332, 1955 U.S. App. LEXIS 3964 (C.A.D.C. 1955).

A homicide committed without purpose so to do in the course of the perpetration or attempted perpetration of a robbery is murder in the first degree. D.C. Code 1940, §§ 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

Defendant who shot victim in perpetration of robbery would be guilty of first or second degree murder even if pistol went off accidentally, since law presumes that defendant, while attempting to perpetrate robbery, foresaw and intended whatever consequences might naturally result from such encounter, and considers such state of mind to be implied malice. Code of Laws of 1901, § 798 et seq. *Marcus v. U.S.*, 86 F.2d 854, 1936 U.S. App. LEXIS 3877 (1936).

Under statute, any person who kills another while perpetrating or attempting to perpetrate a robbery, or one of the other enumerated felonies, is guilty of first-degree murder, and this is true even if the homicide is neither intended nor foreseeable. D.C. Code § 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

— Robbery, felony-murder.

Jury may acquit a defendant of felony-murder when it finds that robbery was merely an

afterthought following homicide. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Even if at time of shooting of grocery store security guard defendants were "casing" the store preparatory to a later attempt to rob, the intent to rob requisite to felony-murder conviction would not yet have arisen since it is necessary that the felony have progressed beyond mere preparation to an indictable attempt before the homicide occurs. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

To convict for felony-murder it is necessary that the intent to rob be formed before the homicide. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

The intent to rob which will support felony-murder conviction can only be proved by action beyond mere preparation. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Victim of homicide, even though dead, was "person" within robbery statute under circumstances where time interval between stabbing and taking of money from her body was short, and even if intent of taking money did not occur until after she was dead perpetrator could properly be convicted of robbery. D.C. Code 1951, §§ 22-2401, 22-2901. *Carey v. U.S.*, 296 F.2d 422, 1961 U.S. App. LEXIS 3480 (C.A.D.C. 1961).

Under District of Columbia statute, murder committed in course of robbing a grocery store is first degree murder although there is no premeditation or intent or desire to kill. D.C. Code 1951, § 22-2401. *Stewart v. U.S.*, 214 F.2d 879, 1954 U.S. App. LEXIS 2790 (C.A.D.C. 1954).

One who kills as he robs is charged by statute with having that degree of malice which is indispensable to murder in the first degree. D.C. Code 1940, § 22-2401. *Wheeler v. U.S.*, 165 F.2d 225, 1947 U.S. App. LEXIS 2054 (1947).

The perpetration of a robbery, during which act a homicide is committed, legally takes the place of that premeditation to kill which is necessary for murder in the first degree, and it was not error to give such instruction merely because the indictment for murder tendered no such issue as robbery. *Burton v. U.S.*, 151 F.2d 17, 1945 U.S. App. LEXIS 2891 (1945).

To support felony-murder conviction, there had to be evidence sufficient to support jury finding that murder took place during course of robbery; however, mere coincidence in time of robbery and murder is insufficient to support felony-murder conviction. *Head v. United*

States, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

Harmless or reversible error.

— In general.

Court of Appeals' decision subsequent to instant prosecution established that District of Columbia Code insanity burden could be applied to felony-murder charge, although underlying felony was United States Code violation, without violating scope of District of Columbia Code section or denying defendant equal protection, and any error in applying District of Columbia Code insanity burden to prosecution before 1973 was thus not reversible error, given current law. D.C. Code 1981, § 22-2401; U.S. Const. Amend. 14. *United States v. Greene*, 834 F.2d 1067, 1987 U.S. App. LEXIS 16241 (C.A.D.C. 1987), writ of certiorari denied by 487 U.S. 1238, 108 S. Ct. 2908, 101 L. Ed. 2d 940, 1988 U.S. LEXIS 3135, 56 U.S.L.W. 3895 (1988).

Juror sitting on murder trial was not prejudiced by her receiving two collect calls from an unknown inmate, which she did not accept, where at subsequent bias hearing juror assured trial judge and counsel that the calls would not affect her decision. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

— Preliminary proceedings, harmless or reversible error.

Refusal to grant severance in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, was not prejudicial to defendant due to fact that evidence placing a codefendant at scene of crime was quantitatively and qualitatively greater than evidence against defendant where evidence against defendant was both substantial and compelling, jury was specifically instructed to determine guilt of each defendant by considering only his own conduct and evidence which applied to him and where verdicts demonstrated that jury fulfilled its obligation under charge. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed. Rules Crim. Proc. rules 8(b), 14, 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where count of indictment charging defendant with carrying pistol on day of his arrest was dismissed for failure of proof before case was submitted to jury and indictment was retyped, omitting count, defendant was not prejudiced by court's refusal to sever such properly joined count from counts charging felony murder, first-degree burglary and armed robbery. D.C. Code §§ 22-1801(a), 22-2401, 22-2901; Fed. Rules Crim. Proc. rule 8(a), 18 U.S.C. *United States v. Joyner*, 492 F.2d 650, 1974 U.S. App. LEXIS 10133 (C.A.D.C. 1974), writ of

certiorari denied by 419 U.S. 852, 95 S. Ct. 94, 42 L. Ed. 2d 83, 1974 U.S. LEXIS 2566 (1974).

Although defendant relied on alibi defense and codefendant maintained that defendant and he had been drinking at lounge and that defendant and victim had gone into parking lot by themselves before stabbing occurred, defendants were not prejudiced by joint trials on theory of irreconcilable defenses, where such defenses were subject to scrutiny on cross-examination, alibi defense was contradicted by witness' testimony and evidence that victim's type of blood had been found on defendant's shoe and jury was instructed to consider evidence individually against defendant and codefendant. D.C. Code §§ 22-2401, 22-2403; Fed. Rules Crim. Proc. rule 14, 18 U.S.C. *United States v. Hurt*, 476 F.2d 1164, 1973 U.S. App. LEXIS 10998 (C.A.D.C. 1973).

Where assault and weapon charges against one defendant were joined for trial with murder charges against other defendants, particular defendant was prejudiced by association with evidence proving bloody and grotesque killing, and in view of reference throughout trial to defendants as group having name of particular defendant, associating particular defendant in minds of jurors with murder with which he was not charged, prejudice required reversal and there was thus abuse of discretion in denying severance. D.C. Code §§ 22-502, 22-2401, 22-3202, 22-3204, 23-311(c); D.C. Code SCR, Criminal Rule 8(b). *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

Indictment or information.

— Commission or attempt to commit other offense, indictment or information.

Under statute defining murder in the first degree as a purposeful killing or as a killing without purpose in the perpetration of enumerated felonies, including robbery, indictment charging commission of homicide in attempted robbery charged murder in the first degree under the second portion of the statute and was not insufficient because not in words charging either a purposeful killing or a killing without purpose. D.C. Code 1940, §§ 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

Under statute defining murder in the first degree as a killing without purpose in the perpetration or attempted perpetration of enumerated felonies, intent to kill is not a material ingredient of the crime and need not be alleged. D.C. Code 1940, § 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

An indictment which charged defendant with killing druggist while attempting to rob him charged murder in the first degree. D.C. Code 1940, §§ 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

An indictment for murder while committing robbery, under Code, § 798, D.C. Code 1929, T. 6, § 21, providing that one who kills another in perpetrating any offense punishable by imprisonment in the penitentiary is guilty of murder, is not demurrable on the ground that robbery is not punishable by such imprisonment; Code, § 810, punishing robbery by imprisonment for not less than 6 months or more than 15 years, and section 934 providing for jail imprisonment where the sentence is for more than 6 months and not exceeding a year, and for imprisonment in the penitentiary where it exceeds a year. *U.S. v. Evans*, 28 App.D.C. 264, 1906 U.S. App. LEXIS 5240 (1906).

Trial court was not required to sever charges of first-degree murder and assault with a deadly weapon (ADW); evidence presented by the government for the murder and ADW charges, respectively, would have been mutually admissible to prove either of the crimes because the same gun was used in each and the same two witnesses testified regarding both incidents, the ADW and the murder were committed on separate occasions, nine months apart, against different victims, the prosecutor presented the evidence pertaining to each crime separately, and trial court repeatedly instructed the jury to keep the evidence separate and to follow the instructions on the presumption of innocence. *Atchison v. United States*, 982 A.2d 1138, 2009 D.C. App. LEXIS 543 (2009), writ of certiorari denied by 130 S. Ct. 1549, 176 L. Ed. 2d 140, 2010 U.S. LEXIS 1486, 78 U.S.L.W. 3481 (U.S. 2010).

— In general.

An indictment charging first degree murder was not defective, even though it did not contain the phrase "being of sound memory and discretion". D.C. Code 1951, § 22-2401. *Jones v. U.S.*, 296 F.2d 398, 1961 U.S. App. LEXIS 3529 (C.A.D.C. 1961).

It is not essential to the validity of an indictment for murder that it charge that the accused was of sound memory and discretion at the time of the commission of the crime. *Hill v. U.S.*, 22 App.D.C. 395, 1903 U.S. App. LEXIS 5543 (1903).

Government is free to introduce either evidence of actual premeditation or evidence of intent to commit felony on indictment charging first-degree murder; however, when evidence supports both theories, an indictment that charges defendant for one death by two counts of first-degree murder, one based on premeditation and the other based on felony-murder, is

preferred. *Byrd v. United States*, 510 A.2d 1035, 1986 D.C. App. LEXIS 348 (1986).

Government is free to introduce either evidence of actual premeditation or evidence of intent to commit felony on indictment charging first-degree murder, however, when evidence supports both theories, an indictment that charges defendant for one death by two counts of first-degree murder, one based on premeditation and the other based on felony-murder, is preferred. *Byrd v. United States*, 500 A.2d 1376, 1985 D.C. App. LEXIS 564 (1985), vacated by 505 A.2d 51 (D.C. 1986).

— Intent or motive, indictment or information.

It is not necessary for a common-law indictment for murder to charge a specific intention to take life. *Burge v. U.S.*, 26 App.D.C. 524, 1906 U.S. App. LEXIS 5118 (1906).

An indictment for murder under Code, § 798, D.C. Code 1929, T. 6, § 21, is not defective for want of an express allegation of an intent to kill. *Burge v. U.S.*, 26 App.D.C. 524, 1906 U.S. App. LEXIS 5118 (1906).

— Issues, proof, and variance, indictment or information.

An indictment, charging defendant, in the same count, with having caused the death of deceased both by shooting and drowning, is supported by evidence that the accused shot the deceased, and immediately afterwards caused him to be thrown into the sea. *Andersen v. U.S.*, 18 S.Ct. 689, 1898 U.S. LEXIS 1559 (1898).

Government's proof at trial that defendant and others shot into crowd of people at close range did not impermissibly vary from indictment charging defendant with assault with intent to murder while armed, despite defendant's claim that he was charged with assaulting each individual with intent to "murder him," rather than random shooting, absent any indication that government switched theories of intent between grand jury proceedings and trial. D.C. Code 1981, § 22-503. *United States v. Richardson*, 167 F.3d 621, 1999 U.S. App. LEXIS 3011 (C.A.D.C. 1999), writ of certiorari denied by 528 U.S. 895, 120 S. Ct. 225, 145 L. Ed. 2d 189, 1999 U.S. LEXIS 6155, 68 U.S.L.W. 3230 (1999).

Although indictment alleged that defendant had shot another with a pistol, thereby causing injuries from which individual died, whereas proof established that fatal weapon was a sawed-off shotgun, where no suggestion was made that defendant was in any way prejudiced by mistake in indictment and, from statements of witnesses and grand jury testimony made available to him before trial, defendant knew what proof would be, variance was not fatal. *United States v. Marshall*, 471 F.2d 1051, 1972 U.S. App. LEXIS 7096 (C.A.D.C. 1972).

Under an indictment in the common-law form for murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of statute defining murder in the first degree. *Burton v. U.S.*, 151 F.2d 17, 1945 U.S. App. LEXIS 2891 (1945).

In prosecution for murder, evidence that deceased was policeman held admissible, though his official capacity was not alleged in indictment. *Holmes v. U.S.*, 11 F.2d 569, 1926 U.S. App. LEXIS 2541 (1926).

The proof of the means of commission of a homicide need not conform strictly to the averment of such means in the indictment, provided the means of death proved agree in substance with the means charged. *Hamilton v. U.S.*, 26 App.D.C. 382, 1905 U.S. App. LEXIS 5377 (1905).

There was no showing that proof at trial differed materially from facts alleged in indictment, despite defendant's claim that both he and codefendant were indicted as principals in murder, while government offered evidence that it was defendant who shot victim. *Byers v. United States*, 649 A.2d 279, 1994 D.C. App. LEXIS 190 (1994).

Elements of predicate felony become additional elements which must be proven in order to establish offense of felony murder. D.C. Code 1981, § 22-2401. *Waller v. United States*, 531 A.2d 994, 1987 D.C. App. LEXIS 456 (1987).

— Joinder of counts and parties, indictment or information.

Defendants' four counts of murder were required to be merged into one due to the fact that there was only one victim. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Murder and weapons charges against one defendant could be joined with obstruction of justice charges against second defendant, in multi-defendant prosecution arising from stabbing death of victim, where defendants both participated in attack on victim and second defendant's attempt to keep his girlfriend from talking to police, which was basis for obstruction of justice charges, was logically related to attack. D.C. Code 1981, §§ 22-722(a)(3), 22-2401, 22-3202, 22-3204(b); Criminal Rule 8(b). *Sams v. United States*, 721 A.2d 945, 1998 D.C. App. LEXIS 229 (1998), writ of certiorari denied by 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 928, 2000 U.S. LEXIS 832, 68 U.S.L.W. 3479 (2000), writ of certiorari denied by 531 U.S. 1015, 121 S. Ct. 575, 148 L. Ed. 2d 492, 2000 U.S. LEXIS 7864, 69 U.S.L.W. 3363 (2000).

Indictment charging defendant with three counts of first-degree murder of single named victim could not have conceivably misled jury into believing that defendant had committed three killings and hence indictment was not defective. D.C. Code 1981, § 22-2401. *Byrd v.*

United States, 510 A.2d 1035, 1986 D.C. App. LEXIS 348 (1986).

Indictment charging defendant with three counts of first-degree murder, D.C. Code 1981, § 22-2401, of single named victim could not have conceivably misled jury into believing that defendant had committed three killings and hence indictment was not defective. *Byrd v. United States*, 500 A.2d 1376, 1985 D.C. App. LEXIS 564 (1985), vacated by 505 A.2d 51 (D.C. 1986).

Where rape and robbery victims were prostitutes who were abducted or induced into getting into defendant's car in very early hours of morning, and each victim described the car, in varying degrees of particularity consistent with defendant's as a dark blue 1970 Thunderbird, and where circumstances of crime were similar but each crime was separate and distinct, joinder of counts against defendant did not work any prejudice. D.C. Code §§ 22-501, 22-2401, 22-2801, 22-2901, 22-3202, 22-3502. *Bowyer v. United States*, 422 A.2d 973, 1980 D.C. App. LEXIS 385 (1980).

Charges against defendant, accused of first-degree murder, and codefendant, charged with being an accessory after the fact by threatening a material witness, were not improperly joined in a single indictment, in view of allegation that defendants jointly participated in the same act; fact that count against codefendant was subsequently dismissed for lack of evidence did not infect the joinder itself. D.C. Code SCR, Criminal Rule 8(b); D.C. Code §§ 22-106, 22-2401. *Jackson v. United States*, 329 A.2d 782, 1974 D.C. App. LEXIS 331 (1974), writ of certiorari denied by 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74, 1975 U.S. LEXIS 2593 (1975).

Crimes were appropriately joined in the same indictment. *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988).

— Lesser included offenses, indictment or information.

For purposes of imposing cumulative sentences under District of Columbia law, Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of a rape. D.C. Code §§ 22-2401, 22-2404, 22-2801, 23-112. *Whalen v. U.S.*, 100 S.Ct. 1432, 1980 U.S. LEXIS 15 (U.S. Dist. Col. 1980).

Second degree murder is an included defense under an indictment for felony-murder. D.C. Code 1961, §§ 22-2401, 22-2403. *Jackson v. U.S.*, 313 F.2d 572, 1962 U.S. App. LEXIS 3288 (C.A.D.C. 1962).

Under indictment charging first degree murder done during perpetration or attempted perpetration of rape, mayhem, robbery, kidnapping, or housebreaking while armed with or using a dangerous weapon, defendant may, if evidence warrants, be found guilty of the nec-

essarily included offense of second degree murder. D.C. Code 1951, § 22-2401. *Green v. U.S.*, 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

Under indictment charging murder in the first degree, defendant may be found guilty of murder in the second degree if the evidence warrants. Federal Rules of Criminal Procedure, rule 31(c), 18 U.S.C.; D.C. Code 1940, §§ 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

Defendant could not be convicted of both first-degree premeditated murder and first-degree felony murder of same victim. *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari denied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

Second-degree murder while armed and attempted robbery while armed were lesser included offenses of felony-murder, requiring vacation of either the felony-murder conviction or the convictions for the lesser offenses. U.S. Const.Amend. 5; D.C. Code 1981, §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *Price v. United States*, 531 A.2d 984, 1987 D.C. App. LEXIS 448 (1987).

While underlying felony of attempted armed robbery was element of felony-murder, its principal function was as an intent-divining mechanism and it permitted jury to infer state of mind requisite for conviction of murder in first degree and, as such, it was not a lesser included offense of felony-murder. D.C. Code § 22-2401. *Waller v. United States*, 389 A.2d 801, 1978 D.C. App. LEXIS 482 (1978), writ of certiorari denied by 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253, 1980 U.S. LEXIS 2108 (1980).

Rape is not a lesser included offense of felony-murder. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

— Malice, indictment or information.

Defendant could be convicted of second degree murder under felony-murder indictment even though indictment failed to allege "malice aforethought", where indictment contained the fully equivalent language that defendant "unlawfully and feloniously did murder" named person "by means of shooting him with a pistol". D.C. Code 1961, §§ 22-2401, 22-2403; Fed.Rules Crim.Proc. rules 7(c), 31(c), 18 U.S.C. *Jackson v. U.S.*, 313 F.2d 572, 1962 U.S. App. LEXIS 3288 (C.A.D.C. 1962).

— Place and time of death, indictment or information.

Where indictment alleged that injury causing death was inflicted in the District of Colum-

bia, failure to aver that death took place therein was not a jurisdictional defect. Cr.Code § 336, 18 U.S.C. § 553. *Bostic v. Rives*, 107 F.2d 649, 1939 U.S. App. LEXIS 2799 (1939).

An indictment for homicide, which charges that defendant threw a person into the water, and that the person was there "drowned," but fails to charge that she died, is not cured by an averment in the conclusion of the indictment, "and so the grand jurors," etc., "do say that the said F. B., her, the said A.W., in the manner and by the means aforesaid, feloniously," etc., "did kill and murder, against the form of," etc.; for this part of an indictment is considered as containing only conclusions of law concerning the effect of the preceding allegations of fact, and cannot operate to supply defects in the statement of facts. *U.S. v. Barber*, 20 D.C. 79 (D.C.Sup. 1891).

An indictment for murder, which charges that the accused did feloniously, etc., throw a certain person into a certain canal, wherein there was a great quantity of water, by means of which the said person in the canal aforesaid with the water aforesaid, "was then and there mortally choked, suffocated, and drowned," is fatally defective, on arrest of judgment, for the failure to conclude with an averment that she died by means of being thus "mortally choked, suffocated, and drowned." *U.S. v. Barber*, 20 D.C. 79 (D.C.Sup. 1891).

In an indictment for murder no degree of emphasis in stating the mortal or fatal nature of the prisoner's act can make that statement amount to an averment that the injured person actually died; much less that he died by that means. The sole office of that averment is to state that the prisoner's act was homicidal; the result of that act, being a separate fact and element in the crime of murder, must be specifically averred. It is therefore absolutely necessary to state that the party murdered died of the injury that he received. *U.S. v. Barber*, 20 D.C. 79 (D.C.Sup. 1891).

— Place of offense, indictment or information.

An indictment for murder, which alleges that the crime was committed in the District of Columbia, and in a certain house situated therein, is not insufficient because it omits to allege the precise locality of the house. *Lanckton v. U.S.*, 18 App.D.C. 348, 1901 U.S. App. LEXIS 5069 (1901).

— Specification of grade or degree of homicide, indictment or information.

An indictment charging a defendant with felony-murder, charged first degree murder, even though indictment omitted an allegation to the effect that accused was of sound memory and discretion. D.C. Code 1951, § 22-2401.

Coleman v. U.S., 295 F.2d 555, 1961 U.S. App. LEXIS 3632 (C.A.D.C. 1961).

Fact that indictment's first-degree murder counts, which alleged that defendant purposely beat, stabbed, shot or strangled various victims, thereby causing injuries resulting in their death, did not allege that defendant had a purpose of intent to kill was not a defect requiring dismissal of counts or that the counts be construed as charging murder in second degree, in view of fact that counts sufficiently notified defendant of charges against him and that his counsel was aware throughout the proceedings that defendant was charged with first-degree murder. D.C. Code § 22-2401; D.C. Code SCR, Criminal Rule 7(c). *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

— **Wound or other injury causing death, indictment or information.**

An indictment for murder under Code, § 798, D.C. Code 1929, T. 6, § 21, which charges that the defendant did “choke, suffocate, and strangle” a certain person, “of which said choking, suffocating, and strangling” the said person died, is sufficient, although there is no allegation that the choking was “mortal.” *Hamilton v. U.S.*, 26 App.D.C. 382, 1905 U.S. App. LEXIS 5377 (1905).

An indictment for murder, averring that the prisoner pushed A.W. into a canal, who was “then and there mortally choked, suffocated, and drowned,” is fatally defective on arrest of judgment for want of the averment that she died by this means, and is not cured by the conclusion that the prisoner feloniously, etc., “did kill and murder,” these being only conclusions of law. *U.S. v. Barber*, 20 D.C. 79 (D.C.Sup. 1891).

Instructions.

— **Accident or misfortune, instructions.**

Record failed to establish proof of claim that trial court erred in failing to instruct jury adequately as to accidental homicide. *United States v. Dent*, 477 F.2d 447, 1973 U.S. App. LEXIS 10804 (C.A.D.C. 1973).

Where question of accidental death was only contested issue in homicide case and jury received no guidance on this issue from trial court, second-degree murder conviction was reversed for new trial under proper instructions. *Thomas v. United States*, 419 F.2d 1203, 1969 U.S. App. LEXIS 10029 (C.A.D.C. 1969).

— **Aiding and abetting, instructions.**

There was no reasonable possibility that the jury applied an arguably ambiguous general instruction on aiding and abetting given in prosecution of defendant and co-defendant for

first-degree premeditated murder so as to improperly exempt the government from its burden of proving that they each premeditated and deliberated over killing the victim, and, thus, reversal of defendant's murder conviction was not warranted based on the instruction; trial court, in instructing jury on elements of the offense, took care to state that the government had to prove that defendants caused the death of victim that they did so with a specific intent to kill victim, and that they did so after premeditation and deliberation, and in context, the thrust of the instruction was that an accomplice might be guilty without having performed all the physical actions necessary to complete the charged offense, not that an accomplice might be guilty without having the requisite mental state for that offense. *Ewing v. United States*, 36 A.3d 839, 2012 D.C. App. LEXIS 23 (2012), writ of certiorari denied by 2013 U.S. LEXIS 3092, 81 U.S.L.W. 3579 (U.S. Apr. 15, 2013).

Trial court error in providing the “natural and probable consequences” aiding and abetting jury instruction did not constitute plain error, in prosecution for murder; defendant failed to show a reasonable probability that the error had a prejudicial effect on the outcome of the trial, as defendant never argued that he lacked the intent to commit first-degree murder, rather, he argued that he was not present when the murder occurred. *Martinez v. United States*, 982 A.2d 789, 2009 D.C. App. LEXIS 546 (2009).

“Natural and probable consequences” language in aiding-and-abetting instruction, which erroneously permitted liability to be predicated on negligence rather than requisite mental state of premeditation and deliberation and intent to kill, was harmless beyond a reasonable doubt as to defendant convicted of first-degree premeditated murder in connection with fatal beating; conviction of codefendant for lesser-included offense of armed second-degree murder showed that jury regarded defendant, not codefendant, as the principal, and there was no reasonable probability that jury convicted defendant on an aiding-and-abetting theory. *Fortson v. United States*, 979 A.2d 643, 2009 D.C. App. LEXIS 378 (2009), amended by 2009 D.C. App. LEXIS 692 (D.C. Sept. 3, 2009).

Plain error of trial court by including in aiding and abetting instruction “natural and probable consequences” language that allowed jury to convict defendants of first-degree murder while armed without finding the necessary mens rea for first-degree murder, in trial of five defendants arising out of beating of homeless man and murder of passerby who tried to intervene, resulted in a miscarriage of justice such that the plain error rule required convictions of defendants for first-degree murder while armed be reversed and convictions in-

stead be entered for second-degree murder while armed; defendants were tried as aiders and abettors, the principals who committed the murder were not codefendants, there was no compelling evidence that the defendants personally had the intent to kill and acted with premeditation and deliberation in doing so, but there was evidence that defendants acted with malice, as required to support conviction for second-degree murder. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Plain error of trial court, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by including in aiding and abetting instruction "natural and probable consequences" language which allowed jury to convict defendants of first-degree murder while armed without finding the necessary mens rea, affected the substantial rights of the defendants, for purposes of determining whether the first-degree murder convictions should be reversed on plain error review, as the government's sole theory of defendants' liability for murder was as aiders and abettors, aiding and abetting liability for murder required a principal, the principals who committed the murder were not codefendants, and the prosecution argued that defendants were guilty of first-degree murder if the principals had acted with premeditation and deliberation. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Error of trial court, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by including in aiding and abetting instruction "natural and probable consequences" language which allowed jury to convict defendants of first-degree murder while armed without finding the necessary mens rea for first-degree murder, was plain error, for purposes of plain error review, as the instruction imposed liability on an accomplice for a crime committed by a principal based on the accomplice's negligence. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L.

Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Error was harmless beyond a reasonable doubt, as to aiding and abetting instruction given, in prosecution for first-degree premeditated murder, which was not only unsupported by evidence but also eliminated the mens rea requirement of first-degree premeditated murder; government's theory was that first man fired nonfatal shots and that defendant was liable as principal who fired fatal shots, while defendant's theory was that second man fired fatal shots, but no reasonable reading of evidence would have led jury to conclude that defendant aided and abetted second man, and likelihood of prejudicial jury confusion was negligible, because prosecution consistently took position that defendant fired fatal shots, and parties' closing arguments focused on credibility of witnesses who gave contrasting versions of events and did not discuss aiding and abetting liability. *Tyree v. United States*, 942 A.2d 629, 2008 D.C. App. LEXIS 31 (2008), writ of certiorari denied by 556 U.S. 1130, 129 S. Ct. 1612, 173 L. Ed. 2d 1000, 2009 U.S. LEXIS 2077, 77 U.S.L.W. 3528 (2009).

Evidence did not warrant instruction on aiding and abetting, in prosecution for first-degree premeditated murder; witnesses testified that a man other than defendant fired several shots at victim, three of which hit him in the legs and brought him to the ground, after which defendant shot him twice, in the back, with his shotgun, but an autopsy found that the leg wounds were not fatal and that it was the shotgun blasts to the back that killed the victim, and thus, if jury believed defendant fired the shotgun, then defendant was a principal who could not aid and abet himself, while if jury did not believe he fired the shotgun, and instead believed it was fired by someone other than the man who shot at victim's legs, defendant was a nonparticipant. *Tyree v. United States*, 942 A.2d 629, 2008 D.C. App. LEXIS 31 (2008), writ of certiorari denied by 556 U.S. 1130, 129 S. Ct. 1612, 173 L. Ed. 2d 1000, 2009 U.S. LEXIS 2077, 77 U.S.L.W. 3528 (2009).

— Cause of death, instructions.

Jury instructions inadequately expressed defense theory of independent cause of death of victim, where instruction told jury no more than that defendant denied killing victim, phrase "independent cause," or its equivalent, and legal principle involved, were not mentioned in instructions, and judge's expansion of standard instruction on causation in murder and manslaughter had effect of emphasizing Government's theory. *Stack v. United States*, 519 A.2d 147, 1986 D.C. App. LEXIS 493 (1986).

In prosecution for murder of victim, who was assaulted during purse-snatching incident and

who died six days later at hospital after decision was made to discontinue heroic measures to keep her alive, trial court properly refused to instruct jury that they should find defendant not guilty of murder if Government failed to prove beyond a reasonable doubt that defendant caused victim's death because actions of physician in discontinuing such heroic measures constituted intentional or wilful malpractice or were an abnormal response to a situation caused by defendant's act; failure to give such an instruction was proper in absence of evidence as to what constituted "intentional or wilful malpractice" or "abnormal response" and to demonstrate that actions of physician breached such standard. D.C. Code § 22-2401. In re N., 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

— **Commission or attempt to commit other offense, instructions.**

In prosecution for felony murder against defendants who during armed robbery handcuffed 75-year-old victim who died on arrival at hospital shortly thereafter, instructions on felony-murder were not deficient in not requiring jury to find that death was a foreseeable result of defendants' behavior, since under District of Columbia felony murder statute malice is implied from commission of the robbery. D.C. Code § 22-2401. *United States v. Branic*, 495 F.2d 1066, 1974 U.S. App. LEXIS 9266 (C.A.D.C. 1974).

Felony-murder instruction which has been used in the District of Columbia jurisdiction, as well as the one proposed for use by the Junior Bar Association, reflects an understanding that the statute embraces occasions when the jury may properly be urged to find that the homicidal act fell outside the scope of the felonious crime which the parties undertook to commit; accordingly, it was error for the trial court to forbid defense counsel to argue to the jury that the fatal stabbing of the victim by one of the defendants was an unexpected response to his being slapped in the face by the victim, was independent of any common purpose to rape, and was without the scope of the felonious crime which the three defendants undertook to commit. D.C. Code §§ 22-105, 22-2401. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Evidence, in felony-murder prosecution, presented jury question as to whether there was such an "arrest" of accused prior to killing of an officer, as to break essential link between the robbery and the killing, and such issue was properly submitted to jury under instructions explaining the issue and what constituted arrest. D.C. Code 1951, § 22-2401. *Coleman v. U.S.*, 295 F.2d 555, 1961 U.S. App. LEXIS 3632 (C.A.D.C. 1961).

Where defendant testified that he entered store with definite purpose of committing robbery, but that a moment later he changed his mind and drew pistol from pocket hoping to quiet woman in charge, and thus to escape detection and arrest, but in excitement pistol was unintentionally discharged, instruction that, if defendant voluntarily abandoned his plan to rob before fatal shot was fired, defendant would not be guilty of murder in first degree, fully protected defendant's legal rights. D.C. Code 1940, § 22-2401. *Mumforde v. U.S.*, 130 F.2d 411, 1942 U.S. App. LEXIS 3113 (1942).

In prosecution against two defendants for murder in perpetration of robbery, instruction that if defendants agreed to commit petit larceny and that no force of arms was contemplated, then defendant was not liable for consequences of shot fired by codefendant, held properly refused in view of testimony, and instruction that if before crime is committed person to agreement honestly withdraws, he is not guilty if other person commits crime. Code of Laws of 1901, § 798 et seq. *Marcus v. U.S.*, 86 F.2d 854, 1936 U.S. App. LEXIS 3877 (1936).

In prosecution for murder in perpetration of robbery wherein defendant testified that he did not intentionally shoot deceased, but that, while he was armed with pistol, he was engaged in attempt to steal meat from a truck, instruction that to make offense murder in first degree, there should be actual intent to kill and, if defendant did not have purpose to kill, then defendants would be guilty of murder in second degree, held proper where evidence did not justify verdict of "manslaughter" which is unlawful killing of another without malice, express or implied. Code of Laws of 1901, § 798 et seq. *Marcus v. U.S.*, 86 F.2d 854, 1936 U.S. App. LEXIS 3877 (1936).

Trial court's instructions in felony-murder trial did not have to require jury to find "close and strong relationship," "intimate connection," or "direct and substantial causal" nexus between robbery and killing; such language would require jury to quantify respective significance of different causal factors whenever defendant has several possible reasons for flight in course of which killing occurs. *Johnson v. United States*, 671 A.2d 428, 1995 D.C. App. LEXIS 149 (1995).

Trial court's failure to instruct jury, in felony-murder trial arising out of vehicle crash during police chase, that it had to find that avoidance of apprehension for robbery was "significant" or "substantial" cause of defendants' decision to flee was not error, in context of court's entire instructions, and given evidence showing that flight began as briefly as six minutes after robbery assault. *Johnson v. United States*, 671 A.2d 428, 1995 D.C. App. LEXIS 149 (1995).

Trial court's jury instructions, in felony-murder trial arising out of vehicle crash during police chase, did not dilute causal requirement so that any motivational influence of robbery, no matter how slight or trivial, was enough for conviction, but, instead, instructions adequately insured that, before convicting, jury found significant motivational link between defendants' desire to complete robbery and flight resulting in homicide, even though instructions required that specific actions leading to fatal injuries be part of defendant's efforts to successfully complete robbery and be motivated "at least in part" by desire to avoid apprehension with stolen property; trial court also told jury that to convict it had to find that at time that car fled from police the defendant was still in process of transporting robbery proceeds from area of crime to avoid apprehension and detection of property. *Johnson v. United States*, 671 A.2d 428, 1995 D.C. App. LEXIS 149 (1995).

With respect to felony-murder charge against passenger of vehicle involved in fatal crash, trial court's jury instruction reinforced necessity of causal link between robbery and homicide and allowed conviction only if jury found that flight was part of his "common effort" with driver, acting together, to complete robbery, and, thus, instruction fairly permitted passenger's conviction as accomplice to felony murder. *Johnson v. United States*, 671 A.2d 428, 1995 D.C. App. LEXIS 149 (1995).

Court properly refused to instruct jury that it had to find killing took place "in furtherance of" underlying felony, rather than during or in the course of the underlying felony, to convict defendant of felony-murder; there was evidence that defendant was the actual killer, he was seen with the gun in his hand that was probably the murder weapon, and he later confessed that he had "shot that man." D.C. Code 1981, § 22-2401. *Butler v. United States*, 614 A.2d 875, 1992 D.C. App. LEXIS 188 (1992), writ of certiorari denied by 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558, 1992 U.S. LEXIS 7611, 61 U.S.L.W. 3401 (1992).

Since evidence established that defendants were engaged jointly in the perpetration of a "general hold-up" which encompassed both the store itself and any other victims they chose to rob while inside, jury was properly instructed that, to return a guilty verdict on felony-murder count as charged in indictment, jury had to find that killing of store owner took place while defendants perpetrated or attempted to perpetrate the robbery of both the store and of a customer of that store; defendants were not entitled to have jury instructed that defendants were entitled to an acquittal if jury found the theft of the customer to be an afterthought, i.e., that defendants did not have the intent to rob the customer until after the shooting of the store owner. *Jones v. United States*, 483 A.2d

1149, 1984 D.C. App. LEXIS 518 (1984), writ of certiorari denied by 471 U.S. 1118, 105 S. Ct. 2363, 86 L. Ed. 2d 263, 1985 U.S. LEXIS 1953, 53 U.S.L.W. 3824 (1985).

— Defense of another, instructions.

Jury should be instructed on law concerning defense of third persons where force used by defender of third person was not excessive as a matter of law. *Graves v. United States*, 554 A.2d 1145, 1989 D.C. App. LEXIS 37 (1989).

Instruction on defense of third persons was required where defendant could reasonably have believed his pregnant wife was in imminent danger of bodily harm when participant in altercation with defendant lunged at wife. *Graves v. United States*, 554 A.2d 1145, 1989 D.C. App. LEXIS 37 (1989).

In order to justify instruction on defense of a third person, defendant must point to evidence fairly tending to show that he reasonably believed the force used was necessary to avert serious bodily harm to the third person. *Graves v. United States*, 554 A.2d 1145, 1989 D.C. App. LEXIS 37 (1989).

Fact that defendant's own testimony supported only self-defense instruction because he stated that he struck victim with hatchet only when victim confronted him with knife did not preclude defendant's request for instruction on defense of third person. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Proper instruction regarding defense of a third person includes instruction on use of deadly force and caution concerning use of excessive force. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

In order to provide basis for instruction on defense of third person, defendant must point to evidence fairly tending to show that he reasonably believed particular deadly force used to avert serious bodily harm to victim was necessary, not excessive, under circumstances. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Even if defendant was entitled to use deadly force in defense of another, i.e., force likely to cause death or serious bodily harm, there are degrees of deadly force; on some occasions it may be reasonable only to cause serious bodily harm not threatening life itself. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

— Defense of habitation, instructions.

In a prosecution for homicide, which occurred in defendant's own home, where defendant's right to have a pistol in the house was not in any way questioned, and the issue was whether the killing was justifiable, requests for charges that defendant had a right to have the pistol in his house, and, if necessary, to use it, were

properly denied. *Price v. U.S.*, 276 F. 628, 1921 U.S. App. LEXIS 2127 (1921).

— **Deliberation and premeditation, instructions.**

In prosecution for murder committed in District of Columbia, refusal of requested instruction permitting jury to weigh evidence of accused's mental deficiencies, which were short of insanity in legal sense, in determining the fact of accused's capacity for premeditation and deliberation, was not error. D.C. Code 1940, § 22-2401. *Fisher v. U.S.*, 66 S.Ct. 1318, 1946 U.S. LEXIS 2178 (U.S. Dist. Col. 1946).

Charge in homicide prosecution should focus primarily on defendant's actual thought processes in terms of meditation and conscious weighing of alternatives and the appreciable time element is subordinate, necessary for but not sufficient to establish deliberation. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

"Appreciable time" charge in homicide prosecution is a meaningful way to convey to jury the core meaning of premeditation and deliberation and for that reason should be given at least where specifically requested by defense. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

Court's refusal in homicide prosecution to state that the time one must have for deliberation be "some appreciable period of time" rather than "some period of time" as originally proposed by judge was compounded by charge of court that the time to deliberate may be in the nature of hours, minutes or seconds. D.C. Code 1961, §§ 22-2401, 22-2404. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

Psychiatric testimony which went no further than to say that accused was the kind of person who was apt to conceive and carry into effect a brutal murder because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men did not authorize instruction on issue whether the psychopathic characteristics of defendant prevented him from forming deliberate intent necessary to constitute first degree murder. *Fisher v. U.S.*, 149 F.2d 28, 1945 U.S. App. LEXIS 2550 (1945).

Where defendant, charged with first degree murder, relied on theory of drunkenness to show that there was no premeditation or deliberation, instruction adequately covered subject of deliberation and premeditation. *Mergner v. U.S.*, 147 F.2d 572, 1945 U.S. App. LEXIS 2170 (1945).

Trial court's re-instruction to jury during its deliberations in prosecution for first-degree premeditated murder that premeditation and

deliberation could occur "during the beating," but that jury had to find that they "occurred before the killing," in response to jury's note asking whether the premeditation and deliberation necessary for the offense could have occurred during, rather than before, the altercation that resulted in the homicide, adequately dispelled jury's difficulties with concrete accuracy, and, thus, was appropriate; jury evinced no confusion about need to base its findings on the evidence, nor any inclination to indulge in undue speculation, and trial court's prior instructions had made jury well aware of the necessity for proof beyond a reasonable doubt of each element of the offense, including premeditation and deliberation. *Ewing v. United States*, 36 A.3d 839, 2012 D.C. App. LEXIS 23 (2012), writ of certiorari denied by 2013 U.S. LEXIS 3092, 81 U.S.L.W. 3579 (U.S. Apr. 15, 2013).

Erroneous pre-deliberation "attitude and conduct" instruction, which might have been understood to encourage jurors to surrender their honest convictions in order to reach agreement, did not require reversal, in murder prosecution, as instruction included additional language balanced against the desirability of agreement that reminded the jurors not to surrender their honestly held convictions, even if that prevented agreement. *Heath v. United States*, 26 A.3d 266, 2011 D.C. App. LEXIS 434 (2011).

Pre-deliberation "attitude and conduct" instruction, cautioning jurors that "the final test" of the quality of their services would be found in the verdict jurors rendered and not in the preliminary opinions any juror might have before jury reached its verdict was inappropriate, and was to be avoided, in murder prosecution, as instruction might be understood to encourage jurors to surrender their honest convictions in order to reach agreement. *Heath v. United States*, 26 A.3d 266, 2011 D.C. App. LEXIS 434 (2011).

Supporting inference of concealment, and to a lesser extent flight, was evidence that murder defendant put on a dark shirt and hat over his clothes just before shootings, removed them as he quickly walked away toward his car and left scene, and returned later without the tell-tale clothes, and thus, court's instruction permitting, but not requiring, jury to consider this as evidence of consciousness of guilt on defendant's part was not an abuse of discretion, and although the evidence of flight or concealment by codefendant was thinner, any arguable error in including him within reach of instruction was not prejudicial enough to require reversal. *Lloyd v. United States*, 806 A.2d 1243, 2002 D.C. App. LEXIS 531 (2002).

— **Grade or degree of offense, instructions.**

Under District of Columbia law, an accused in a criminal trial is not entitled to an instruc-

tion based on evidence of mental weakness short of legal insanity, which would reduce his crime from first to second-degree murder. D.C. Code 1940, §§ 22-2401, 22-2403, 22-2404. *Fisher v. U.S.*, 66 S.Ct. 1318, 1946 U.S. LEXIS 2178 (U.S. Dist. Col. 1946).

Court's instruction on second degree murder as lesser included offense of felony-murder was properly given where evidence so warranted and where defendants made timely request therefor. D.C. Code §§ 22-2401, 22-2403. *United States v. Robinson*, 475 F.2d 376, 1973 U.S. App. LEXIS 11290 (C.A.D.C. 1973).

If defendant presses no objection, judge may instruct jury to render verdicts on both first-degree felony murder count and second-degree murder count, assuming judge concludes the instruction will not confuse jury; however, if defendant insists that charge of second-degree murder be submitted to jury solely as lesser offense included within first-degree murder charge, and if he makes a timely motion or objection, he is entitled to an instruction directing jury (a) to first consider issue of guilt as to first-degree murder; (b) in the event of acquittal, to consider guilt of second-degree murder as lesser included offense; and (c) in the event of verdict of guilty of first-degree murder, to enter no verdict concerning second-degree murder. *United States v. Butler*, 455 F.2d 1338, 1971 U.S. App. LEXIS 7080 (C.A.D.C. 1971).

Jury may be instructed on second-degree murder as a lesser included offense even though indictment is solely for felony-murder. D.C. Code §§ 22-2401, 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Where indictment charges felony-murder, verdict of second-degree murder is appropriate if there is proof from which the jury might reasonably find defendant did not commit one of the enumerated felonies but was guilty of an intentional killing on impulse, and on this state of proof a charge of second-degree murder as a lesser included offense may be requested by prosecution or defense. D.C. Code §§ 22-2401, 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

If prosecutor files in two counts of first-degree murder, once charge of premeditated murder is struck as supported by insufficient evidence and that count is reduced to second-degree murder, defendant is entitled, on motion, to have entire count struck and to have issue of guilt as to second-degree murder submitted only as lesser included offense and only in the event of reasonable doubt of guilt of greater offense. D.C. Code §§ 22-2401 to 22-

2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

On request, an accused is entitled to instructions in a murder prosecution that make clear the distinction between first and second degrees of murder by reference to distinction between killings in cold blood and impulsive killings. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

While instructions calculated to lead jury to conclude that impulsive killings are murder in first degree are erroneous, instructions given in murder prosecution, while skimpy, did set forth the difference between the degrees of murder sufficiently so that reversal was not required on ground of plain error, notwithstanding the absence of objection. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Analysis of jury would be illuminated if it is first advised that a typical case of first-degree murder is the murder in cold blood while murder committed on impulse or in sudden passion is murder in the second degree, and then instructed that a homicide conceived in passion constitutes murder in the first degree only if jury is convinced beyond a reasonable doubt that there was an appreciable time after design was conceived and that in this interval there was further thought and a turning over in the mind and not mere persistence of an initial impulse of passion. D.C. Code 1961, §§ 22-2401, 22-2403. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Submitting question of first-degree murder to jury was not erroneous on theory that evidence was insufficient to support verdict of that crime and that its submission tended to lead to compromise verdict of manslaughter whereas, except for such submission claim of self-defense might have been sustained, where under evidence manslaughter conviction could not be attributed to submission to jury of issue of more serious offense, court cautioned jury in a manner which indicated doubt that verdict of first-degree murder would be warranted, and defendant's counsel raised no objection to the instruction. *Gaines v. United States*, 349 F.2d 190, 1965 U.S. App. LEXIS 5239 (C.A.D.C. 1965).

Court erred in refusing to instruct that jury could not find defendant guilty of both first-degree and second-degree murder. D.C. Code 1961, §§ 22-2401 to 22-2403; 18 U.S.C. § 1111. *Naples v. U.S.*, 344 F.2d 508, 1964 U.S. App. LEXIS 3943 (C.A.D.C. 1964).

Trial judge in instructing jury as to difference between first degree murder and second degree murder, should endeavor to make it absolutely

clear to jury that intentional killing may be second degree murder if premeditation and deliberation do not exist. D.C. Code 1961, §§ 22-2401, 22-2403. *Tucker v. United States*, 318 F.2d 221, 1963 U.S. App. LEXIS 5946 (C.A.D.C. 1963), writ of certiorari denied by 381 U.S. 952, 85 S. Ct. 1812, 14 L. Ed. 2d 726, 1965 U.S. LEXIS 1004 (1965).

Giving of instruction that second degree murder differs from first degree murder in that it may be committed either without purpose or intent to kill, or without premeditation and deliberation was not prejudicial error, in view of instructions in their entirety, in view of fact that court was careful to distinguish two degrees of murder in important respect that premeditation and deliberation are essential elements of first degree murder, in view of absence of objection or request for additional instruction, and in view of evidence and sentence of life imprisonment. D.C. Code 1961, § 22-2401, 22-2403. *Tucker v. United States*, 318 F.2d 221, 1963 U.S. App. LEXIS 5946 (C.A.D.C. 1963), writ of certiorari denied by 381 U.S. 952, 85 S. Ct. 1812, 14 L. Ed. 2d 726, 1965 U.S. LEXIS 1004 (1965).

Where it could not be determined from evidence whether defendant intended to kill or merely wound his victim and it could not be said from record with legal certainty that interval between fight and the killing which followed was or was not of sufficient duration to provide time for premeditation required for first degree murder, court properly submitted lesser included offense of second degree murder in prosecution under indictment on charge of first degree murder. D.C. Code 1961, §§ 22-2401 to 22-2403. *Hansborough v. U.S.*, 308 F.2d 645, 1962 U.S. App. LEXIS 4033 (C.A.D.C. 1962).

Failing to instruct that jury might return a second degree murder verdict was not error in a felony-murder prosecution, where accused and his brother robbed a store proprietor, accused took some money and fled, and in immediate close and continuous pursuit, police officers followed accused up to instant of killing of one of the officers by accused. D.C. Code 1951, § 22-2401. *Coleman v. U.S.*, 295 F.2d 555, 1961 U.S. App. LEXIS 3632 (C.A.D.C. 1961).

In prosecution under indictment charging murder and robbery of victim wherein principal defense was insanity, it was not error for trial court to decline to give requested instruction that evidence of diminished intellect would permit jury to return a verdict of a lesser degree of homicide than first degree murder. *Stewart v. U.S.*, 275 F.2d 617, 1960 U.S. App. LEXIS 5365 (C.A.D.C. 1960).

In homicide prosecution, wherein there was sufficient evidence of possible intoxication to justify second degree charge, it was a question of fact for jury to resolve whether accused had possessed "purpose" to kill, irrespective of his

drinking, and second degree murder charge was not incorrect for failure to spell out degree of intoxication which must have overcome accused. D.C. Code 1929, § 6-21. *Askins v. U.S.*, 231 F.2d 741, 1956 U.S. App. LEXIS 3461 (C.A.D.C. 1956).

Where, in arson and murder prosecution, all testimony as to what occurred in burning house pointed to first degree murder only, giving of second degree murder instruction was error. D.C. Code 1951, §§ 22-401, 22-2401. *Green v. U.S.*, 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

In prosecution for first degree murder, instruction to jury that second degree murder is killing with malice aforethought, but without intent to kill, was erroneous as to such limitation. D.C. Code 1951, § 22-2403. *Kitchen v. U.S.*, 205 F.2d 720, 1953 U.S. App. LEXIS 2666 (C.A.D.C. 1953).

An instruction that if jury believe defendant guilty of killing but have reasonable doubt as to whether offense is murder in the first degree or murder in the second degree, doubt should be resolved in defendant's favor and he should be found guilty of lesser crime, is necessary only where from evidence as a whole jury might reasonably find defendant guilty of either first or second degree murder. D.C. Code 1940, §§ 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

Where instructions were largely devoted to discussion of the elements of three crimes of murder in first degree, murder in second degree and manslaughter and to possible effect of intoxication on existence of specific intent and deliberation and premeditation, and did not expressly inform jury that unless they found beyond reasonable doubt that all elements of some crime existed, they must acquit the defendant, the instructions were insufficient. *McAffee v. U.S.*, 105 F.2d 21, 1939 U.S. App. LEXIS 3249 (1939).

Failure to give requested instruction that if jury believed beyond reasonable doubt that defendant was guilty of some grade of culpable homicide but had a reasonable doubt regarding whether he was guilty of first or second degree murder, jury could not find him guilty of a higher offense than second degree murder was error, notwithstanding instruction was incomplete because of failure to cover manslaughter. *McAffee v. U.S.*, 105 F.2d 21, 1939 U.S. App. LEXIS 3249 (1939).

Permitting of jury to find defendant, charged with murder in first degree and defending solely on ground of insanity, guilty of murder in second degree, held not error if defendant were not as matter of law guilty of first degree murder if sane, since, if defendant were found sane at time of homicide, case remained for consideration as if no plea of insanity had been

interposed. *Owens v. U.S.*, 85 F.2d 270, 1936 U.S. App. LEXIS 4088 (1936).

Trial court should not be criticized for stating in instruction with considerable detail law regarding different degrees of murder. *Goodman v. U.S.*, 70 F.2d 741, 1934 U.S. App. LEXIS 4290 (1934).

A prayer by the prosecution in a homicide case, that the accused was guilty of murder in the first degree if he had formed a purpose to kill the deceased in a certain contingency, and on its happening had done so, even though the purpose had not existed continuously, unless it had been abandoned, is supported by evidence that accused had threatened to kill deceased if he ever saw her with another man; that immediately before the homicide she was talking to another man; and that accused called her to come to him, and, while waiting for her, had the knife in his hand with which he stabbed her a few minutes later. *Grant v. U.S.*, 28 App.D.C. 169, 1906 U.S. App. LEXIS 5230 (1906).

There was no "error" in failing to instruct as to first-degree murder in capital murder prosecution since, if facts supported finding that defendant did not deliberate or premeditate, he could not have been convicted of either capital or first-degree murder. *Pruett v. Thompson*, 771 F. Supp. 1428, 1991 U.S. Dist. LEXIS 12116 (1991), affirmed by 996 F.2d 1560, 1993 U.S. App. LEXIS 12323 (4th Cir. Va. 1993).

In light of proof of attempted robbery, trial court could have legitimately determined that the evidence in felony-murder trial did not warrant giving a second-degree murder instruction. *Moore v. Garraghty*, 739 F. Supp. 285, 1990 U.S. Dist. LEXIS 6761 (1990), affirmed by 932 F.2d 963, 1991 U.S. App. LEXIS 13748 (4th Cir. Va. 1991).

Murder prosecution instruction to effect that jury should first consider highest degree of offense, and pass on to next degree if they were not unanimously convinced that government had proven guilt beyond a reasonable doubt, was proper and preferable to defendant's requested instruction that if jury was convinced beyond reasonable doubt that defendant was guilty of some degree of culpable homicide but was reasonably doubtful as to degree, it must proceed to lesser degree. *United States v. White*, 225 F. Supp. 514, 1963 U.S. Dist. LEXIS 6247 (D.D.C.1963), remanded by 349 F.2d 965, 121 U.S. App. D.C. 287, 1965 U.S. App. LEXIS 5055 (1965).

Evidence was sufficient to support giving of charges on first and second-degree murder while armed; there was testimony that defendant pushed victim first and escalated confrontation by pulling and firing his weapon, defendant approached victim, who had already been wounded by bullet and was laying on ground, stood over him, and defendant shot him several times in chest, while saying to him that he was

going to die. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Jury instruction on second-degree murder as lesser-included offense of first-degree murder was not improper because reasonable jury could have concluded that government failed to establish premeditation, the only element distinguishing first from second-degree murder. *Woodard v. United States*, 738 A.2d 254, 1999 D.C. App. LEXIS 199 (1999).

Evidence of defendant's longstanding jealousy of murder victim's associations with other men, and of defendant's volatile temperament, was sufficient to support instruction on second-degree murder as lesser-included offense of charged first-degree murder. *Wilson v. United States*, 711 A.2d 75, 1998 D.C. App. LEXIS 91 (1998).

There was no evidence of unplanned or impulsive murders, and thus, trial judge was not obligated to give instruction on second degree murder as lesser included offense, despite speed with which events unfolded and alleged lack of evidence of motive and premeditation; speed was not controlling factor as to premeditation and deliberation, and there was sufficient circumstantial evidence to demonstrate premeditation and deliberation, including defendant's bringing gun to scene, intercepting first victim from behind, and chasing second victim, and evidence that defendant had threatened to "mess [second victim] up." *Bright v. United States*, 698 A.2d 450, 1997 D.C. App. LEXIS 174 (1997).

Trial court should have given second-degree murder instruction, even though there was strong evidence that three armed men had met, gone searching for victim, and shot him 21 times with four different weapons; there was testimony of apartment resident who had observed four men arguing, followed immediately by gunshots, suggesting lack of premeditation. *Shuler v. United States*, 677 A.2d 1014, 1996 D.C. App. LEXIS 101 (1996).

Even if there is no disputed factual element distinguishing greater offense from lesser, court should still give requested instruction on second-degree murder as lesser included offense of felony-murder and should appraise all testimony to see if it is capable of more than one reasonable inference. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

Trial court should give instruction on second-degree murder as lesser included offense of felony-murder where Government, even if it failed to prove underlying burglary, could have obtained second-degree murder conviction. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

Second-degree murder was lesser included offense of first-degree felony-murder committed by defendant engaged in robbery with loaded pistol and, therefore, did not need to be charged in first-degree felony-murder indictment in order to justify trial court's instruction on second-degree murder. D.C. Code 1981, §§ 22-2401, 22-2403; U.S. Const. Amend. 5. *Towles v. United States*, 521 A.2d 651, 1987 D.C. App. LEXIS 311 (1987), writ of certiorari denied by 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741, 1987 U.S. LEXIS 2800 (1987).

Instruction on second-degree murder as lesser included offense of first-degree murder was proper, given that reasonable jury could have concluded that government had failed to establish beyond reasonable doubt elements of premeditation and deliberation. *Young v. United States*, 515 A.2d 1090, 1986 D.C. App. LEXIS 453 (1986).

In prosecution for felony-murder, trial court properly denied defendant's request for instruction as to lesser included charge of second-degree murder, since evidence, including testimony that defendant had declared his intention to commit robbery immediately prior to the shooting, provided no rational basis for requested instruction. D.C. Code 1981, §§ 22-2401, 22-2403, 22-3202. *Wood v. United States*, 472 A.2d 408, 1984 D.C. App. LEXIS 329 (1984).

Even though defendant was charged with both first-degree murder and felony-murder, second-degree murder constituted appropriate lesser included offense of both charged offenses and trial court could properly give instruction on such lesser included offense relative to each of the charged offenses. D.C. Code 1973, §§ 22-103, 22-2401, 22-3202. *Turner v. United States*, 459 A.2d 1054, 1983 D.C. App. LEXIS 355 (1983).

— Harmless or reversible error, instructions.

Failure to instruct that to convict person of aiding and abetting a felony-murder jury must find that homicide was committed in the course of the felony and in furtherance of the common purpose to commit the felony was not plain error. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Refusal, in criminal prosecution, to instruct that testimony of accomplices, who testified for government after having been granted immunity, should be considered with caution was reversible error. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; 18 U.S.C. § 6002. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Failure, in criminal prosecution, to give an accomplice instruction with regard to accomplices who testified for government was not

plain error where nonaccomplice testimony corroborated accomplice testimony to significant extent against one accused and to lesser extent against another and where accomplices did not appear to have extraordinary disposition to prevaricate. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed. Rules Crim. Proc. rules 30, 52(b), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Instructions providing, inter alia, that high degree of recklessness requisite to prove malice as an element of murder is distinguished from lesser recklessness constituting manslaughter by reason of quality of defendant's awareness of risk either actually or from showing of such danger that any reasonable person must have been aware of it were not prejudicially erroneous. *United States v. Dent*, 477 F.2d 447, 1973 U.S. App. LEXIS 10804 (C.A.D.C. 1973).

Submission of murder charge to jury was not reversible error, where jury not only acquitted of murder but might have inferred an intentional stabbing and given short shrift to claim of self-defense urged at trial and might well have inferred a reckless disregard of possibility of death or serious bodily injury. *United States v. Dent*, 477 F.2d 447, 1973 U.S. App. LEXIS 10804 (C.A.D.C. 1973).

Instructions on malice and manslaughter in prosecution for first-degree murder were not reversibly erroneous. *United States v. Marshall*, 471 F.2d 1051, 1972 U.S. App. LEXIS 7096 (C.A.D.C. 1972).

Despite defense counsel's objection that case should go to the jury with instructions to first consider guilt on felony murder charge, and that, in the event of acquittal of that crime, jury should only then consider issue of guilt of second-degree murder, the defendant was not substantially prejudiced when trial judge, doubtful of the ultimate ruling in case upon which defense counsel's objection was predicated, decided to instruct the jury to render verdicts on both counts and, in case guilty verdicts were returned on both, to "cross the bridge of having to set one aside for good reason." *United States v. Butler*, 455 F.2d 1338, 1971 U.S. App. LEXIS 7080 (C.A.D.C. 1971).

Defendant, who in a multi-count indictment was charged, inter alia, with first-degree felony murder and with second-degree murder, was not prejudiced by charge in which court instructed jury that it was to first consider the felony murder count and if it had reasonable doubt about that count it was to find defendant not guilty of felony murder and then go on to consider the second-degree murder count. *Fullard v. United States*, 413 F.2d 369, 1969 U.S. App. LEXIS 13295 (C.A.D.C. 1969).

Where indictment charged in separate counts both first-degree felony-murder and first-degree premeditated murder and trial

judge charged with respect to both felony-murder and second-degree murder, in absence of any request, motion or objection by defendant, failure to further charge that jury, which returned verdicts of guilty both as to felony-murder and as to manslaughter as lesser included offense, should consider question of second-degree murder only if it determined government had not met its burden as to some element of first-degree murder charged was not plain error and was not reversible error. D.C. Code §§ 22-2401 to 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Charge, to which no objection was made in homicide prosecution, that there was no real issue as to fact that blows by defendant caused death of deceased was not reversibly erroneous, where defense counsel in opening statement conceded that defendant struck fatal blow, and defense counsel's closing argument continued theory of case as one of self-defense and made no claim that defendant had not caused deceased's death. *Richardson v. United States*, 338 F.2d 552, 1964 U.S. App. LEXIS 4049 (C.A.D.C. 1964).

Where, had not erroneous second degree murder instruction been given in arson and murder prosecution defendant, who was found guilty by jury of second degree murder, might have been found not guilty under the murder count, giving of such second degree murder instruction constituted reversible error. D.C. Code 1951, §§ 22-401, 22-2401. *Green v. U.S.*, 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

A conviction of first degree murder after erroneous instruction to jury that second degree murder is killing with malice aforethought, but without intent to kill, must be reversed, as Court of Appeals cannot assume that jury would not have returned verdict of guilty of second degree murder had it known that it could convict intentional killer of such offense. D.C. Code 1951, §§ 22-2401, 22-2403. *Kitchen v. U.S.*, 205 F.2d 720, 1953 U.S. App. LEXIS 2666 (C.A.D.C. 1953).

Where instruction regarding second-degree murder and manslaughter was given at request of defendant's counsel, if the instruction was subject to criticism on ground that it was confusing because it opened up a matter not properly for jury's consideration, it was favorable to defendant, and he could not complain. D.C. Code 1940, § 22-2401. *Mumforde v. U.S.*, 130 F.2d 411, 1942 U.S. App. LEXIS 3113 (1942).

In homicide prosecution, charge of court concerning motive and contradictory statements of witnesses was not prejudicial to defendant, where government introduced evidence tending to show motive, and evidence was introduced

showing contradictions by witnesses, including the defendant himself. *Bishop v. U.S.*, 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

In prosecution of defendant for murder of wife where defendant gave testimony indicating an attempt to avoid attack by wife armed with knife, the giving of an instruction precluding a verdict of manslaughter was error, requiring reversal where defendant was convicted of murder in first degree. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

The refusal of a trial court to grant an instruction to one accused of murder that, if the jury find the accused was intoxicated when the offense was committed, they might take the fact of intoxication into consideration in determining the grade of punishment which should be inflicted, if error at all, is not prejudicial error, where the accused is convicted of manslaughter only. *Lanckton v. U.S.*, 18 App.D.C. 348, 1901 U.S. App. LEXIS 5069 (1901).

Trial court's refusal to respond to jury's question whether "cause" could mean physically striking victim, for purposes of first-degree murder while armed/felony murder, and instruction that it was jury's duty to determine whether defendant caused victim's death, was not abuse of discretion; only evidence regarding cause of death was defendant striking victim with black pipe, and had judge answered that "cause" meant physically striking victim, then judge would have all but directed jury to find that defendant's act of striking victim caused victim's death. *Lanckton v. U.S.*, 18 App.D.C. 348, 1901 U.S. App. LEXIS 5069 (1901).

Error in aiding and abetting instruction regarding first-degree murder while armed and possession of a firearm during a crime of violence (PFCV), in that instruction amounted to a negligence instruction because error allowed jury to find defendant guilty of murder and PFCV as the natural and probable consequences of another's actions, was harmless beyond a reasonable doubt, in trial of defendant for conspiracy to commit first-degree murder, first-degree murder while armed and PFCV; court provided a valid Pinkerton co-conspirator instruction in addition to the erroneous aiding and abetting instruction, jury convicted defendant of conspiracy to commit first-degree murder and thus every juror found the requisite intent for first-degree murder, such findings sufficed for Pinkerton co-conspirator liability, and murder of victim by an armed killer was a reasonably foreseeable consequence of that conspiracy. *Wheeler v. United States*, 977 A.2d 973, 2009 D.C. App. LEXIS 343 (2009), amended by 987 A.2d 431, 2010 D.C. App. LEXIS 211 (D.C. 2010), writ of certiorari denied by 131 S. Ct. 325, 178 L. Ed. 2d 211, 2010 U.S. LEXIS 7488, 79 U.S.L.W. 3204 (U.S. 2010).

In prosecution for first-degree murder while armed, in which defendant was convicted of

voluntary manslaughter as lesser-included offense, trial court's error in giving jury instruction on lesser-included offense of voluntary manslaughter, which was not supported by evidence of sufficient provocation to mitigate murder to voluntary manslaughter, was harmless, because without that instruction, there was no reasonable probability that jury would have acquitted defendant of the other lesser-included offense of second-degree murder; defendant's defense was mistaken identity, but government presented strong evidence that defendant was the shooter, including eyewitness testimony of defendant's mother's boyfriend and victim's cousin, identifying defendant as the shooter. *High v. United States*, 972 A.2d 829, 2009 D.C. App. LEXIS 184 (2009).

Error in trial court's jury instruction in trial for first-degree premeditated murder with respect to "natural and probable consequences" doctrine, which allowed conviction on theory of aiding and abetting without proof of mens rea required for offense, was harmless beyond a reasonable doubt as to first of two defendants; any impartial trier of fact who credited the prosecution's evidence would be bound to conclude that defendant intended to kill victim, tried to kill her, and succeeded in doing so either by personally causing her death or by abetting a knife-wielding confederate who actually inflicted fatal wound if defendant did not. *Wilson-Bey v. United States*, 903 A.2d 818, 2006 D.C. App. LEXIS 424 (2006), writ of certiorari denied by 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089, 2007 U.S. LEXIS 5173, 75 U.S.L.W. 3607 (2007).

Error, if any, in submitting first-degree and second-degree murder charges to jury was harmless; there was no basis to conclude that mere submission of greater charges resulted in confusion, unduly influenced jury, or led them to decide case on anything other than evidence and law, and defendant was acquitted of both first-degree and second-degree murder. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

There was no miscarriage of justice in giving of partial reinstruction on element of premeditation, in response to jury note, without mentioning element of deliberation, in prosecution for first degree murder; no reasonable juror would have found that defendant did not deliberate before he killed victim, as there was ample evidence that after victim, who had been wounded in the back during chase, fell to ground, defendant ran another 106 feet to where he had fallen before he fired final shots at victim, which gave defendant sufficient time to form intent to kill, i.e., "premeditate," and to deliberate on that intent as he approached

victim. *Bates v. United States*, 834 A.2d 85, 2003 D.C. App. LEXIS 624 (2003).

Partial reinstruction on element of premeditation, in response to jury note, without mentioning element of deliberation, was not obviously wrong, in prosecution for first degree murder, in light of specific question asked by jury, and given trial court's reliance that jury had been given and had access to full instruction. *Bates v. United States*, 834 A.2d 85, 2003 D.C. App. LEXIS 624 (2003).

Absent a request for a limiting instruction that detective's testimony, that he had not believed witness' statements that witness had not seen the shooting, was being admitted only for the purpose of explaining detective's decision to continue to seek out and eventually re-interview the witness, the trial court did not commit reversible error in failing to give such an instruction, in prosecution for first-degree murder while armed. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

Trial court's failure to sua sponte instruct jury as to limited purpose of other crimes evidence was not error, let alone plain error, in murder case in which Government witness testified on redirect examination about prior assault in which defendant pointed apparent murder weapon at her and pulled the trigger; evidence of assault was admitted as evidence of defendant's prior gun possession, which was proof that defendant possessed the means to commit the murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Although defendant was improperly denied "imperfect self-defense" instruction, error was harmless where jury was instructed on first and second-degree murder, and jury found defendant guilty of first-degree murder; jury's finding of premeditation could not coexist with defendant's mitigation claim, and if jury believed defendant acted in self defense, even if unreasonably, it would have convicted appellant of second-degree murder. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Trial court's error in refusing to give requested instruction on second-degree murder as lesser included offense of felony-murder was harmless where finding that defendant had intent to steal was inherent in jury's finding of guilt of first-degree burglary; jury could not rationally have found defendant guilty of lesser included offense of second-degree murder where only disputed elements separating greater offense from lesser included offense was whether defendant had specific intent to steal. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

That defense counsel argued independent cause of death of victim theory to jury in closing did not cure trial court's error in failing to adequately instruct on defense theory of independent cause. *Stack v. United States*, 519 A.2d 147, 1986 D.C. App. LEXIS 493 (1986).

In prosecution for crimes including two counts of first-degree murder while armed, no reversible error arose from use of verdict form which, according to defendant, was misleading in that it encouraged the jury to find defendant guilty of the first count so that the jurors would not have to consider the remaining lesser offenses listed. D.C. Code §§ 22-401, 22-2401 to 22-3202. *Hallman v. United States*, 410 A.2d 215, 1979 D.C. App. LEXIS 539 (1979).

Trial judge did not err in refusing to give manslaughter instruction where jury, which was given instruction on second-degree murder as a lesser included offense, found defendant guilty of first-degree murder. *Dean v. United States*, 377 A.2d 423, 1977 D.C. App. LEXIS 375 (1977).

In murder prosecution, in which it appeared that defendant shot another person six times at close range during a period of a minute to a minute and one-half, instruction defining malice as a state of mind showing a heart "regardless of social duty," rather than "regardless of the life and safety of others," as suggested in prior opinion of United States Court of Appeals, was not reversible error. *Hurt v. United States*, 337 A.2d 215, 1975 D.C. App. LEXIS 368 (1975).

— In general.

Where defendant admitted that, after he had strangled decedent, he had searched for and found keys to decedent's automobile and drove same to Georgia and that before leaving decedent's apartment he had used a cloth to avoid leaving fingerprints on door knob, jury was entitled to consider whether those actions indicated a consciousness of guilt; and it was not error, in homicide prosecution, to instruct on flight. *Edmonds v. U.S.*, 273 F.2d 108, 1959 U.S. App. LEXIS 2922 (C.A.D.C. 1959).

Defendant was convicted of first-degree premeditated murder while armed because reasonable jurors inferred from the facts and circumstances surrounding murder that he had the requisite mens rea, and thus, there was no reasonable probability that the trial court's incorrect aiding and abetting instruction, which failed to instruct the jury on the mens rea element of the murder charge, had a prejudicial effect on the outcome of his trial, and as such, the incorrect instruction did not materially impact the jury's verdict so as to constitute plain error. *Kidd v. United States*, 940 A.2d 118, 2007 D.C. App. LEXIS 683 (2007).

Curative instruction as given in charge to jury, that results of polygraphs were not admis-

sible in a trial because they were unreliable and that jurors should not let topic come up in their thinking or in their discussions, was sufficient in murder prosecution to cure any prejudice arising from reference by essential government witness to having taken a lie detector test, where curative instruction was delayed until final instructions at defense counsel's request and was crafted by defense counsel. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

In prosecution for first-degree felony-murder, second-degree murder, armed robbery and robbery, evidence was insufficient to require trial court to instruct jury on defendant's theory of case that a second, later beating of victim took place by persons other than defendant. D.C. Code §§ 22-2401, 22-2901, 22-3202. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

— Insanity, instructions.

In prosecution for first-degree murder and carrying dangerous weapon, jury instruction on sanity which stated that defendant would be immediately committed for mental examination, after which there would be another judicial determination as to whether he was suffering from mental illness at that time and whether he was dangerous to himself and others, and that if defendant was found to be suffering from mental illness but was not dangerous to himself or others he would be released from hospital, was proper. *United States v. Brown*, 490 F.2d 758, 1973 U.S. App. LEXIS 6261 (C.A.D.C. 1973).

Instruction that Government was required to prove that accused was of sound memory and discretion was not required in prosecution for violation of District of Columbia statute pertaining to felony murder. D.C. Code § 22-2401 et seq. *United States v. Greene*, 489 F.2d 1145, 1973 U.S. App. LEXIS 7659 (C.A.D.C. 1973).

Instructions on insanity, in prosecution for murder and robbery, were not misleading or erroneous, but were proper. *Carey v. U.S.*, 296 F.2d 422, 1961 U.S. App. LEXIS 3480 (C.A.D.C. 1961).

In prosecution for murder, instruction that if verdict of not guilty by reason of insanity was returned defendant would be committed to mental hospital until such time as it was established that he was no longer insane, was not objectionable for failure to add that he would be kept in hospital until he would not in reasonable future be dangerous to himself or others. D.C. Code 1951, § 24-301. *Starr v. U.S.*, 264 F.2d 377 (C.A.D.C. 1958).

In murder prosecution, where the purport of the instruction on insanity was that in order to

acquit the jury must reach affirmative conclusions of mental disease and the causal connection between the disease and the act, instruction was error. *Carter v. U.S.*, 252 F.2d 608, 1957 U.S. App. LEXIS 4250 (C.A.D.C. 1957).

Where court instructed that jury could return fourth verdict, which was not guilty because of insanity, if jury found that defendant at time of homicide was either suffering from mental disease or from mental defect, and that there was causal connection between such mental defect or such mental disease and homicide, and that there was a fifth possible verdict, which was a verdict of not guilty, and that jury could return that verdict if it found that prosecution failed to establish from evidence beyond reasonable doubt that defendant committed homicide, there was danger that jury might infer from contrasting treatment of the two possible verdicts that, in order to acquit by reason of insanity, it would be necessary for jury to reach affirmative conclusions that defendant was insane at time of homicide and that act was product of the illness. *Wright v. U.S.*, 250 F.2d 4, 1957 U.S. App. LEXIS 4105 (C.A.D.C. 1957).

In murder prosecution, wherein defendant relied on defense of insanity, and wherein two psychiatrists testified that at time of homicide defendant was mentally ill and unable to distinguish right from wrong, trial court should have given defendant's requested instruction that jury should acquit defendant by reason of insanity, if jury found that defendant was unable to distinguish right from wrong. *Wright v. U.S.*, 250 F.2d 4, 1957 U.S. App. LEXIS 4105 (C.A.D.C. 1957).

In prosecution for first degree murder committed in robbing a grocery store, defended on ground of insanity, instruction attempting to distinguish between "mental disease" and "mental disorder", read in light of explanation offered by record, could have led jury to conclude defendant could be acquitted by reason of insanity only if defendant suffered from abnormality due to physical deterioration of or injury to brain, and was erroneous and prejudicial to defendant. D.C. Code 1951, § 22-2401. *Stewart v. U.S.*, 214 F.2d 879, 1954 U.S. App. LEXIS 2790 (C.A.D.C. 1954).

Where there was no evidence indicating that defendant, charged with murder, did not know the nature and character of his act or was not conscious of the difference between right and wrong, instruction on issue of insanity was unauthorized. *Fisher v. U.S.*, 149 F.2d 28, 1945 U.S. App. LEXIS 2550 (1945).

Instruction on defense of insanity in homicide prosecution held erroneous as ignoring doctrine of irresistible impulse. *Smith v. U.S.*, 36 F.2d 548, 1929 U.S. App. LEXIS 2201 (1929).

In a prosecution for an assault with intent to kill, where the defense was insanity, a charge,

which in substance told the jury not to convict unless they were satisfied beyond a reasonable doubt that he had done the act charged against him in the indictment, and that he knew at the time the nature and quality of the act, and whether it was right or wrong, and that, if they had reasonable doubt about the sanity of the defendant, he should be acquitted, was correct. *Grock v. U.S.*, 289 F. 544, 1923 U.S. App. LEXIS 1997 (1923).

Where, in a homicide case, the defense is insanity, an instruction asked by the prosecution is properly granted which is to the effect that if the jury find the defendant was insane up to the time of committing the crime, and sane immediately afterwards, they should find him sane at the moment when the crime was committed. *Snell v. U.S.*, 16 App.D.C. 501, 1900 U.S. App. LEXIS 5314 (1900).

Where it is sought to be shown that accused killed his wife during an attack of epilepsy, it is not error for the trial court to charge the jury that if accused was sane up to within a short time of the homicide, was sane afterwards, and remained sane until the present time, they should find he was sane when he committed the act. *Taylor v. U.S.*, 7 App.D.C. 27, 1895 U.S. App. LEXIS 3616 (1895).

Prosecutor's unobjected-to use of words "we" and "us," particularly in context such as "[defendant] left us facts," and "we know graphic things," was not plain error in murder prosecution, despite claim that jury could have been construed these types of statements as expressing opinion of prosecutor, perhaps based on facts that had not been presented to jury; those words appeared to have been used only to describe evidence as it may have been viewed by all observers in courtroom, including jury. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

In prosecution for felony-murder, trial court did not err in failing to instruct jury that in order to convict defendant of felony-murder, Government had to affirmatively prove that defendant was of "sound memory and discretion" both at the time of the underlying felony and the time of the killing. D.C. Code § 22-2401. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

— Instructions after submission of cause.

Where jury during deliberations sent questions to judge concerning felony-murder count, inquiring as to timing of formation of intent to rob, and trial court merely reread the murder statute and the standard instruction, and jury could have been left with impression that coincidence in time between murder and robbery was sufficient to support felony-murder conviction, there was error which could not be held harmless. D.C. Code § 22-2401, 22-2901.

United States v. Bolden, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Anti-deadlock instruction did not improperly coerce a guilty verdict, in trial of defendant for murder, though clerk's separate conversations with two jurors during deliberations indicated that one juror was holding out for an acquittal and in assessing the risk of coercion it had to be assumed that the hold-out was informed of his fellow jurors' conversations, where the trial judge during the instruction told the jury that he did not know how it was divided, judge did not express concerns about any juror's conduct in deliberations, judge told the jury that it should take care not to disclose its split in any future notes to the court, judge provided the Gallagher instruction, and the overall tenor of the Gallagher instruction made it clear that a verdict was not being demanded. *Hankins v. United States*, 3 A.3d 356, 2010 D.C. App. LEXIS 504 (2010).

Defendant was not prejudiced, in prosecution for first-degree premeditated murder, by trial court's refusal of defendant's untimely request for instruction on defense theory that someone other than defendant fired the fatal shots, which request was made after closing arguments and final instructions had already been given; proposed instruction simply summarized the evidence that the defense claimed supported its theory that other man fired the fatal shots, including noting the impeachment of government's witnesses and the inferences the defense would have the jury draw from physical evidence presented, points made in proposed instruction were primarily factual and were made by defense counsel in closing argument, and instructions given by trial court extensively explained that credibility was for the jurors to assess and offered guidance on factors they could take into account in making that determination. *Tyree v. United States*, 942 A.2d 629, 2008 D.C. App. LEXIS 31 (2008), writ of certiorari denied by 556 U.S. 1130, 129 S. Ct. 1612, 173 L. Ed. 2d 1000, 2009 U.S. LEXIS 2077, 77 U.S.L.W. 3528 (2009).

Trial court did not coerce verdict by instructing jury to continue deliberations after jury sent a note that revealed jury split of 11-1 with respect to one or more charges against defendant in prosecution for murder and other offenses; dissenting juror was not isolated by trial court, nothing in note written by dissenting juror indicated that she felt in any way intimidated by other jurors, jury's note did not necessarily mean that trial court was faced with a deadlocked jury, trial court did not give an anti-deadlock instruction, and trial court told jury that trial court did not intend to coerce a verdict and that jury should continue deliberations to "attempt to reach a verdict." *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari de-

nied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

Instruction that jurors were not to speculate about matters outside record, given after jury sent two notes to trial court during deliberations, which notes inquired about availability of portions of witness' grand jury testimony that had not been introduced in evidence and whether woman who was named during trial as someone who had seen victim's abduction but who was not a witness was available to testify, did not deter jury from evaluating evidence that had been admitted regarding the witness or the woman, as instruction was responsive to jury's stated concern, it was correct, and it was not unbalanced. *Kitt v. United States*, 904 A.2d 348, 2006 D.C. App. LEXIS 440 (2006), writ of certiorari denied by 552 U.S. 824, 128 S. Ct. 180, 169 L. Ed. 2d 35, 2007 U.S. LEXIS 9135, 76 U.S.L.W. 3157 (2007).

Where homicide case presented no issue concerning possibility of mere coincidence in time and place between killing and commission of robbery and where there was no evidence or argument that robbery was afterthought to murder or that homicidal act fell outside scope of felonious crime which parties undertook to commit, felony-murder rule was inapplicable, and where jury asked if they could find particular defendant guilty of felony-murder or any other charged armed offenses if they found that he did not have possession of the gun, trial court properly declined to give supplemental instruction on theories of abetting, accessory or accomplice. *Long v. United States*, 364 A.2d 1174, 1976 D.C. App. LEXIS 393 (1976).

— Instructions already given.

In prosecution for felony-murder, wherein jurors were instructed that, to return guilty verdict, they had to find that killing took place while defendant, or an aider or abettor, was perpetrating or attempting to perpetrate the offense of robbery and instruction was highlighted by closing statements of one codefendant's trial counsel that jurors should acquit on felony-murder count if they found that robbery was an "after-thought," defendants were not prejudiced by trial court's refusal to charge specifically that, if intent to rob victim was formed after the shooting, there could be no conviction of felony-murder. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

— Intent or motive, instructions.

In murder prosecution, instructions on malice and specific intent, which equated specific intent with malice and instructed jury that "the law infers or presumes from the use of such

weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide" were plainly erroneous and, because evidence was not overwhelming and instructions might well have precluded reasonable juror from considering manslaughter as possible verdict, vacation of conviction was required. *United States v. Frady*, 636 F.2d 506, 1980 U.S. App. LEXIS 12972 (C.A.D.C. 1980).

In murder prosecution, refusal to instruct that a drug-induced stupor may negate specific intent, was not error, where there was evidence that defendant took amphetamines, drank a quantity of liquor and had trouble driving to scene of the homicide, but there was no evidence that he was in a stupor at time of stabbing and, in any event, other instructions given on element of specific intent sufficed. *United States v. Marcey*, 440 F.2d 281, 1971 U.S. App. LEXIS 11708 (C.A.D.C. 1971).

In prosecution of Puerto Rican defendant, whose companion shot and killed guard in front of dwelling of President of the United States, for first degree murder, wherein defendant interposed defense that he and companion, though armed with pistols, had no intent to kill anyone but merely wished to create an incident in order to bring to the attention of American people conditions in Puerto Rico, court properly charged jury that defendant's testimony as to conditions in Puerto Rico had nothing to do with the case, over objection of defendant that such conditions were relevant and material to issue of his intent and materially responsive to prosecutor's claim of motive. D.C. Code 1940, §§ 22-105, 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

Instruction that in considering questions of intent, premeditation and deliberation jury should consider entire personality of defendant, his mental, nervous, emotional and physical characteristics as developed by evidence was properly refused because it confused issue of insanity with question whether psychopathic characteristics of defendant prevented him from forming deliberate intent necessary to constitute first degree murder. *Fisher v. U.S.*, 149 F.2d 28, 1945 U.S. App. LEXIS 2550 (1945).

It is not error for the trial court, in a murder case, to instruct the jury that it is not necessary for the prosecution to prove a motive, but that absence of proof of motive may be considered as a circumstance in favor of the accused. *Lanckton v. U.S.*, 18 App.D.C. 348, 1901 U.S. App. LEXIS 5069 (1901).

Error in trial court's jury instruction in trial for first-degree premeditated murder with respect to "natural and probable consequences" doctrine, which allowed conviction on theory of aiding and abetting without proof of mens rea required for offense, was not harmless beyond a

reasonable doubt as to second of two defendants, even though case against that defendant was strong; given evidence, an impartial juror might readily have had reasonable doubt whether defendant formed intent to kill victim, and under instruction, a juror who believed that defendant's intent was merely to join in an assault on victim could nevertheless reasonably find defendant guilty of aiding and abetting premeditated murder. *Wilson-Bey v. United States*, 903 A.2d 818, 2006 D.C. App. LEXIS 424 (2006), writ of certiorari denied by 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089, 2007 U.S. LEXIS 5173, 75 U.S.L.W. 3607 (2007).

In prosecution for first-degree murder, felony-murder and rape wherein defendant raised insanity defense, trial court did not err in refusing to instruct jury that it might consider evidence of defendant's mental abnormality as negating deliberate intent required for first-degree murder which was in effect attempt to raise defense of "diminished capacity." D.C. Code 1973, § 22-2401. *Doepel v. United States*, 434 A.2d 449, 1981 D.C. App. LEXIS 345 (1981), writ of certiorari denied by 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483, 1981 U.S. LEXIS 4463, 50 U.S.L.W. 3376 (1981).

Where defendant did not claim insanity or offer expert psychiatric evidence but merely testified that he was under an emotional strain at the time of the shootings, trial court did not err in refusing to instruct the jury to consider defendant's stressful state of mind in determining whether he was capable of forming specific intent and whether there was malice, deliberation and premeditation in connection with the homicides with which defendant was charged. *Morgan v. United States*, 363 A.2d 999, 1976 D.C. App. LEXIS 382 (1976), writ of certiorari denied by 431 U.S. 919, 97 S. Ct. 2187, 53 L. Ed. 2d 231, 1977 U.S. LEXIS 1828 (1977).

— Intoxication, instructions.

Where intoxication as an element in insanity defense was not mentioned in court's instruction on drunkenness, even though it was clear that effect of alcohol on defendant was crucial to her insanity defense, on retrial for second-degree murder wherein defendant had been convicted of manslaughter court was instructed to advise jury explicitly that although voluntary intoxication is not a defense to the crime, it could give consideration to defendant's claim of intoxication, together with testimony of psychiatrists concerning interaction of defendant's recourse to alcohol and her mental condition, in course of determining issue raised by insanity defense. *King v. United States*, 372 F.2d 383, 1966 U.S. App. LEXIS 3952 (C.A.D.C. 1966).

In homicide prosecution, the giving of instruction that defendant would not be guilty of first-degree murder if he was so intoxicated

that he could not entertain the specific purpose required by statute to constitute first-degree murder, and the refusal to give requested instruction that defendant would not be guilty of either first or second-degree murder and should be acquitted, if he was so intoxicated that he could not entertain the specific purpose required by statute to constitute first or second-degree murder, was not error. D.C. Code 1929, T. 6, § 21. *Bishop v. U.S.*, 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

It is error to qualify a special instruction asked in a homicide case to the effect that the weight of evidence as to the accused's intoxication is for the jury, by adding that such evidence should be received with caution and carefully examined, in connection with all the circumstances of the case. *Sabens v. U.S.*, 40 App.D.C. 440, 1913 U.S. App. LEXIS 2099 (1913).

— Lesser included offenses, instructions.

Jury instruction on second-degree murder as a lesser included offense of first-degree premeditated murder was warranted, even though defendant argued that there was no evidence that he had the mens rea necessary for second-degree murder; based on the evidence presented, a reasonable jury could have found that defendant left a party with victim and a companion, that the companion ordered victim out of the vehicle, that the companion shot victim without defendant's prior knowledge, and that defendant then shot victim reflexively out of fear or shock after the companion ordered him to shoot. *Atchison v. United States*, 982 A.2d 1138, 2009 D.C. App. LEXIS 543 (2009), writ of certiorari denied by 130 S. Ct. 1549, 176 L. Ed. 2d 140, 2010 U.S. LEXIS 1486, 78 U.S.L.W. 3481 (U.S. 2010).

Rage alone is insufficient to support a voluntary manslaughter instruction as a lesser-included offense of murder because there must also be adequate provocation. *High v. United States*, 972 A.2d 829, 2009 D.C. App. LEXIS 184 (2009).

Instruction on second-degree murder as a lesser-included offense of first-degree premeditated murder was warranted, in trial of defendant and co-defendant arising from shooting deaths of two victims that resulted in conviction of co-defendant on two counts of second-degree murder; though co-defendant gave machine gun to defendant after learning that the two victims had been trying to break into his car, there was evidence from which jury could infer that co-defendant only formed the intent to kill at the last moment, either when co-defendant learned victims did not have enough money to compensate him for damage to his car after victims were patted down, or when one of his companions asked co-defendant after the pat down what he was going to do and co-defendant took question as a challenge to his

street credibility. *Coleman v. United States*, 948 A.2d 534, 2008 D.C. App. LEXIS 246 (2008), writ of certiorari denied by 558 U.S. 931, 130 S. Ct. 349, 175 L. Ed. 2d 231, 2009 U.S. LEXIS 6443, 78 U.S.L.W. 3180 (2009).

Evidence was sufficient to support instruction on second-degree murder as a lesser included offense of first-degree murder; jurors could have concluded that defendant acted out of impulsive fear when he suddenly came across victims. *Gardner v. United States*, 898 A.2d 367, 2006 D.C. App. LEXIS 205 (2006).

Where both Government and defendant opposed instructions on lesser included offenses as to defendant charged with burglary, attempted robbery, assault, and murder, trial court's refusal to so instruct jury on request of codefendant was not error. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

In prosecution for first-degree felony-murder, second-degree murder, armed robbery, and robbery, evidence provided no rational basis for a lesser charge of assault with a deadly weapon, or simple assault, and court was not required to put case to jury on basis that essentially indulged and even encouraged speculations as to bizarre reconstruction. D.C. Code §§ 22-2401, 22-2901, 22-3202. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

— Limiting instructions.

Absent waiver of instruction, failure, in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, to give immediate limiting instruction as to admissibility where testimony of arresting officer was admitted to impeach defendant's testimony that he had not stated that codefendant "lived across the street" was plain error requiring reversal, though general instruction on impeachment evidence was given in very long charge. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Volunteered testimony of government witness in murder prosecution, to effect that he and defendant had sold drugs together, did not require mistrial, where trial court struck such testimony and instructed jury to disregard it. *Reams v. United States*, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

— Malice, instructions.

In murder prosecution, instructions submitting to jury the issues of insanity, irresistible impulse, malice, deliberation, and premeditation were free from error. D.C. Code 1940, § 22-2401. *Fisher v. U.S.*, 66 S.Ct. 1318, 1946 U.S. LEXIS 2178 (U.S. Dist.Col. 1946).

It is improper in homicide prosecution to instruct that "malice" is state of mind showing heart regardless of social duty, a mind deliberately bent on mischief, a generally depraved, wicked and malicious spirit. *United States v. Hinkle*, 487 F.2d 1205, 1973 U.S. App. LEXIS 7168 (C.A.D.C. 1973).

Trial judge erred in prosecution for murder in instructing jury that wrongful act intentionally done is done with malice aforethought, thereby equating intent with malice. *United States v. Wharton*, 433 F.2d 451, 1970 U.S. App. LEXIS 11384 (C.A.D.C. 1970).

Instruction that law infers or presumes malice from use of deadly weapon in commission of homicide was error. *United States v. Wharton*, 433 F.2d 451, 1970 U.S. App. LEXIS 11384 (C.A.D.C. 1970).

Instruction on malice which stated in effect that wrongful act intentionally done is done with malice aforethought improperly omitted fact that the intentionally done wrongful act must have been without justification or excuse. *Sims v. United States*, 405 F.2d 1381, 1968 U.S. App. LEXIS 4882 (C.A.D.C. 1968).

Instruction that in absence of explanatory circumstances the law infers or presumes malice from use of deadly weapon was error. D.C. Code §§ 22-2401, 22-2403. *Sims v. United States*, 405 F.2d 1381, 1968 U.S. App. LEXIS 4882 (C.A.D.C. 1968).

In homicide prosecution, instructions which submitted first-degree murder, second-degree murder, and manslaughter and which contained statement that wrongful act intentionally done was done with malice was prejudicial error. D.C. Code §§ 22-2401, 22-2403; Fed. Rules Civ. Proc. rule 52(b), 18 U.S.C. *Sims v. United States*, 405 F.2d 1381, 1968 U.S. App. LEXIS 4882 (C.A.D.C. 1968).

Instruction in homicide prosecution that law inferred malice from use of deadly weapon would be erroneous and if appropriate objection is made, trial court must instruct jury that only it may decide whether to draw from all circumstances, including use of deadly weapon, an inference of malice aforethought. Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. *Howard v. United States*, 389 F.2d 287, 1967 U.S. App. LEXIS 4276 (C.A.D.C. 1967).

Court erred in murder prosecution in stating that the law infers malice from use of a deadly weapon, but such was not plain error of such substantial prejudice as to require reversal even though no objection was made where, inter alia, the charge clearly alerted jury to the need of finding premeditation and deliberation over and above malice before bringing in a first-degree verdict, and a jury inferring premeditation and deliberation could not have failed to infer malice. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

In prosecution for murder resulting in conviction of second-degree murder, the court's charge covering premeditation, malice, and self-defense was not erroneous. D.C. Code 1940, §§ 22-2404, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

In first degree murder prosecution, instruction that though deliberate and premeditated malice involves turning over in the mind an intention to kill, it does not take any appreciable length of time to turn a thought of that kind over in the mind, was erroneous, but the instruction was sufficiently corrected by a later charge in effect contradicting it. D.C. Code 1929, T. 6, § 21. *Bullock v. U.S.*, 122 F.2d 213, 1941 U.S. App. LEXIS 2942 (1941).

Trial court, in instructing on first-degree premeditated murder, was not required to state that jury was required to find malice, as statute defined offense in terms of killing another purposely, with deliberate and premeditated malice, the term "purposely" was synonymous with intentionally, and the malice element was therefore satisfied only by proof of a specific intent to kill, which was what jury was told that it had to find, in addition to premeditation and deliberation. *Kitt v. United States*, 904 A.2d 348, 2006 D.C. App. LEXIS 440 (2006), writ of certiorari denied by 552 U.S. 824, 128 S. Ct. 180, 169 L. Ed. 2d 35, 2007 U.S. LEXIS 9135, 76 U.S.L.W. 3157 (2007).

— Nature and circumstances of act, instructions.

In murder prosecution, where there was evidence that accused pursued victim along street and stabbed him many times, court did not improperly refuse to give a charge based on theory that only fatal blow was struck inside laundry before accused and victim ran into the street. *Fook v. U.S.*, 164 F.2d 716, 1947 U.S. App. LEXIS 1977 (1947).

In prosecution for murder, court properly instructed that, if defendant did flee from the scene, jury had right to consider that fact as a consciousness of guilt, if jury deemed it proper to do so. *U.S. v. Edmonds*, 63 F.Supp. 968, 1946 U.S. Dist. LEXIS 2946 (D.D.C.1946).

In murder prosecution, where court called jury's attention to defendant's denial that he fled from the scene, and permitted jury to determine that question before they could consider flight as a consciousness of guilt, court did not err in refusing to elaborate by giving an additional charge to the effect that defendant claimed that he ran from the scene not for the purpose of avoiding arrest but because of fear of attack by decedent's companion. *U.S. v. Edmonds*, 63 F.Supp. 968, 1946 U.S. Dist. LEXIS 2946 (D.D.C.1946).

Where defendant, a drug pusher, volunteered to assist his drug distributor and others to avenge a prior robbery of the distributor, broke

into victim's room with his pistol drawn, accompanied the distributor in subsequently tracking down the victim, either grabbed or shoved victim before he was shot and killed or himself shot and killed the victim and fled and cooperated in concealing evidence, defendant's armed presence at scene of crime was intended to aid the distributor and defendant was not entitled to an instruction that mere presence at the scene of the crime by itself was insufficient to establish guilt. *Peoples v. United States*, 329 A.2d 446, 1974 D.C. App. LEXIS 324 (1974).

— Nature of means or instrument used, instructions.

In prosecution for murder prayer for instruction by the prisoner "that the weapon used, a quarter of a brick, was not a deadly weapon, and malice could not be presumed from its use," is properly rejected by the trial court, especially where the evidence fails to show whether the missile was quarter or half of a brick. *Hopkins v. U.S.*, 4 App.D.C. 430, 1894 U.S. App. LEXIS 3349 (1894).

A charge in a murder case, where self-defense was relied on, which states that if defendant, without attempting to retreat or get out of the way of deceased, used a deadly weapon, intending to take the life of deceased or to inflict great bodily harm, then he is guilty of murder, is erroneous as giving undue emphasis to the use of a dangerous weapon, and ignoring the question of heat of blood. *U.S. v. Green*, 17 D.C. 562 (D.C.Sup. 1888).

— Necessity for request, instructions.

Trial court did not abuse its discretion and did not commit plain error when instructing on malice in murder prosecution, where instructions described three states of mind which could constitute malice, clearly indicated that malice implied state of mind which could include specific intent to kill, intent to commit serious bodily harm, or intent to act in a manner regardless of life and safety of others; moreover, judge had no sua sponte duty to adopt form of instructions of listing three mental states, rather than providing standard instruction. *Swanson v. United States*, 602 A.2d 1102, 1992 D.C. App. LEXIS 29 (1992).

— Passion and provocation, instructions.

Where defendant charged with killing his wife had testified that his wife slapped his face, there was no error in failing to instruct that jury, if it rejected his plea of insanity, might consider question of defendant's sanity as evidence in determining whether provocation suffered by him was sufficient to reduce offense from murder to manslaughter. *Hart v. U.S.*, 130 F.2d 456, 1942 U.S. App. LEXIS 3123 (1942).

In prosecution for first-degree murder while armed, evidence was insufficient to show that reasonable person in defendant's circumstances

would have been sufficiently provoked to lose self-control and kill the victim, his friend, on impulse, because he believed victim had engaged in sexual relations with his step-sister, and thus, evidence did not support jury instruction on lesser-included offense of voluntary manslaughter; evidence showed that defendant was upset when he saw victim and his step-sister, who was 29 years old and did not have particularly close relationship with defendant, coming downstairs together after being upstairs in a house for 20 to 25 minutes, and then saw step-sister kiss victim on the cheek, and there was no evidence of sexual encounter between victim and step-sister. *High v. United States*, 972 A.2d 829, 2009 D.C. App. LEXIS 184 (2009).

— Persons liable, instructions.

Fact that there was evidence that one of the three defendants jointly indicted on charge of murder in perpetration of robbery threw away the gun and bullets after the murder did not require an instruction that jury could find such defendant guilty as accessory after the fact, where such defendant's testimony and other circumstances stamped him as an accessory before the fact and therefore guilty as a principal. D.C. Code 1940, §§ 22-105, 22-2401. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

Where robbery of fountain cash register at front of drug store by one of co-defendants jointly indicted on charge of killing another in perpetrating robbery was a part of general holdup of store in perpetration of which other defendant killed proprietor while obtaining money in cash register in rear of store, defendant who did not do the shooting was not entitled to an instruction that two separate robberies had been committed, that such defendant could be convicted only of being accessory after the fact or that such defendant could be convicted only of offense of robbery. D.C. Code 1940, § 22-2401. *Wheeler v. U.S.*, 165 F.2d 225, 1947 U.S. App. LEXIS 2054 (1947).

Ample evidence was presented at trial to justify aiding and abetting instruction, even though Government's theory of case was consistently that defendant was principally responsible for victim's fatal stab wounds; evidence established that victim died from stab wound to heart and suffered eight additional stab wounds, evidence further established that defendant and two codefendants were only other persons in prison shower area with victim when stabbing occurred, and no substantial evidence was offered by defendant to refute conclusion that one of them, or perhaps all three, committed murder. *United States v. Horton*, 716 F. Supp. 927, 1989 U.S. Dist. LEXIS 9406 (1989), affirmed by 921 F.2d 540, 1990 U.S. App. LEXIS 22278 (4th Cir. Va. 1990).

Defendant on trial for first-degree murder by shooting victim was not entitled to a jury instruction that he had been associated with the shooting because of a long-standing rumor, even though defendant argued that the instruction set forth an affirmative defense theory independent of his theory of mistaken identity; defendant formulated a mistaken binary where he could not be guilty of the shooting as a matter of law if he was associated with the shooting because of a long-standing rumor, the presence or lack of a long-standing rumor was instead a factor for the jury to consider when assessing witness credibility, and trial court provided the jury with sufficient guidance on that point. *Williams v. United States*, 6 A.3d 843, 2010 D.C. App. LEXIS 607 (2010).

Error in trial court's use of jury instruction on aiding and abetting that included language on natural and probable causes, which allowed jury to find guilt without having to find that defendant possessed requisite *mens rea*, was not plain error at trial for first-degree premeditated murder under theory of aiding and abetting; no reasonable juror could have concluded that defendant had any intent other than to kill victim or that actions taken by defendant before killing were anything other than deliberate and premeditated, given evidence that, *inter alia*, defendant first suggested killing victim and provided directions to location where victim was killed. *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari denied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

Instruction on testimony of an accomplice did not validate or endorse government's position that case involved criminal associates, and thus instruction was proper, in prosecution for felony murder, attempted armed robbery, and related weapons offenses; trial court, in giving instruction, twice referred to "alleged accomplice" rather than simply "accomplice," which was plain reference to government's theory that defendant and alleged accomplice had jointly set out to rob victim, and instruction did not endorse government's theory, but rather, in context, gave jury message to scrutinize carefully the testimony of one who had implicated defendant in crime along with himself. *Byrd v. United States*, 870 A.2d 71, 2005 D.C. App. LEXIS 47 (2005).

Aiding and abetting instruction was warranted, in homicide and assault prosecution arising from shooting into automobile; there was sufficient evidence to convict defendant as principal or as aider and abettor, and jury could properly return general verdict against defendant without specifying whether he was principal or aider and abettor. D.C. Code 1981, §§ 22-501, 22-2401, 22-3202. *Payne v. United*

States, 697 A.2d 1229, 1997 D.C. App. LEXIS 163 (1997).

Because jury could well have concluded that first defendant was principal and second defendant was aider and abettor, trial court did not err in giving aiding and abetting instruction or in declining second defendant's request to instruct jury that some of evidence was only admissible against one defendant, where second defendant did not specify which evidence would not be admissible against him, and where evidence presented against first defendant was circumstantially relevant in government's murder case against second defendant. *Reaves v. United States*, 694 A.2d 52, 1997 D.C. App. LEXIS 82 (1997).

Government was entitled to aiding and abetting instruction permitting jury to find defendant guilty of murder and assault whether he was personally responsible for shooting each victim or was acting with another in carrying out shooting; there was evidence that defendant acted knowingly to distract victim before codefendant began firing his gun, after which defendant began firing his gun. *Leonard v. United States*, 602 A.2d 1112, 1992 D.C. App. LEXIS 31 (1992).

Although the trial court, which instructed the jury that it could convict defendants of felony-murder if it found that the killings occurred "in the course of the felony," should have included the phrase "in furtherance of the common purpose to commit the felony" in its instruction, no reversible error occurred since the instructions actually given informed the jury of the applicable legal principles; by instructing that the killing must occur in "the course of a felony," the court informed the jury that the connection between the felony and homicide must be more than a coincidence of time and place, and defense counsel was not prevented from arguing to the jury that the killings were outside the scope of, and foreign to, the original plan or design. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

In proceeding in which defendant was convicted of two counts of first-degree murder, instruction, which tracked language of the standard jury instruction on aiding and abetting, did not impose a greater or different responsibility than was justified by the law and the evidence in the case; such instruction was not prejudicial, though it may have been both vague and superfluous in the first-degree murder context. D.C. Code §§ 22-105, 22-2401. *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

Under evidence in homicide prosecution, defendant could have been convicted as principal as distinguished from aider and abettor, even if it was not proved beyond reasonable doubt that he was trigger man, and trial court properly refused to charge jury that it could either convict defendant as principal or would be obliged to acquit him if evidence did not prove beyond reasonable doubt that he had been trigger man. *Long v. United States*, 364 A.2d 1174, 1976 D.C. App. LEXIS 393 (1976).

— **Province of jury, instructions.**

In prosecution for first degree murder committed in robbing a grocery store, defended on ground of insanity, instruction stating that a psychopath is not insane within meaning of law, and that a psychopath is person of low intelligence, although expert testimony was that a psychopath was usually of superior intelligence, was erroneous as court invasion of combined functions of expert witness and jury by assertions treating factual issues as already settled by testimony or law. D.C. Code 1951, § 22-2401. *Stewart v. U.S.*, 214 F.2d 879, 1954 U.S. App. LEXIS 2790 (C.A.D.C. 1954).

— **Resistance to unlawful acts, instructions.**

Where the person suspected of having stolen money from an express company, when called into a room in the express company's office, in the presence of the superintendent of the company, a detective, and the maker of a counterfeit seal, and identified by the latter as the one who ordered it, and accused of the theft, and called on to account for the stolen money, commits an assault with intent to kill on the seal maker, for which he is indicted, it is not error for the trial court, in the trial under such indictment, to refuse instructions to the jury which afford no ground of justification for the offense charged, but raise questions as to what constitutes a technical arrest or a constructive imprisonment, and as to whether in the District a private person has authority to make an arrest for any criminal offense. *Davis v. U.S.*, 16 App.D.C. 442, 1900 U.S. App. LEXIS 5310 (1900).

— **Self-defense, instructions.**

Trial court properly refused tendered instruction on self-defense in murder prosecution where defendant's own testimony, if believed, indicated that he did not shoot victim at all but that victim was shot by third person. *United States v. Crowder*, 543 F.2d 312, 1976 U.S. App. LEXIS 8090 (C.A.D.C. 1976), writ of certiorari denied by 429 U.S. 1062, 97 S. Ct. 788, 50 L. Ed. 2d 779, 1977 U.S. LEXIS 433 (1977).

Although "actual belief" would have been preferable to "honest belief" in charge upon self-defense in murder prosecution, the charge did not impose higher standard of belief but

only required finding that the defendant really believed that he was in immediate danger. *United States v. Hardin*, 443 F.2d 735, 1970 U.S. App. LEXIS 5866 (C.A.D.C. 1970).

In murder prosecution self-defense instruction containing statement that assault with bare fists only does not of itself justify one, in repelling such assault, to resort to use of dangerous or deadly weapon in manner calculated to produce death or serious bodily harm, held reversible error, since it singled out particular aspect of facts bearing on question of self-defense. *Meadows v. U.S.*, 82 F.2d 881, 1936 U.S. App. LEXIS 3141 (1936).

Evidence that during a race war defendant, a negro, ran into an areaway, where he was in comparative safety, and could have gone home by a back way, but adjusted his revolver, and then went back on the sidewalk near a mob attacking a house on the opposite side of the street, held not to warrant charging on the law of self-defense. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

A charge that, if defendant's situation was such that he honestly believed, and had reasonable grounds to believe, that he could save himself from serious bodily harm only by killing deceased, he had the right to kill him, is a correct and sufficient charge on the right of self-defense, since an honest belief implies reasonable grounds for the existence of such relief. *Price v. U.S.*, 276 F. 628, 1921 U.S. App. LEXIS 2127 (1921).

A requested instruction of self-defense, stating that if defendant, when he shot the deceased, was under reasonable belief of imminent danger, the jury should find him not guilty of murder, is defective for failure to state what the defendant was in imminent danger of, since one cannot avail himself of the principle of self-defense unless he is able to show that he was in imminent peril of his life or of great bodily harm at the time he did the act resulting in the homicide. *Jackson v. U.S.*, 48 App.D.C. 272, 1919 U.S. App. LEXIS 2311 (1919).

In a prosecution for homicide, an instruction that if the jury believe that the accused invited the deceased to speak with him, for the purpose of provoking a difficulty with him, in order that he might slay him, the accused cannot avail himself of the defense of self-defense, though he delivered the fatal stroke while in danger of death or serious bodily harm at the hands of the deceased, does not permit the drawing of an inference from an inference, and is not erroneous. *Wallace v. U.S.*, 18 App.D.C. 152, 1901 U.S. App. LEXIS 5049 (1901).

In a prosecution for homicide, in which the defense is that accused acted in self-defense an instruction is properly rejected which states that if, on the whole evidence, the jury have a reasonable doubt as to whether the deceased at the time of the killing had in his possession the

ax in evidence, the accused is entitled to the benefit of that doubt, as it segregates a single part of the evidence. *Wallace v. U.S.*, 18 App.D.C. 152, 1901 U.S. App. LEXIS 5049 (1901).

In a prosecution for homicide, evidence that the accused and deceased were rival lovers of the same woman, and that the accused, shortly before the killing, and after the deceased and the woman had been car-riding together, sought an explanation of the woman, and said to the deceased that he would see him presently, is sufficient to support an instruction by the prosecution that if the jury believed that the accused provoked the difficulty with the deceased, and in the progress thereof it became necessary to kill the latter to save himself from death or serious bodily harm, the defendant cannot justify the killing of the deceased on the ground of self-defense. *Wallace v. U.S.*, 18 App.D.C. 152, 1901 U.S. App. LEXIS 5049 (1901).

Defendant was not entitled to jury instruction with respect to homicide victim's general reputation for past violence, where defendant requested the instruction in relation to impressions defendant himself held of victim, not of victim's general reputation. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Defendant was entitled to imperfect self-defense instruction in homicide trial, where reasonable jury could have found that defendant had subjective actual belief that his life was in danger and a like belief that he had to react with the force that he did, even though such beliefs of defendant were objectively unreasonable. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Instruction on false appearances proffered by manslaughter defendant in connection with self-defense theory, was supported by evidence where both defendant and eyewitness testified that victim pulled black object from his clothing, and defendant could have believed that object was gun; defendant was not required to present further evidence tending to prove that object was not in fact gun. *Jackson v. United States*, 645 A.2d 1099, 1994 D.C. App. LEXIS 124 (1994).

Defendant was not entitled to have issue of self-defense submitted to jury in homicide prosecution, despite circumstances surrounding victim's yelling to passenger in defendant's car and his pursuit of defendant's car and discovery of pistol in victim's front pocket after his death, where victim made no threat, actual or apparent, prior to being shot to death by codefendant and there were many options available to defendant short of shooting victim. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Trial court did not err in refusing to grant requested instruction on self-defense or defense of third person, where alleged initiator of scuffle in van had fled scene well before fatal shot was fired and no weapons were subsequently recovered from van. *Jones v. United States*, 516 A.2d 929, 1986 D.C. App. LEXIS 519 (1987), writ of certiorari denied by 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848, 1987 U.S. LEXIS 2179, 55 U.S.L.W. 3776 (1987).

Jury instruction that before a person can avail himself of plea of self-defense against charge of homicide, he must do everything in his power, consistent with his own safety, to avoid danger and avoid necessity of taking life did not improperly encourage jury to draw adverse inference from defendant's failure to retreat. *Cooper v. United States*, 512 A.2d 1002, 1986 D.C. App. LEXIS 378 (1986).

Evidence that defendant was attacked in his home by a cooccupant did not entitle him to instruction that he had no duty to retreat. *Cooper v. United States*, 512 A.2d 1002, 1986 D.C. App. LEXIS 378 (1986).

In homicide prosecution, in view of absence of evidence showing defendant's belief of imminent danger and in view of fact that defendant's defense of accidental death was totally inconsistent with theory of self-defense, trial court properly rejected request for self-defense instruction. *Gezmu v. United States*, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

Fact that murder victim was positioned near parked automobile was insufficient to require instruction on self-defense in first-degree murder prosecution. *Byrd v. United States*, 364 A.2d 1215, 1976 D.C. App. LEXIS 394 (1976).

Trial court did not err in denying defendant's request for instruction on self-defense in first-degree murder prosecution, wherein record was devoid of any evidence fairly tending to bear upon issue of self-defense. *Byrd v. United States*, 364 A.2d 1215, 1976 D.C. App. LEXIS 394 (1976).

It is error to charge that accused must have been in imminent peril of his life or of some great bodily harm in order to support defense of justifiable homicide. *U.S. v. Hamilton*, 15 D.C. 446 (D.C. Sup. 1886).

— Sentence and punishment, instructions.

Explanation of penalty for offense is required only for charge of first-degree murder; in every other instance, sentencing is solely the province of the court, and not of jury. D.C. Code §§ 22-502, 22-2401, 22-2403, 22-2901, 22-3202, 22-3204. *United States v. Caldwell*, 543 F.2d 1333, 1974 U.S. App. LEXIS 5417 (C.A.D.C. 1974), writ of certiorari denied by 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97, 1976 U.S. LEXIS 1234 (1976).

Guilt-phase instruction that there is no death penalty in the District of Columbia was

not plain error, in prosecution for first-degree murder. *Watkins v. United States*, 846 A.2d 293, 2004 D.C. App. LEXIS 156 (2004).

Joint or separate trial of charges.

Obstruction of justice charge arising from murder of witness to triple murder was properly joined with charges stemming from triple murder, based on substantial connections between them; it could fairly be inferred that witness was murdered because of her knowledge about triple murder, weapons from those two separate murders were found together among defendant's belongings, and even though obstruction took place in different location, location where witness's body was discovered was very close to home of defendant's mother. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Evidence of obstruction of justice charge arising from murder of witness to triple murder would be admissible in separate trial for triple murder, and thus, defendant was not entitled to severance of obstruction charge; evidence of obstruction would be admissible as evidence of defendant's consciousness of guilt and as direct evidence of triple homicide, and probative value of evidence of witness's murder was not substantially outweighed by danger of impermissible prejudice because it was unlikely that jury regarded facts of witness's murder as evidence of general proclivity of defendant to behave violently, and because of unique relationship between that evidence and lone contested issue, i.e., identity. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

No conflict existed between defenses presented by defendant and codefendant which would warrant severance of charges, in multi-defendant prosecution arising from stabbing death of victim; codefendant's theory was one of self-defense, defendant maintained that defendant was acting in defense of codefendant, and there was testimony from several government witnesses as to activities of both defendants so that jury could not have been confused or misled simply by their joinder in single indictment. D.C. Code 1981, §§ 22-722(a)(3), 22-2401, 22-3202, 22-3204(b). *Sams v. United States*, 721 A.2d 945, 1998 D.C. App. LEXIS 229 (1998), writ of certiorari denied by 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 928, 2000 U.S. LEXIS 832, 68 U.S.L.W. 3479 (2000), writ of certiorari denied by 531 U.S. 1015, 121 S. Ct. 575, 148 L. Ed. 2d 492, 2000 U.S. LEXIS 7864, 69 U.S.L.W. 3363 (2000).

Defendant was not entitled to have first-degree murder charge severed from charge of conspiracy to distribute and possess illegal drugs with intent to distribute; defendant conceded that evidence of murder would be admissible at separate trial on conspiracy charge, and evidence relating to conspiracy would have

been admissible at separate murder trial to show motive. Criminal Rule 14; D.C. Code 1981, §§ 22-2401, 22-3202, 33-541(a)(1), 33-549. *Void v. United States*, 631 A.2d 374, 1993 D.C. App. LEXIS 226 (1993).

In prosecutions for murder, kidnapping, etc., arising out of the so-called "Hanafi" take-overs of three buildings, the trial court did not abuse its discretion in refusing to sever that count of the indictment charging assault with a deadly weapon. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

In proceeding in which defendant was convicted of two counts of first-degree murder, refusal to sever the three homicide counts against defendant and to order separate trials on each charge was not abuse of discretion, in light of fact that existence of a cover-up scheme would have rendered evidence of all the charges against defendant mutually admissible at the separate trials if severance motion had been granted and in view of indication that the degree of any prejudice to defendant was outweighed by considerations of economy and expedited judicial administration. D.C. Code §§ 22-2401, 23-311(a); D.C. Code SCR, Criminal Rules 8(a), 14. *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

Defendant, who was convicted of possession of dangerous weapon and four counts of first-degree murder, failed to establish abuse of discretion in denial of his motion to sever counts of indictment involving a murder, which was only homicide that defendant wished to testify about, from counts charging him with the other murders, in that defendant, by merely stating that "[I]t is very possible that the defendant will wish to take the stand with respect to one charge and not the others," had not presented sufficient information as to nature of testimony he wished to give on one count and his reasons for not testifying on other counts. D.C. Code §§ 22-2401, 22-3204, 23-311(a), 23-313; D.C. Code SCR, Criminal Rules 8(a), 14. *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

Where robbery and felony-murder, although unrelated as to place, were so closely related in time as to almost constitute continuing transaction and evidence of robbery would have been admissible in separate trial for felony-murder to show motive, intent, absence of accident and common scheme or plan to rob, trial court did

not abuse its discretion in denying severance of robbery and felony-murder counts. D.C. Code §§ 22-2401, 22-2901, 22-3204; D.C. Code SCR, Criminal Rule 14. *Calhoun v. United States*, 369 A.2d 605, 1977 D.C. App. LEXIS 421 (1977).

Joint or separate trials of codefendants.

Joint trial of all defendants on charges growing out of same underlying event, an assassination, but premised upon entirely disparate levels and allegations of culpability foreshadowed confusion of evidence and prejudice to a defendant who was charged only with false declarations to grand jury and misprision of felony, in view of likelihood of confusion of defendants, in view of gross disparity in charges and in view of deprivation of at least some opportunity to cross-examine witnesses and introduce evidence, and same was true notwithstanding trial judge's conscientious effort to limit admission of evidence for only relevant purposes against such particular defendant. U.S. Const. Amend. 6; 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401; Fed.R.Cr.Proc. Rule 14, 18 U.S.C.; Fed.Rules Evid. Rule 404(b), 18 U.S.C. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Grant of severance was not required on ground that defendant could have called codefendant to testify that defendants were not together when homicide and robbery occurred where there was no intimation that codefendant would have been willing to testify at defendant's trial, and if codefendant were to testify, Government's impeaching statement which was inculpatory of defendant would probably have surfaced. D.C. Code §§ 22-2401, 22-2901. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Fact that there was conflict in accused's defenses, in that codefendants relied on separate alibi defenses and defendant admitted his presence at scene of offenses and in that such defendant's efforts to discredit testimony that he and a codefendant knocked out victim assertedly undermined such codefendant's alibi defense and fact that defendant did not testify and thus codefendants were precluded from cross-examining him did not so prejudice codefendants as to render refusal to grant severance an abuse of discretion where damaging implications of defendant's defense were corroborated by substantial testimony. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

In prosecution of defendants on murder and rape charges, trial court did not abuse its discretion in denying motion of defendant brothers for a severance from codefendant, who

had fatally stabbed the victim, notwithstanding defendants' claim that the evidence against the codefendant was much stronger than the evidence against them. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Refusal to grant a severance for trial purposes as to defendant tried for several crimes including first-degree murder arising out of two separate robberies was prejudicial to defendant because there was not only the danger that evidence with respect to two robberies would cumulate in jurors' minds and tend to prove defendant guilty of each, but also because the evidence as to one of the robberies was so weak that its primary usefulness was to support government's case as to robbery which resulted in the murder. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901; Fed.Rules Crim.Proc. rules 8(a), 14, 16, 18 U.S.C. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

Refusal to grant three defendants jointly indicted on charge of murder in perpetration of robbery separate trials was not an abuse of discretion, where trial court duly limited effect of evidence introduced which was competent against one defendant and incompetent as to others. D.C. Code 1940, § 22-2401. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

Refusal of motion of one of two defendants jointly indicted on charge of killing another in perpetrating a robbery for a severance on ground that such defendant could not obtain a fair and impartial trial because codefendant had made admissions and confessions out of his presence and hearing was not an abuse of discretion, where codefendant's testimony from witness stand was substantially to same effect as his former extrajudicial statement implicating moving defendant. D.C. Code 1940, § 22-2401. *Wheeler v. U.S.*, 165 F.2d 225, 1947 U.S. App. LEXIS 2054 (1947).

Trial court acted within its discretion in denying second defendant's motion to sever his trial for murder and other offenses from first defendant's trial for same offenses, even though first defendant's confession implicated second defendant, and second defendant argued that confession was prejudicial to him at trial; trial court redacted confession to eliminate any reference or inferential reference to second defendant. *Lindsey v. United States*, 911 A.2d 824, 2006 D.C. App. LEXIS 630 (2006), writ of certiorari denied by 552 U.S. 1077, 128 S. Ct. 804, 169 L. Ed. 2d 607, 2007 U.S. LEXIS 12987, 76 U.S.L.W. 3303 (2007).

Severance of defendants' murder trials from that of codefendant who apparently enlisted defendants in a plan to murder victim was not warranted, in light of effect of admission of

codefendant's statements and letters and restrictions placed upon admission of evidence of another homicide in which codefendant might have been involved, and in light of fact that defendants' defenses were not otherwise irreconcilable. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

Even if defendant's and codefendant's defenses conflicted, defendant was not prejudiced by the conflict, so as to warrant severance of defendants, in prosecution for various offenses including first-degree murder and armed robbery; there was enough independent evidence of defendant's guilt so that trial court could reasonably find with substantial certainty that conflict in defenses alone would not sway jury to defendant guilty. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202; Criminal Rule 14. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Trial court's failure to sever charges in multi-defendant prosecution arising from stabbing death of victim did not create "spillover" prejudice against defendant by making trial so complex that jury was unable to decide guilt or innocence of each defendant separately from others, where one codefendant was acquitted of all charges, and thus, no basis existed for concluding that jury was confused or frustrated by complexity of evidence, or that jury could not fairly decide guilt or innocence of one defendant separately from others. D.C. Code 1981, §§ 22-722(a)(3), 22-2401, 22-3202, 22-3204(b). *Sams v. United States*, 721 A.2d 945, 1998 D.C. App. LEXIS 229 (1998), writ of certiorari denied by 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 928, 2000 U.S. LEXIS 832, 68 U.S.L.W. 3479 (2000), writ of certiorari denied by 531 U.S. 1015, 121 S. Ct. 575, 148 L. Ed. 2d 492, 2000 U.S. LEXIS 7864, 69 U.S.L.W. 3363 (2000).

Where assault and weapon charges against one defendant were distinct in time and place from charges of first-degree murder while armed, brought against other defendants, and evidence of murder was overwhelmingly major portion of five-week trial while there was comparatively meager evidence on assault and weapon charges, and evidence of murder would not have been admissible at separate trial of particular defendant on assault and weapon charges, it was error to deny severance. D.C. Code §§ 22-502, 22-2401, 22-3202, 22-3204, 23-

311(c); D.C. Code SCR, Criminal Rule 8(b). *Sousa v. United States*, 400 A.2d 1036, 1979 D.C. App. LEXIS 316 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408, 1979 U.S. LEXIS 3979 (1979), writ of certiorari denied by 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 408 (1979).

Merger of offenses.

Where charge of felony murder included every essential fact element of charge of rescue of a federal prisoner, there had been a merger and thus imposition of consecutive sentence for rescue offense was improper. 18 U.S.C. § 752(a); D.C. Code § 22-2401 et seq. *United States v. Greene*, 489 F.2d 1145, 1973 U.S. App. LEXIS 7659 (C.A.D.C. 1973).

Convictions for felony murder merged with corresponding convictions for first degree premeditated murder while armed. *Robinson v. United States*, 890 A.2d 674, 2006 D.C. App. LEXIS 14 (2006).

Defendants' four counts of murder were required to be merged into one due to the fact that there was only one victim. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Defendant's two convictions for first-degree burglary while armed merged with each other, his convictions for felony murder merged with his respective premeditated murder convictions, and his conviction of felony murder merged with his conviction of first-degree burglary upon which it was predicated. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Felony murder conviction merged with underlying felony of first-degree sexual abuse. *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434 (2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Defendant's conviction for conspiracy to murder and obstruction of justice did not merge with his convictions for substantive offenses of murder and obstruction of justice, for purposes of determining whether there are two offenses or only one, thus requiring merger of the sentences, since conspiracy count did not merge with any underlying offense. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Robbery conviction with respect to victim of fatal shooting should be vacated, upon merger of convictions for first-degree premeditated murder and first-degree felony murder with robbery as underlying felony, only if the trial court determined on remand that premeditated murder was the murder conviction that should

be vacated. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Aggravated assault while armed (AAWA) does not merge with assault with intent to murder while armed (AWIMWA); AAWA requires proof of serious bodily injury, which AWIMWA does not, while AWIMWA requires proof of a specific intent to kill and malice, which AAWA does not. *Ginyard v. United States*, 816 A.2d 21, 2003 D.C. App. LEXIS 32 (2003), writ of certiorari denied by 538 U.S. 1066, 123 S. Ct. 2237, 155 L. Ed. 2d 1123, 2003 U.S. LEXIS 4218, 71 U.S.L.W. 3735 (2003).

Convictions of felony murder and premeditated murder of the same victim merged for sentencing purposes. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

Convictions of felony murder and armed robbery merged for sentencing purposes. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

Convictions of defendant both for assault with intent to kill intended victim and for separate offense of murder of bystander, arising from same incident of firing of multiple bullets at intended victim, did not violate Double Jeopardy Clause. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Premeditated murder and three felony murder convictions had to be reduced to a single murder conviction. D.C. Code 1981, §§ 22-2401, 22-3202. *Green v. United States*, 718 A.2d 1042, 1998 D.C. App. LEXIS 161 (1998), writ of certiorari denied by 526 U.S. 1011, 119 S. Ct. 1156, 143 L. Ed. 2d 222, 1999 U.S. LEXIS 1836, 67 U.S.L.W. 3560 (1999).

Charges of first-degree murder and kidnapping each required proof that of element that other did not, and thus, convictions for kidnapping and murder did not merge, notwithstanding defendant's claim that kidnapping was incidental to underlying crime of murder. D.C. Code 1981, §§ 22-2101, 22-2401. *Parker v. United States*, 692 A.2d 913, 1997 D.C. App. LEXIS 61 (1997).

Convictions for second-degree murder while armed and armed robbery merged with conviction for felony murder while armed. D.C. Code 1981, §§ 22-2401, 22-2403, 22-2901, 22-3202. *Gresham v. United States*, 654 A.2d 871, 1995 D.C. App. LEXIS 32 (1995), writ of certiorari denied by 516 U.S. 854, 116 S. Ct. 155, 133 L. Ed. 2d 99, 1995 U.S. LEXIS 5969, 64 U.S.L.W. 3243 (1995).

Felony-murder conviction and conviction for underlying robbery were merged. D.C. Code 1981, §§ 22-2401, 22-2901. *Garris v. United*

States, 491 A.2d 511, 1985 D.C. App. LEXIS 375 (1985).

Conviction of robbery merged with conviction of felony-murder and, hence, was subject to being reversed. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-2901. *Graves v. United States*, 490 A.2d 1086, 1984 D.C. App. LEXIS 586 (1984), writ of certiorari denied by 474 U.S. 1064, 106 S. Ct. 814, 88 L. Ed. 2d 788, 1986 U.S. LEXIS 2427, 54 U.S.L.W. 3461 (1986).

Defendants' convictions for one count of armed robbery merged with their convictions for felony-murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Derrington v. United States*, 488 A.2d 1314, 1985 D.C. App. LEXIS 329 (1985), writ of certiorari denied by 486 U.S. 1009, 108 S. Ct. 1738, 100 L. Ed. 2d 201, 1988 U.S. LEXIS 2187, 56 U.S.L.W. 3789 (1988).

Defendants' convictions for felony-murder while armed and the underlying felony of first-degree burglary while armed merged, and thus, case would be remanded with instructions to vacate the armed burglary conviction. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202, 22-3204; 18 U.S.C. §§ 5005 et seq., 5010(c). *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

Convictions of rape, robbery, and burglary, which underlay felony-murder convictions, merged into those felony-murder convictions and, accordingly, convictions of rape, robbery, and burglary would be vacated. D.C. Code 1981, §§ 22-1801, 22-2401, 22-2801, 22-2901, 22-3502. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

In prosecution for murder, kidnapping, and assault arising out of the "Hanafi" take-overs of three buildings, the kidnapping convictions of defendants did not merge with the other offenses. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Defendant's conviction for armed robbery did not merge into his conviction for felony-murder. D.C. Code §§ 22-2401, 22-3201. *Ellis v. United States*, 395 A.2d 404, 1978 D.C. App. LEXIS 570 (1978), writ of certiorari denied by 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280, 1979 U.S. LEXIS 2309 (1979).

Mayhem was not lesser included offense of, and did not merge into, felony-murder on theory that defendant's act of burning victim was simply the means of killing him. D.C. Code §§ 22-506, 22-2401, 23-112. *Ellis v. United States*, 395 A.2d 404, 1978 D.C. App. LEXIS 570 (1978), writ of certiorari denied by 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280, 1979 U.S. LEXIS 2309 (1979).

Double jeopardy clause did not prohibit simultaneous prosecution and separate punishment of defendants for both felony-murder and for underlying felony of attempted armed robbery and the underlying felony did not merge into the felony-murder conviction, where the only connection between the attempted armed robbery and the homicide was that commission of the attempted robbery permitted finding of intent requisite to convict defendant of felony-murder in first degree. D.C. Code § 22-2401; U.S. Const. Amend. 5. *Waller v. United States*, 389 A.2d 801, 1978 D.C. App. LEXIS 482 (1978), writ of certiorari denied by 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253, 1980 U.S. LEXIS 2108 (1980).

In view of different societal interests protected by the rape and felony-murder statutes and in absence of any indication that Congress intended rape to be nonprosecutable under the merger rule when a defendant is charged with felony-murder based on a rape, offense of rape did not merge into felony-murder based on the rape. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Application of merger doctrine was unwarranted where burglary based upon assault served as predicate for felony-murder, in view of fact that statute expressly provided that even purposeless killing of another during housebreaking while armed constitutes first-degree murder, and in view of fact that societal interest served by burglary statute was separate and distinct from that of the murder statute. D.C. Code § 22-2401. *Harris v. United States*, 377 A.2d 34, 1977 D.C. App. LEXIS 361 (1977).

Nature and elements of homicide.

Nature and elements of murder.

— Cause of death, nature and elements of homicide.

Where a person dies from wounds inflicted in an assault, the fact that he did not procure proper medical treatment, or neglected to take proper care of himself, will not relieve the assailant from criminal responsibility. *Hopkins v. U.S.*, 4 App.D.C. 430, 1894 U.S. App. LEXIS 3349 (1894).

One who, in striking another, inflicts a blow which may not be mortal in and of itself but thereby starts a chain of causation which leads to death, is guilty of homicide even if victim contributes to his own death or hastens it by failing to take proper treatment. *U.S. v. Hamilton*, 182 F.Supp. 548, 1960 U.S. Dist. LEXIS 3027 (D.D.C.1960).

Where, after defendant had jumped on and kicked victim's face, tubes were inserted into

victim's nasal passages and trachea to maintain his breathing process, but victim later pulled out the tubes and died of asphyxiation due to aspiration or inhalation of blood caused by the severe injuries to his face defendant was guilty of homicide, not merely of assault with a dangerous weapon, even if victim consciously and deliberately pulled out tubes and would have lived if he had not. *U.S. v. Hamilton*, 182 F.Supp. 548, 1960 U.S. Dist. LEXIS 3027 (D.D.C.1960).

A death of a fever caused by a beating while the person was in a weak state of health is murder, where the beating was with malice aforethought; otherwise, it is manslaughter. *U.S. v. Woods*, 28 F.Cas. 762, 1834 U.S. App. LEXIS 277 (1834).

Arson victim's voluntary and deliberate reentry into burning building to save dog was natural response and was not legal cause of victim's death superseding defendant's felonious act of setting fire so as to insulate defendant from criminal liability for felony murder. D.C. Code 1981, §§ 22-401, 22-2401. *Bonhart v. United States*, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Exception for physician's gross negligence to rule that medical treatment which contributes to or immediately leads to death is not intervening cause that relieves defendant from criminal responsibility for death did not apply to prosecution in which stabbing victim died from hepatitis, where defendant did not argue that hepatitis resulted from grossly negligent, or even negligent, medical treatment. *McKinnon v. United States*, 550 A.2d 915, 1988 D.C. App. LEXIS 210 (1988).

Unusual type of hepatitis contracted by stabbing victim was reasonably foreseeable consequence of stabbing, and thus did not break causal chain between defendant's actions and stabbing victim's death, where all expert witnesses testified that most likely cause of victim's hepatitis was treatment necessitated by wounds defendant had inflicted. *McKinnon v. United States*, 550 A.2d 915, 1988 D.C. App. LEXIS 210 (1988).

Generally, if person inflicts a dangerous wound, it is not a defense to a charge of homicide that the death was contributed to by or resulted from unskillful or improper medical treatment, but gross maltreatment, which is sole cause of death, is available as a defense. *Baylor v. United States*, 407 A.2d 664, 1979 D.C. App. LEXIS 459 (1979).

Generally, in determining whether gross negligence in treating wound was sole cause of death, the test is whether, when death occurred, the original wound inflicted by defendant contributed substantially to the event. *Baylor v. United States*, 407 A.2d 664, 1979 D.C. App. LEXIS 459 (1979).

Attending physicians and family of crime victim owe no duty to defendant to treat victim so as to mitigate defendant's criminal liability. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

In prosecution for murder of victim, who was assaulted during purse-snatching incident and who died six days later at hospital after decision was made to discontinue heroic measures to keep her alive, it was incumbent upon defendant, who participated in incident but who neither touched victim nor her purse, to demonstrate that law regarded the act of assault on victim as distinct from physician's act of discontinuing heroic measures. D.C. Code § 22-2401. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

If two acts, which result in death of victim, are not separate, defendant as perpetrator of first act is held responsible for consequences of second; if such acts are distinct, the law will not punish defendant except for the first act. D.C. Code § 22-2401. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

If two acts which result in death of victim, are determined to be separate, issue arises whether defendant's commission of first act was a substantial factor contributing to victim's death; if it was then liability for homicide will attach. D.C. Code § 22-2401. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

Where action of medical personnel in discontinuing extraordinary measures to keep crime victim alive is either reasonable or negligent, law holds perpetrator of crime liable for consequences of the discontinuance; for law to deem act of perpetrator of crime separate from act of medical personnel, the latter must descend at least below the negligence level. D.C. Code § 22-2401. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

— Common law, nature and elements of homicide.

Generally, the District of Columbia homicide statutes constitute a restatement of the common-law definition of murder, but have substituted for the indefinite common-law concept of felony the more precise concept, which controls, of offenses punishable by imprisonment in the penitentiary. D.C. Code 1929, T. 6, Secs. 21-23. *Lee v. U.S.*, 112 F.2d 46, 1940 U.S. App. LEXIS 4220 (1940).

The District of Columbia statute providing that homicide committed purposely and with deliberate and premeditated malice is first degree murder, and that homicide committed with malice aforethought without deliberation and premeditation is second degree murder, embodies the substance of murder as it was known to the common law, although distinction was made in severity of punishment for degrees of murder. D.C. Code 1929, T. 6, § 21. *Bishop v.*

U.S., 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

The definition of murder given in Code, § 798, D.C. Code 1929, T. 6, § 21, is declaratory of the common law, and is not a new or statutory definition. *Hamilton v. U.S.*, 26 App.D.C. 382, 1905 U.S. App. LEXIS 5377 (1905).

The definition of murder given in § 798, District of Columbia Code, D.C. Code 1929, T. 6, § 21, namely,—“Whoever, being of sound memory and discretion, purposely, and either deliberate and premeditated malice, or by means of poison, or in perpetrating, or in attempting to perpetrate, any offense punishable by imprisonment in the penitentiary, kills another,”—is not a new or statutory definition of murder, but is simply the common-law definition of that crime. *Hill v. U.S.*, 22 App.D.C. 395, 1903 U.S. App. LEXIS 5543 (1903).

Although first and second-degree murders are defined by statute, those statutes embody common-law definition of murder. D.C. Code 1981, §§ 22-2401 to 22-2403. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

— Deliberation and premeditation, nature and elements of murder.

Law requires only that some appreciable time elapse during which necessary premeditation can take place in order to convict of premeditated murder. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Passage of time, standing alone, will not support an inference that deliberation took place, in prosecution for premeditated murder. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Jury may not find “premeditation” solely from fact that defendant had time to premeditate. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

The passage of sufficient time for deliberation does not itself permit inference that requisite thought process occurred. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

Some appreciable time must elapse in order that reflection and consideration amounting to the deliberation and premeditation required for first-degree murder may occur. D.C. Code 1929, T. 6, § 21. *Bullock v. U.S.*, 122 F.2d 213, 1941 U.S. App. LEXIS 2942 (1941).

No particular length of time is necessary for the deliberation required for first-degree mur-

der; it being the fact of deliberation, rather than the time of its continuance, which is important. *Bostic v. U.S.*, 94 F.2d 636, 1937 U.S. App. LEXIS 4133 (1937).

Though lapse of time is important because of the opportunity afforded for the deliberation required for first-degree murder, it is not the lapse of time itself which constitutes deliberation, but the reflection and consideration in the accused's mind concerning a design or purpose to kill. *Bostic v. U.S.*, 94 F.2d 636, 1937 U.S. App. LEXIS 4133 (1937).

Generally, some appreciable time must elapse in order that reflection and consideration amounting to the deliberation required for first-degree murder may occur. *Bostic v. U.S.*, 94 F.2d 636, 1937 U.S. App. LEXIS 4133 (1937).

Evidence that defendant accosted a young woman acquaintance of the deceased, and that after the first hostile conversation between defendant and deceased, five or ten minutes elapsed before another exchange of words and the shooting of deceased, showed sufficient time for the deliberation required for first-degree murder, even though defendant was unacquainted with deceased and bore him no ill will previously. *Bostic v. U.S.*, 94 F.2d 636, 1937 U.S. App. LEXIS 4133 (1937).

Premeditation or deliberation need exist only for moment before actual slaying and may be inferred from brutality of killing, number of blows inflicted, physical disparity between defendant and victim, and defendant's efforts to conceal crime or avoid detection. *Pruett v. Thompson*, 771 F. Supp. 1428, 1991 U.S. Dist. LEXIS 12116 (1991), affirmed by 996 F.2d 1560, 1993 U.S. App. LEXIS 12323 (4th Cir. Va. 1993).

Under District of Columbia law, in order that there may be sufficient premeditation and deliberation, to constitute murder in first degree, some appreciable interval, no matter how brief, must elapse after intent to kill is formed and before killing is accomplished, and during that interval there must have been some reflection which would amount to premeditation and deliberation. *U.S. v. Wilson*, 178 F.Supp. 881, 1959 U.S. Dist. LEXIS 2601 (D.D.C.1959).

In a prosecution for first-degree premeditated murder, both premeditation and deliberation, which may occur in only a few seconds, may be inferred from the surrounding facts and circumstances. *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari denied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

First-degree premeditated murder is murder committed with the specific intent to kill after premeditation and deliberation; premeditation means that the defendant formed the specific intent to kill the victim for some length of time,

and deliberation requires a showing that the defendant acted with consideration and reflection upon the preconceived design to kill. *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari denied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

"Premeditation" required to establish charge of first-degree murder means that the defendant formed the specific intent to kill the victim for some length of time, however short, before the murderous act. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

"Deliberation" required to establish charge of first-degree murder requires that there was the reflection and turning over in the mind of the accused concerning his existing design and purpose to kill; no minimum time lapse is required. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Separate element of "deliberation" to establish first-degree murder does not require a minimum lapse of time, but the reflection and turning over in the mind of the accused concerning his existing design and purpose to kill. *Bates v. United States*, 834 A.2d 85, 2003 D.C. App. LEXIS 624 (2003).

"Premeditation" means that the defendant formed the specific intent to kill the victim for some length of time, however short, before the murderous act. *Bates v. United States*, 834 A.2d 85, 2003 D.C. App. LEXIS 624 (2003).

To prove first degree premeditated murder while armed, the deliberation element requires consideration and reflection upon the preconceived design to kill, while the premeditation element requires proof that the defendant gave thought before acting to the idea of taking a human life and reached a definite decision to kill. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Premeditation requires proof that the defendant gave thought before acting to the idea of taking a human life and reached a definite decision to kill. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Proof of deliberation in prosecution for premeditated murder requires a showing that the defendant acted with consideration and reflection upon the preconceived design to kill, turning it over in the mind, giving it second thought. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

For purposes of murder charge, time involved in acting with premeditation and deliberation may be minutes or just a few seconds. *Porter v.*

United States, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Time lapse is important with respect to charge of premeditated murder because it can show an opportunity for deliberation. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Fact that the accused brings a weapon to the murder scene is probative of the elements of deliberation and premeditation required for first degree murder. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

In order to prove premeditation, government must show that defendant, before acting, gave thought to idea of taking human life and reached definite decision to kill. *Harris v. United States*, 668 A.2d 839, 1995 D.C. App. LEXIS 247 (1995).

In order to prove deliberation, government must demonstrate that accused acted with consideration and reflection upon preconceived design to kill. *Harris v. United States*, 668 A.2d 839, 1995 D.C. App. LEXIS 247 (1995).

Both premeditation and deliberation may be inferred from surrounding facts and circumstances, and may occur in a period as brief as a few seconds. *Harris v. United States*, 668 A.2d 839, 1995 D.C. App. LEXIS 247 (1995).

In order to prove premeditation so as to support murder conviction, government must demonstrate that defendant, before acting, thought about idea of taking human life and reached decision to kill. *Patton v. United States*, 633 A.2d 800, 1993 D.C. App. LEXIS 286 (1993).

To prove deliberation so as to support murder conviction, government must prove that defendant acted with consideration and reflection upon preconceived decision to kill. *Patton v. United States*, 633 A.2d 800, 1993 D.C. App. LEXIS 286 (1993).

A conditional threat is not inconsistent with evidence of premeditation and deliberation. D.C. Code 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

Although some time must elapse before deliberation can be found to have existed so as to support first-degree murder conviction, there is no fixed time required. D.C. Code 1981, § 22-2401. *Garris v. United States*, 465 A.2d 817, 1983 D.C. App. LEXIS 455 (1983), writ of certiorari denied by 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243, 1984 U.S. LEXIS 967, 52 U.S.L.W. 3551 (1984).

Establishing premeditation requires showing that defendant gave thought, before acting, to idea of taking human life and reached definite decision to kill. D.C. Code 1973, §§ 22-2401, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

While some appreciable time for reflection is required to demonstrate element of premeditation, such interval need not be long, if circumstances reveal that killing was product of some deliberation rather than senseless act of mind abandoned to impulse, passion or frenzy. D.C. Code 1973, § 22-2401. *Doepel v. United States*, 434 A.2d 449, 1981 D.C. App. LEXIS 345 (1981), writ of certiorari denied by 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483, 1981 U.S. LEXIS 4463, 50 U.S.L.W. 3376 (1981).

Although no specific amount of time is necessary to demonstrate premeditation and deliberation, evidence must demonstrate that accused did not kill impulsively, in the heat of passion, or in an orgy of frenzied activity. (Per Ferren, J., with two Judges concurring specially.) D.C. Code § 22-2401. *Freundak v. United States*, 408 A.2d 364, 1979 D.C. App. LEXIS 463 (1979).

— Express malice, nature and elements of murder.

However sudden a killing may be, if the means used or the manner of doing it, or other external circumstances attending it, indicate a sedate and deliberate mind and former design to kill, it will be upon express malice. *Travers v. U.S.*, 6 App.D.C. 450, 1895 U.S. App. LEXIS 3603 (1895).

"Express malice" exists where one unlawfully kills another in pursuance of wrongful act or unlawful purpose, without legal excuse. *McClurkin v. United States*, 472 A.2d 1348, 1984 D.C. App. LEXIS 317 (1984), writ of certiorari denied by 469 U.S. 838, 105 S. Ct. 136, 83 L. Ed. 2d 76, 1984 U.S. LEXIS 3334, 53 U.S.L.W. 3237 (1984).

— Implied malice, nature and elements of murder.

"Implied malice" may be inferred from circumstances of killing, such as killing caused by defendant's intentional use of fatal force absent mitigating or justifying circumstances or when act which imparts danger to another is done so recklessly or wantonly as to manifest disregard for human life. *McClurkin v. United States*, 472 A.2d 1348, 1984 D.C. App. LEXIS 317 (1984), writ of certiorari denied by 469 U.S. 838, 105 S. Ct. 136, 83 L. Ed. 2d 76, 1984 U.S. LEXIS 3334, 53 U.S.L.W. 3237 (1984).

— In general.

Felony-murder statutes do not embody a legislative purpose to deter the commission of felonies to the point of embracing the coincidence rationale. D.C. Code § 22-2401. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

— In general.

Difference between risk-creating activity sufficient to sustain murder conviction and criminal manslaughter conviction lies in whether

actor is aware of risk or should have been. *Boykins v. United States*, 702 A.2d 1242, 1997 D.C. App. LEXIS 172 (1997).

Where accused was aware of risk of harm, but acted in conscious disregard of it, killing is murder or "voluntary manslaughter," and where accused is not aware of risk of harm, but should have been, killing will be "involuntary manslaughter." *Boykins v. United States*, 702 A.2d 1242, 1997 D.C. App. LEXIS 172 (1997).

Mitigation principle is predicated on legal system's recognition of the weaknesses or infirmity of human nature, as well as a belief that those who kill under extreme mental or emotional disturbance for which there is reasonable explanation or excuse are less morally blameworthy than those who kill in the absence of such influences. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Legally recognized mitigating factors serve to extenuate or dampen the otherwise malicious nature of the perpetrator's mental state, and thus serve as a bar to a conviction for murder. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

— Intent or design to effect death, nature and elements of murder.

Offense of deliberated and premeditated murder requires a specific intent that cannot be satisfied merely by showing defendant failed to conform to objective standard. *U.S. v. Brawner*, 471 F.2d 969, 1972 U.S. App. LEXIS 8824 (C.A.D.C. 1972).

Word "purposely" as used in statute dealing with first-degree murder, is synonymous with "intentionally", and does not refer to the purpose of, or the intention in, the killing. D.C. Code 1940, § 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

Intent to kill must always be proved in first-degree murder prosecution under first clause of local statute in order to convict, but motive for the killing is not always a material element in defense. D.C. Code 1940, § 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

Where evidence of a shooting tended to show malice aforethought, whether defendant had a definite purpose of shooting any one is immaterial. *Liggins v. U.S.*, 297 F. 881, 1924 U.S. App. LEXIS 2910 (1924).

Under an indictment for murder, charging that the deceased, in attempting to escape from the murderous assault of defendant, fell into a canal and was drowned, the defendant is guilty of murder, if the deceased, in seeking to escape the violent assault of the defendant on her had a well-grounded belief that the defendant intended to take her life or inflict further serious bodily injury on her, and, so believing, inadvertently fell into the canal and was drowned; and

it is not necessary that the prosecution shall show, or that the jury shall believe, that defendant had the malicious intent actually to do bodily harm to the deceased or to take her life. *Norman v. U.S.*, 20 App.D.C. 494, 1902 U.S. App. LEXIS 5471 (1902).

Convictions for felony murder with predicate felonies of robbery and kidnapping, on theory that defendant was an aider and abettor, could stand even absent evidence that defendant had specific intent to kill, as the underlying felonies were enumerated in first-degree murder statute, which meant that there was no requirement that state prove that defendant had specific intent to kill, and there was evidence of defendant's culpable participation in the underlying felonies. *Kitt v. United States*, 904 A.2d 348, 2006 D.C. App. LEXIS 440 (2006), writ of certiorari denied by 552 U.S. 824, 128 S. Ct. 180, 169 L. Ed. 2d 35, 2007 U.S. LEXIS 9135, 76 U.S.L.W. 3157 (2007).

Intent to kill is often inferred from surrounding circumstances. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Statute providing that whoever, being of sound memory and discretion, kills another purposely, of deliberate and premeditated malice, is guilty of first degree murder does not require the purposefulness or intent of the killing to be directed against the person killed, nor does the statute textually imply that, if the intent to kill is realized in the killing of the intended person, it is somehow "used" up or expended and may not embrace the killing of an additional, unintended victim or victims. *Lloyd v. United States*, 806 A.2d 1243, 2002 D.C. App. LEXIS 531 (2002).

Text of first-degree murder statute is consistent with application of its mental element to the simultaneous killing of both the intended and an unintended victim. *Lloyd v. United States*, 806 A.2d 1243, 2002 D.C. App. LEXIS 531 (2002).

In a murder case, application of the transferred intent doctrine is not limited to situations in which the intended victim survives the deadly assault. *Lloyd v. United States*, 806 A.2d 1243, 2002 D.C. App. LEXIS 531 (2002).

When a defendant contemplates or designs the death of another, the purpose of deterrence is better served by holding that defendant responsible for the knowing or purposeful murder of the unintended, as well as the intended, victim. *Lloyd v. United States*, 806 A.2d 1243, 2002 D.C. App. LEXIS 531 (2002).

One who acts with specific intent to kill or inflict serious bodily injury is guilty of murder, but if accompanied by recognized circumstances of mitigation, crime is voluntary manslaughter. D.C. Code 1981, §§ 22-2403, 22-

3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Extremely negligent conduct which creates unjustifiable and very high degree of risk of death or serious bodily injury to another, without any intent to do either, may constitute murder. *Johnson v. United States*, 631 A.2d 871, 1993 D.C. App. LEXIS 225 (1993).

With respect to unintentional killings, first-degree murder liability attaches only if the killing occurs in the course of one of six statutorily enumerated felonies. D.C. Code 1981, § 22-2401. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

General intent to kill is distinguished from specific intent to kill and involves an intention to commit an act of sufficient force to endanger life of another, but not necessarily with any intent to bring about death as a result. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Intent remains a genuine issue in a murder prosecution where the defense is alibi. D.C. Code 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

Underlying felony of burglary in the first degree permitted jury to infer state of mind required for conviction of first-degree murder. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3201. *Hawthorne v. United States*, 476 A.2d 164, 1984 D.C. App. LEXIS 382 (1984).

— Killing one with design to effect death of another, nature and elements of murder.

Even if doctrine of transferred intent, one who intends to kill one person and kills bystander instead is deemed to have committed whatever form of homicide would have been committed had he killed intended victim, and there are even stronger grounds for applying such principle where intended victim is killed by same act that kills unintended victim. D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Doctrine of transferred intent was properly used to convict defendant of first-degree murder where defendant failed in his attempt to kill his intended victim but mortally wounded unintended victim; it is only by pairing defendant's premeditated and deliberate intent to kill intended victim with actual harm (death) caused to unintended victim that proper punishment could be imposed. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

Transferred intent doctrine, which derives from common-law murder, provides that when

a defendant purposely attempts to kill one person but by mistake or accident kills another, felonious intent of defendant will be transferred from intended victim to actual, unintended victim. *O'Connor v. United States*, 399 A.2d 21, 1979 D.C. App. LEXIS 337 (1979).

Doctrine of transferred intent was contained at critical time of Maryland's cession of district within body of criminal law for District of Columbia and so it was available for Government to use in its theory of prosecution in instant murder case. D.C. Code § 49-301. *O'Connor v. United States*, 399 A.2d 21, 1979 D.C. App. LEXIS 337 (1979).

In prosecution for murder in first degree while armed, evidence was sufficient to permit a reasonable juror to infer premeditation and deliberation by defendant in his shooting at occupant of other vehicle and hence such evidence could constitute an intent on defendant's part to be transferred to his shooting of innocent bystander. *O'Connor v. United States*, 399 A.2d 21, 1979 D.C. App. LEXIS 337 (1979).

Since statute governing crime of first-degree murder merely codifies common-law definition of first-degree murder rather than fashions a new crime, first-degree murder under such statute can be proved on a theory of transferred intent; fact that Congress has transformed common-law crime of murder into a statutory crime may not be viewed as abrogating or altering any feature of murder at common law in absence of an express intention on part of congress to do so. D.C. Code § 22-2401. *O'Connor v. United States*, 399 A.2d 21, 1979 D.C. App. LEXIS 337 (1979).

— Malice generally, nature and elements of murder.

Even in absence of subjective intent to kill, malice may be determined by application of an objective standard, where conduct is reckless and wanton and a gross deviation from reasonable standard of care, of such nature that jury is warranted in inferring that defendant was aware of serious risk of death or serious bodily harm. *United States v. Cox*, 509 F.2d 390, 1974 U.S. App. LEXIS 5596 (C.A.D.C. 1974).

"Malice" is state of mind showing a heart that is without regard for the life and safety of others. *United States v. Hinkle*, 487 F.2d 1205, 1973 U.S. App. LEXIS 7168 (C.A.D.C. 1973).

If malice is proved beyond reasonable doubt and no affirmative defense applies, defendant who kills a human being is guilty of "murder"; if malice is not proved, he is guilty of "manslaughter". *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Malice is sole element differentiating murder from manslaughter. *United States v. Wharton*,

433 F.2d 451, 1970 U.S. App. LEXIS 11384 (C.A.D.C. 1970).

Malice may be established by either of two standards: first, a subjective standard, asking whether defendant actually intended or foresaw that death or serious bodily harm would result from his act; and second, an objective, "reasonable man" standard, asking whether defendant should have foreseen that such result was likely, and it is for jury to determine whether requisite state of mind or negligent pattern of behavior existed. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

"Malice" is a state of mind showing a heart fatally bent on mischief and unmindful of social duties and may also be defined as a condition of mind that prompts a person to do an injurious act wilfully to the injury of another; and malice may be implied or inferred from the act committed, or it may be expressed. *Fryer v. U.S.*, 207 F.2d 134, 1953 U.S. App. LEXIS 2841 (C.A.D.C. 1953).

Proof of motive is not essential to establishment of malice. *Liggins v. U.S.*, 297 F. 881, 1924 U.S. App. LEXIS 2910 (1924).

Malice could be established by either of two standards: first, subjective standard, asking whether defendant actually intended or foresaw that death or serious bodily harm would result from his act; and second, an objective, "reasonable man" standard, asking whether defendant should have foreseen that such result was likely. D.C. Code § 22-2403. *Travelers Indem. Co. v. Walburn*, 378 F. Supp. 860, 1974 U.S. Dist. LEXIS 7811 (1974).

"Malice aforethought" or "malice" is a word of art and, in law of homicide, denotes a vicious and wicked state of mind and may be described as a heart fatally bent on mischief and unmindful of social duty. *U.S. v. Hamilton*, 182 F.Supp. 548, 1960 U.S. Dist. LEXIS 3027 (D.D.C.1960).

Words cannot form sufficient provocation to negate the element of malice in a homicide case. *Boyd v. United States*, 732 A.2d 854, 1999 D.C. App. LEXIS 142 (1999).

Malice, which is a component of both first and second-degree murder, requires the absence of justification, excuse, or mitigation. *Herbin v. United States*, 683 A.2d 437, 1996 D.C. App. LEXIS 188 (1996).

Under common law, "murder" constituted unjustified or unexcused homicide committed with "malice aforethought." *Swanson v. United States*, 602 A.2d 1102, 1992 D.C. App. LEXIS 29 (1992).

Murders committed with "malice aforethought" include murders committed by individuals who, in causing another's death, specifically intend to kill, intend to cause serious bodily harm, act with wanton and willful disregard of unreasonable human risk, or kill during intentional commission of felony. *Swanson v.*

United States, 602 A.2d 1102, 1992 D.C. App. LEXIS 29 (1992).

"Malice aforethought" denotes four types of murder, each accompanied by distinct mental state; killing is malicious where the perpetrator acted with a specific intent to kill, killing is malicious where perpetrator has the specific intent to inflict serious bodily harm, act may involve such wanton and willful disregard of an unreasonable human risk as to constitute malice aforethought even if there is not actual intent to kill or injure, and a fourth kind of malice exists when a killing occurs in the course of the intentional commission of a felony. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury but engaged in that conduct nonetheless; malice may be found where the conduct is reckless and wanton and a gross deviation from a reasonable standard of care, or of such a nature that a jury is warranted in inferring that the defendant was aware of the serious risk of death or serious bodily harm. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Fact that a reasonable person would have been aware of the risk of death or serious bodily harm to another as the result of his actions will not sustain a finding of malice, though it may sustain a conviction for manslaughter. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Even where an individual kills with one of the four states of mind recognized as malice aforethought, the killing is not malicious if it is justified, excused, or committed under recognized circumstances of mitigation. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Implicit in the notion of malice aforethought is the absence of every sort of justification, excuse, or mitigation; absence of justification, excuse, or mitigation is thus an essential component of malice and, in turn, of second-degree murder, and the Government bears the ultimate burden of persuasion on that component. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Even an intentional killing, if it comports with legally accepted notions of self-defense, is not malicious; it is excused and it is accordingly no crime at all. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

At common law, "malice" included any killing, accidental or intentional, committed in course of felony that was itself a life-endangering crime, and state of mind that was viewed at common law as constituting "malice" was established by intent to commit felony; this intent was transferred to killing accompanying felony

to make it killing done with "malice." *Towles v. United States*, 496 A.2d 560, 1985 D.C. App. LEXIS 436 (1985), vacated by 497 A.2d 793, 1985 D.C. App. LEXIS 513 (D.C. 1985), affirmed by 521 A.2d 651, 1987 D.C. App. LEXIS 311 (D.C. 1987).

Malice, the state of mind required for an act of murder, can not be equated with specific intent to kill. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

"Malice," state of mind required for murder, need not entail specific intent to cause death nor does it necessarily exist in every case in which a person acts with specific intent to kill; malice is wanton disregard for human life and the safety of others and may be found when conduct is reckless and wanton and a gross deviation from a reasonable standard of care of such nature that jury is warranted in inferring that defendant was aware of serious risk of death or serious bodily harm; malice may also exist when defendant actually intended or foresaw the death or serious bodily harm from his acts. D.C. Code 1981, § 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

— Provocation, nature and elements of homicide.

Unlawful killing in sudden heat of passion, whether produced by rage, resentment, anger, terror or fear is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in passion of the moment to lose some self-control and commit act on impulse and without reflection. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

Provocation sufficient to produce a heat of passion and a resulting absence of malice may give such character to a homicide as to make it manslaughter, but the same provocation may, under slightly varied circumstances, justify a person in killing in self-defense. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

Provocation mitigates murder to manslaughter in only the most exceptional cases; these are cases in which a deceased provoked a defendant by committing an offense that was so grave, and so heinous, that society partially excuses or justifies the defendant's response because people provoked so strongly cannot be expected to behave any differently. *High v. United States*, 972 A.2d 829, 2009 D.C. App. LEXIS 184 (2009).

The test of the sufficiency of provocation to mitigate murder to voluntary manslaughter is that which would cause an ordinary man, a reasonable man, or an average man, to become aroused as to kill another. *High v. United*

States, 972 A.2d 829, 2009 D.C. App. LEXIS 184 (2009).

The presence of adequate provocation is necessary to mitigate murder to voluntary manslaughter. *High v. United States*, 972 A.2d 829, 2009 D.C. App. LEXIS 184 (2009).

Premeditation and deliberation required in a conviction for first-degree murder cannot coexist with adequate provocation such as will reduce the offense to manslaughter. D.C. Code § 22-2401. *Hurt v. United States*, 337 A.2d 215, 1975 D.C. App. LEXIS 368 (1975).

— Time of death, nature and elements of homicide.

Prosecution for murder was not barred by fact that victim died more than one year and a day after attack. D.C. Code 1981, §§ 22-2403, 22-3202. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Even though Congress codified elements of first and second-degree murder in District of Columbia, common-law year and day rule, under which an assailant may be prosecuted for homicide only if victim dies within a year and a day of the injury inflicted, was law in District of Columbia. D.C. Code 1981, §§ 22-2401, 22-2403, 49-301. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Under rule that no person should be adjudged by any act whatever to kill another who does not die by it within a year and a day thereafter, if victim of crime dies after expiration of a year and a day from date of crime, defendant is not required to show that the death ensued from something other than his act; his misdeed is per se excluded from the possible causes of death. D.C. Code § 49-301. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

Rule that no person should be adjudged by any act whatever to kill another who does not die by it within a year and a day thereafter is inapplicable where the victim dies within a year; under such circumstances, defendant may be entitled to an intervening cause instruction, but time period of a year and a day, and the year and a day rule would be improper subject of instruction. D.C. Code § 49-301. *In re N.*, 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

In prosecution for murder of the victim, who was assaulted during purse-snatching incident and who died six days later at hospital after decision was made to discontinue heroic measures to keep her alive, trial court did not err in failing to instruct jury that they should not find defendant guilty of murder if victim would have survived for a year and a day, since victim died within a year and a day of the assault and there was no evidence upon which a reasonable juror could have concluded that victim would have

lived for a year and a day. D.C. Code §§ 22-2401, 49-301. In re N., 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

New trial.

Evidence in proceeding on motion for new trial, or alternatively, dismissal of indictment, supported trial court's findings that the statements and testimony of witnesses whose statements were allegedly wrongfully withheld from the defense did not include evidence that was relevant or material or that would be helpful to the defense or tend to exculpate accused and that the disclosure to accused prior to trial of the statements would not have led to evidence that was relevant or material or that would tend to be exculpatory of murder and assault with intent to rob charges. D.C. Code §§ 22-501, 22-2401. *United States v. Bowles*, 488 F.2d 1307, 1973 U.S. App. LEXIS 7108 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 991, 94 S. Ct. 1591, 39 L. Ed. 2d 888, 1974 U.S. LEXIS 778 (1974).

Where defendant had been convicted of first-degree murder and, if newly discovered testimony had been given at trial, it would have furnished substantial support, which without it was wholly lacking for claim of defendant that he shot deceased because of fear induced by a fresh assault, defendant was entitled to a new trial. *Johnson v. U.S.*, 110 F.2d 562, 1940 U.S. App. LEXIS 4596 (1940).

Where accused charged with murder was a colored boy without means to employ counsel, court appointed two attorneys to defend him, defense was conducted by one of them and another member of bar who did not examine transcript of testimony taken at coroner's inquest, and after trial they filed no brief in appellate court within time, and trial court finally appointed counsel representing accused on appeal to represent him, failure of trial counsel to produce all available evidence did not deprive accused of right to new trial for newly discovered testimony of witness who testified at coroner's inquest. *Johnson v. U.S.*, 110 F.2d 562, 1940 U.S. App. LEXIS 4596 (1940).

Evidentiary hearing on motion for new trial for murder and weapons offenses was not warranted for claims of ineffective assistance of counsel that were vague and conclusory or which could be resolved based on review of available record. *Mercer v. United States*, 864 A.2d 110, 2004 D.C. App. LEXIS 579 (2004), writ of certiorari denied by 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191, 2005 U.S. LEXIS 2103, 73 U.S.L.W. 3513 (2005).

It was abuse of discretion to deny defendant's motion for a new trial based on juror bias without further inquiry into possibility of bias, in murder prosecution; given direct conflict between juror's testimony and defense counsel's proffer of defense witness' testimony, trial

court should not have credited juror's testimony that he was not biased against witness without first evaluating witness' credibility, and thus trial court lacked factual foundation to determine whether there was jury bias requiring new trial. *Bates v. United States*, 834 A.2d 85, 2003 D.C. App. LEXIS 624 (2003).

Denial of defendants' motions for new trial that were predicated on alleged newly discovered evidence in form of letter from co-defendant claiming that defendants had nothing to do with charged events was not abuse of discretion in prosecution for offenses including murder and armed robbery; evidence of defendants' guilt was strong, and credibility of co-defendant would have been seriously undermined at new trial by impeaching evidence. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Defendant was not entitled to new trial based on newly discovered evidence of reluctant witness who allegedly would have testified that he saw some of Government witnesses attempting to lower a body over a balcony of apartment building where victim was killed, where testimony would not have refuted the substantial evidence, including evidence of defendant's own behavior following the murder, that it was defendant who robbed and shot victim himself. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Newly discovered evidence that coperpetrators told victim "You got our shit!" would not have caused acquittal in case in which Government's principal witness testified that someone said "Where is the shit?" in prosecution for first-degree felony-murder, attempted robbery while armed, and carrying of pistol without license; affiant's statement did not support claim of right defense and did not taint reliability on witness' testimony. D.C. Code 1981, §§ 22-2401, 22-2902, 22-3202, 22-3204. *Townsend v. United States*, 549 A.2d 724, 1988 D.C. App. LEXIS 196 (1988), writ of certiorari denied by 490 U.S. 1102, 109 S. Ct. 2457, 104 L. Ed. 2d 1011, 1989 U.S. LEXIS 2732, 57 U.S.L.W. 3792 (1989).

In proceeding in which defendant was convicted of possession of dangerous weapon and four counts of first-degree murder and in which government witness testified that she was with defendant, two victims and another on night of killing and that there had been argument between defendant and a victim that night, prosecutor's failure, pursuant to request for "all Brady material," to turn over such witness' statement that she did not remember seeing such victim the night he was killed did not necessitate new trial, in view of overwhelming evidence of guilt and fact that the omitted evidence created no reasonable doubt as to guilt. D.C. Code §§ 22-2401, 22-3204. *Strick-*

land v. United States, 389 A.2d 1325, 1978 D.C. App. LEXIS 478 (1978), writ of certiorari denied by 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 481, 1979 U.S. LEXIS 927 (1979).

Persons liable.

— Accessories, persons liable.

Elements of accessory after the fact to first-degree murder while armed are: (1) that the offense of first-degree murder while armed had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

Defendant could not be convicted of being an accessory after the fact (AAF) to murder on basis of actions taken while decedent was still alive, where victims of driveby shooting survived for at least a few minutes after defendant drove car away. D.C. Code 1981, § 22-106. *Little v. United States*, 709 A.2d 708, 1998 D.C. App. LEXIS 50 (1998), writ of certiorari denied by 525 U.S. 851, 119 S. Ct. 126, 142 L. Ed. 2d 102, 1998 U.S. LEXIS 5342, 67 U.S.L.W. 3232 (1998).

Reprimanding codefendant for not having killed victim with first shot, advancing upon victim with pistol, and continued presence at murder scene during police investigation was insufficient to support conviction for being accessory after the fact, even if defendant's acts were designed to silence potential witnesses. D.C. Code 1981, § 22-106. *Outlaw v. United States*, 632 A.2d 408, 1993 D.C. App. LEXIS 259 (1993), writ of certiorari denied by 510 U.S. 1205, 114 S. Ct. 1326, 127 L. Ed. 2d 674, 1994 U.S. LEXIS 2441, 62 U.S.L.W. 3624 (1994).

To sustain a conviction of accessory after the fact, Government was required to establish that defendant had knowledge of another's participation in the murder and that, with such knowledge, defendant aided or assisted the other with the specific intent to help him evade apprehension or punishment. D.C. Code 1981, § 22-106. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

— In general.

Where evidence established that particular defendants were members of conspiracy, object of which was deliberate and premeditated murder of former Chilean ambassador to United States, and object was accomplished in manner agreed upon by the conspirators, guilt of such defendants on substantive murder counts could

rest upon their participation in completed conspiracy or under federal and District of Columbia statutes declaring them punishable as principals for murders because they aided and abetted and counseled or advised commission of the offense. 18 U.S.C. §§ 2, 1111, 1116, 1117; D.C. Code §§ 22-105, 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Conviction of misprision of felony was sustained by evidence that defendant a month after murders and after he had been told how murders were committed concealed his knowledge of assassination and murders when he was interviewed by special agent of Federal Bureau of Investigation, and testimony before grand jury in which defendant denied knowledge of the murders was also sufficient to support misprision count, there being additional important evidence by reason of acts of defendant which jury could find were intended to help another defendant conceal his identity and flee to foreign nations to escape arrest for his participation. 18 U.S.C. §§ 4, 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Under the felony-murder doctrine, defendants were responsible for acts committed by their codefendant in furtherance of the felony undertaken by all three. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Defendant who participated in robbery of cab driver which resulted in killing was guilty of murder in first degree even though defendant was accomplice of codefendant who did actual shooting. D.C. Code §§ 22-105, 22-2401. *United States v. Carter*, 445 F.2d 669, 1971 U.S. App. LEXIS 10458 (C.A.D.C. 1971), writ of certiorari denied by 405 U.S. 932, 92 S. Ct. 988, 30 L. Ed. 2d 806, 1972 U.S. LEXIS 3775 (1972).

That actual shooting was done by one defendant held not to reduce guilt of other defendant, where proof clearly showed premeditated killing concurred in by both defendants. *Borum v. U.S.*, 56 F.2d 301, 1932 U.S. App. LEXIS 2746 (1932).

Where one killing is involved and Government advances alternate theories of felony-murder based upon more than one underlying felony, accused may not be convicted of more than one felony-murder. D.C. Code 1981, § 22-2401. *Garris v. United States*, 465 A.2d 817, 1983 D.C. App. LEXIS 455 (1983), writ of certiorari denied by 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243, 1984 U.S. LEXIS 967, 52 U.S.L.W. 3551 (1984).

By its terms, the first-degree murder statute imposes felony-murder liability solely on the person who does the killing; other participants in a felony are exposed to first-degree murder liability only by virtue of the aiding and abet-

ting statute. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

Felony-murder liability of an accomplice must be determined in accordance with common-law concepts of vicarious liability. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

If one of several confederates commits a homicide while engaged in the commission of a felony, all may be found guilty of felony-murder, even if the killing was unintentional, but the felony-murder liability of an accomplice is not unlimited; the principles of vicarious liability require that the connection between the felony and homicide be more than a mere coincidence of time and place; the relationship must be such that the killing can be said to have occurred in the execution of the common scheme or plot. D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

There is no criminal responsibility on the part of an accomplice if the homicide is a fresh and independent product of the killer's mind, outside of, or foreign to, the common design; this limitation on the felony-murder liability of an accomplice is usually phrased in terms requiring that the killing be "in furtherance of the common design or plan." D.C. Code §§ 22-105, 22-2401. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

— Principals, aiders, abettors, and accomplices, persons liable.

Defendant who twice informed codefendants of witness' whereabouts could not be convicted of aiding and abetting witness' murder, retaliation against witness, or killing witness with intent to prevent him from testifying, given absence of evidence that he intended to bring about such results or that he knew why and what codefendants intended to do. 18 U.S.C. §§ 1512(a)(1)(A), 1513(a)(1)(B), (a)(2); D.C. Code 1981, §§ 22-240 to 22-3202. *United States v. Wilson*, 160 F.3d 732, 1998 U.S. App. LEXIS 29488 (C.A.D.C. 1998), writ of certiorari denied by 528 U.S. 828, 120 S. Ct. 81, 145 L. Ed. 2d 69, 1999 U.S. LEXIS 5162, 68 U.S.L.W. 3224 (1999).

District of Columbia law permitted the prosecution of defendant for aiding and abetting first-degree murder after the gunman had been

acquitted of that offense. D.C. Code 1981, § 22-105. *United States v. Edmond*, 924 F.2d 261, 1991 U.S. App. LEXIS 805 (C.A.D.C. 1991), writ of certiorari denied by 502 U.S. 838, 112 S. Ct. 125, 116 L. Ed. 2d 92, 1991 U.S. LEXIS 5639, 60 U.S.L.W. 3260 (1991).

Gunman's acquittal on charge of first-degree murder, which did not say anything about defendant or his alleged role in bringing about victim's death, did not preclude defendant's prosecution for aiding and abetting first-degree murder; aider and abettor did not have to share mens rea of principal. *United States v. Edmond*, 924 F.2d 261, 1991 U.S. App. LEXIS 805 (C.A.D.C. 1991), writ of certiorari denied by 502 U.S. 838, 112 S. Ct. 125, 116 L. Ed. 2d 92, 1991 U.S. LEXIS 5639, 60 U.S.L.W. 3260 (1991).

Two or more persons can be convicted of first-degree murder, as principals, on a conspiracy theory. *Tyree v. United States*, 942 A.2d 629, 2008 D.C. App. LEXIS 31 (2008), writ of certiorari denied by 556 U.S. 1130, 129 S. Ct. 1612, 173 L. Ed. 2d 1000, 2009 U.S. LEXIS 2077, 77 U.S.L.W. 3528 (2009).

Two or more participants can be convicted as principals, in a prosecution for first-degree murder, if there is evidence that each actor was a causative factor in the offense. *Tyree v. United States*, 942 A.2d 629, 2008 D.C. App. LEXIS 31 (2008), writ of certiorari denied by 556 U.S. 1130, 129 S. Ct. 1612, 173 L. Ed. 2d 1000, 2009 U.S. LEXIS 2077, 77 U.S.L.W. 3528 (2009).

Sufficient evidence supported conviction for first-degree murder under theory of aiding and abetting; record indicated that defendant was seen with co-defendant and others deliberating on victim's fate, defendant confessed that he participated in planning and murder of victim, and several witnesses identified defendant as fleeing scene in getaway car. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Defendant's involvement in street shooting, even though his role was limited to that of getaway driver who never even got out of car, was sufficient to support conviction for first-degree murder as aider and abettor. D.C. Code 1981, §§ 22-105, 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

To establish guilt as aider and abettor in murder, it was not necessary to show that defendant knew or could have reasonably contemplated that principal intended to kill the decedent. *Graham v. United States*, 703 A.2d 825, 1997 D.C. App. LEXIS 268 (1997).

Use of rope by principal to murder was sufficient to prove "while armed" element of first-degree murder conviction for both principal and defendant charged with aiding and abetting since defendant's culpability arose from assistance he rendered to principal. D.C. Code 1981,

§ 22-2402. *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

For government to prove that defendant aided and abetted in murder and assault, it had to prove that he knowingly participated in shootings by assisting principal or participating in commission of crimes with guilty knowledge. *Leonard v. United States*, 602 A.2d 1112, 1992 D.C. App. LEXIS 31 (1992).

On an indictment for murder against three, all may be found guilty, although only one or two dealt the blow, if the others were present, aiding and abetting, or watching or otherwise aiding while near enough to give assistance. *U.S. v. Neverson*, 12 D.C. 152 (D.C. Sup. 1880).

Pleas.

Defendant was not entitled to the withdrawal of his guilty plea to murder and other crimes; defendant's claim of innocence was unsubstantiated and was contradicted by testimony and DNA evidence, defendant did not request withdrawal of his guilty plea until 26 days after he had entered his plea, and defendant failed to offer any factual basis in support of his claim of ineffective assistance of counsel. *Byrd v. United States*, 801 A.2d 28, 2002 D.C. App. LEXIS 304 (2002).

Murder defendant's initial denial of murdering victim was not a fatal defect in the plea proceeding that rendered his subsequent guilty plea invalid, as the trial court established a more than adequate factual basis for the plea; prosecutor made a clear and concise proffer, defendant was instructed to listen carefully, defendant was offered the opportunity to correct any aspect of the proffer, and defendant stated that he killed victim "in the manner described by the prosecutor." *Maske v. United States*, 785 A.2d 687, 2001 D.C. App. LEXIS 244 (2001).

Allowing defendant to withdraw guilty plea to murder was not in the interest of justice; while defendant asserted his innocence, he made no attempt to offer either a defense or evidence to suggest that someone else committed the crime, government made a sufficient proffer that defendant was the perpetrator, defendant waited two months before disclaiming responsibility, and defendant's counsel provided effective assistance. *Maske v. United States*, 785 A.2d 687, 2001 D.C. App. LEXIS 244 (2001).

Presumptions and burden of proof.

— Corpus delicti, presumptions and burden of proof.

Corpus delicti under count charging homicide in perpetration of a housebreaking did not require independent proof that death occurred in perpetration of housebreaking. D.C. Code 1951, §§ 22-1801, 22-2401. *U.S. v. Naples*, 192

F.Supp. 23, 1961 U.S. Dist. LEXIS 3087 (D.D.C.1961).

Evidence that defendant carried hammer from kitchen to bedroom, used it to strike children, and then returned it to kitchen supported inference that defendant carried hammer from one room to another to use it as instrumentality of death and then attempted to cover his tracks and was probative of premeditation and deliberation in prosecution for first-degree murder while armed. D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

Evidence of defendant's repeated prevarications about what he had done could give rise to inference of consciousness of guilt of murdering children with hammer; jurors could reasonably conclude that defendant lied on the witness stand when he denied killing one child, that he lied again when he denied that he had killed second child, and that he lied again when he denied assaulting, robbing, and threatening victims' sister. D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

— Deliberation and premeditation, presumptions and burden of proof.

To prove first degree premeditated murder while armed, evidence of deliberation and premeditation may be inferred from the facts and circumstances surrounding the murder. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

To obtain a conviction of premeditated murder, the government must prove that the defendant acted with premeditation and deliberation, which may be inferred from the circumstances surrounding the killing. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

To prove crimes of first-degree premeditated murder and assault with intent to kill on an aiding and abetting theory, there must be evidence from which a reasonable jury can find that defendant was involved in criminal activity to extent that he in some sort associated himself with venture, that he participated in it as in something that he wished to bring about, that he sought by his action to make it succeed. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct.

486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

To prove first degree premeditated murder, the government must show that, before acting, the accused gave thought to the idea of taking a human life and reached a definite decision to kill. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Deliberation element of first-degree murder requires a showing that the accused acted with consideration and reflection upon the preconceived design to kill. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Premeditation and deliberation necessary for first-degree murder conviction may be inferred from surrounding facts and circumstances. D.C. Code 1981, § 22-2401. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Premeditation and deliberation elements of first-degree murder may be inferred from facts and circumstances surrounding the killing. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Premeditation and deliberation, for purposes of first-degree murder, may be inferred from surrounding facts and circumstances; motive to seek revenge, particularly if it arises well before commission of crime, reinforces such inference. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

Multiple stab wounds can properly be joined with other factors to support inference of premeditation and deliberation, although they cannot alone support that inference. *Patton v. United States*, 633 A.2d 800, 1993 D.C. App. LEXIS 286 (1993).

Evidence of defendant's desire for revenge against his girlfriend, who asked him to leave her house at least several hours before her children were murdered, supported inference of premeditation and deliberation in prosecution for first-degree murder while armed; along with evidence of quarrels between defendant and his girlfriend, there was testimony about statements defendant made during subsequent sexual assault of victims' sister and, before girlfriend left for work on day of killing, defendant told her that it would be one "hell of a day." D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

Evidence that defendant was able to act calmly and deliberately shortly after children had been beaten with hammer supported inference that children's murders were premeditated and deliberate and supported conviction for first-degree murder while armed. D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

Deliberation and premeditation elements of first-degree murder could be inferred from defendant's commission of two murders by beating children with hammers and from his subsequent armed sexual assault, robbery, and threats against victims' sister. D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

Premeditation and deliberation required for first-degree premeditated murder may be inferred from facts and circumstances surrounding killing. D.C. Code 1981, §§ 22-2401, 22-3202. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

In a first-degree murder case the government has the burden to prove that an intentional killing was done with premeditation and deliberation. D.C. Code 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

Premeditation for purposes of establishing first-degree murder can be inferred from the surrounding facts and circumstances. *Byrd v. United States*, 388 A.2d 1225, 1978 D.C. App. LEXIS 483 (1978).

Premeditation and deliberation necessary for first-degree murder may be inferred from sufficiently probative facts and circumstances. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

— Excuse or justification, presumptions and burden of proof.

Once defense of intoxication is interposed in prosecution on charge of assault with intent to kill while armed, burden rests with prosecution to establish that at time offense was committed defendant had capacity to form requisite specific intent. *United States v. Martin*, 475 F.2d 943, 1973 U.S. App. LEXIS 12008 (C.A.D.C. 1973).

Government's obligation to disprove justification, excuse, or mitigation arises only when there is some evidence or one or more of those circumstances; jury need not be instructed on issues of justification, excuse, or mitigation unless either the Government or the defense case has generated some evidence of one of those factors. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

— Felony-murder, presumptions and burden of proof.

In order to convict for felony-murder, the actual taking need not be found to have occurred before the killing, where the intent to rob was formed earlier, and the homicide also need not be a necessary or planned part of the robbery. D.C. Code § 22-2401. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Under District of Columbia felony-murder statute requiring that a homicide committed during a felony be done "purposely" unless the felony is "arson, rape, mayhem, robbery, or kidnapping," by eliminating the element of "purpose" Congress intended to apply the common-law felony-murder rule to them, that is, that a homicide committed in course of their perpetration is murder because the "malice" required for murder can be implied from commission of the felony; the doctrine of implied malice obviates the need for the Government to prove that death was "foreseeable" when homicide occurs during any of the five specified felonies. D.C. Code § 22-2401. *United States v. Branic*, 495 F.2d 1066, 1974 U.S. App. LEXIS 9266 (C.A.D.C. 1974).

Under statute defining "murder in first degree" as the killing of another while armed with or using a dangerous weapon in the perpetration or attempted perpetration of a robbery, it is not necessary to show that the killing was done purposely to raise the offense to first degree murder. D.C. Code 1940, § 22-2401. *Mumforde v. U.S.*, 130 F.2d 411, 1942 U.S. App. LEXIS 3113 (1942).

Statute defining first-degree murder held to obligate prosecution to show that accused, in perpetrating or attempting to perpetrate penitentiary offense, purposely killed another; word "purposely" meaning with design or intentionally. D.C. Code 1929, T. 6, § 21. *Jordon v. U.S.*, 87 F.2d 64, 1936 U.S. App. LEXIS 2780 (1936).

Proof of elements of underlying felony is necessarily part of the proof of felony-murder. *Moore v. Garraghty*, 739 F. Supp. 285, 1990 U.S. Dist. LEXIS 6761 (1990), affirmed by 932 F.2d 963, 1991 U.S. App. LEXIS 13748 (4th Cir. Va. 1991).

Only intent to commit the underlying felony need be proved to sustain felony murder conviction. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

To prove felony murder, government must establish some causal connection between the homicide and the underlying felony, and mere temporal and locational coincidence is not enough; rather, it must appear that there was such actual legal relation between the killing and the crime that the killing can be said to have occurred as a part of the perpetration of the crime; one way of meeting requirement is to show that underlying felony and killing were all part of one continuous chain of events. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Government need not establish that killing was intended or even foreseeable in felony-murder prosecution; however, government must prove actual cause by presenting evidence establishing something more than mere coincidence of time and place between wrongful act and death. D.C. Code 1981, § 22-2401. *Bonhart*

v. United States, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

— Grade or degree of offense, presumptions and burden of proof.

To prove first-degree murder, Government must introduce facts which provide proof beyond a reasonable doubt that a crime was committed not merely intentionally, in sustained frenzy or heat of passion, but with premeditation and deliberation. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

Prosecutor seeking first-degree murder conviction for premeditated murder has obligation to bring forward evidence indicating not only intent to kill but also facts from which premeditation may be inferred. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

To prove "premeditation" necessary for first-degree murder conviction, government must show that a defendant, before acting, gave thought to the idea of taking a human life and reached a definite decision to kill, while "deliberation" is proved by demonstrating that defendant acted with consideration and reflection upon the preconceived design to kill. D.C. Code 1981, § 22-2401. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

To establish "premeditation" element of first-degree murder, government must show that defendant gave thought before acting to idea of taking a human life and reached a definite decision to kill. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

To prove first-degree premeditated murder, Government must show beyond a reasonable doubt that defendant acted with premeditation and deliberation. D.C. Code 1981, §§ 22-2401, 22-3202. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

"Premeditation" required for first-degree premeditated murder requires proof that defendant gave thought before acting to idea of taking human life and reached definite decision to kill. D.C. Code 1981, §§ 22-2401, 22-3202. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

To prove "premeditation" in context of first-degree murder, the government must show that a defendant, before acting, gave thought to the idea of taking a human life and reached a definite decision to kill, while "deliberation" is proved by demonstrating that the accused acted with consideration and reflection upon the preconceived design to kill. D.C. Code 1981, §§ 22-2401, 22-3202. *McAdoo v. United States*, 515 A.2d 412, 1986 D.C. App. LEXIS 432 (1986).

For purposes of establishing first-degree murder, Government is not required to show

that there was a lapse of days or hours, or even minutes, between formation of design to kill and actual execution of the design; time involved may be a space of a few seconds. *Watson v. United States*, 501 A.2d 791, 1985 D.C. App. LEXIS 549 (1985).

To establish first-degree premeditated murder while armed, Government must prove, among other things, that accused committed crime intentionally with premeditation and deliberation while armed. D.C. Code 1973, §§ 22-2401, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

Under District of Columbia "first-degree murder" statute, prosecution bears burden of proving not only that a crime was committed intentionally but that it was done with premeditation and deliberation; to prove "premeditation", government must show that defendant gave thought, before acting, to the idea of taking human life and reached definite decision to kill; "deliberation" is proved by demonstrating that accused acted with consideration and reflection upon the preconceived design to kill, turning it over in the mind and giving it second thought. (Per Ferren, J., with two Judges concurring specially.) D.C. Code § 22-2401. *Freundak v. United States*, 408 A.2d 364, 1979 D.C. App. LEXIS 463 (1979).

— Insanity, presumptions and burden of proof.

Where several psychiatrists testified that defendant was a psychopath or sociopath on day of killings and some thought condition a mental disease, evidence was sufficient to raise issue of insanity and require government to disprove beyond a reasonable doubt the claim that crimes were product of mental disease or defect. *Williams v. U.S.*, 312 F.2d 862, 1962 U.S. App. LEXIS 3538 (C.A.D.C. 1962).

Person accused of felony-murder is presumed sane until presumption is overcome. D.C. Code § 22-2401. *Cooper v. United States*, 368 A.2d 554, 1977 D.C. App. LEXIS 403 (1977).

— Intent or motive, presumptions and burden of proof.

Where screaming seven-year-old girl's throat was cut with a sharp instrument by an adult intruder, jury would be warranted in finding that homicide was accompanied by intention to cause death or grievous bodily harm. *Howard v. United States*, 389 F.2d 287, 1967 U.S. App. LEXIS 4276 (C.A.D.C. 1967).

In a felony-murder case, an accomplice does not escape liability for a foreseeable death merely because he or she neither intended to kill nor pulled the trigger. *Wilson-Bey v. United States*, 903 A.2d 818, 2006 D.C. App. LEXIS 424 (2006), writ of certiorari denied by 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089, 2007 U.S. LEXIS 5173, 75 U.S.L.W. 3607 (2007).

First-degree premeditated murder requires the government to prove, among other things, that the defendant had a specific intent to kill and that he premeditated and deliberated about the act of taking a human life; both of those elements may be inferred from the facts and circumstances surrounding the killing. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

— Malice, presumptions and burden of proof.

Law merely permits, but does not require, inference of presumed malice from use of deadly weapon in commission of homicide. *Mitchell v. United States*, 434 F.2d 483, 1970 U.S. App. LEXIS 9263 (C.A.D.C. 1970), writ of certiorari denied by 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106, 1970 U.S. LEXIS 775 (1970).

Wrongful act intentionally done is not therefore done with malice. D.C. Code §§ 22-2401, 22-2403. *Green v. United States*, 405 F.2d 1368, 1968 U.S. App. LEXIS 5040 (C.A.D.C. 1968), US Supreme Court certiorari denied by 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447, 1971 U.S. LEXIS 3531 (1971).

Every person is presumed to intend the natural and probable consequence of his own act, and the use of a dangerous weapon, resulting in a homicide, by one having no right to use the weapon, in the absence of mitigating facts, is evidence of malice aforethought. *Liggins v. U.S.*, 297 F. 881, 1924 U.S. App. LEXIS 2910 (1924).

A generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief may be inferred from the acts committed. *Liggins v. U.S.*, 297 F. 881, 1924 U.S. App. LEXIS 2910 (1924).

The burden of rebutting the presumption of malice by showing circumstances of alleviation, excuse, or justification rests on the prisoner. *U.S. v. Sickles*, 27 F.Cas. 1074, 1859 U.S. App. LEXIS 794 (1859).

For purpose of felony-murder prosecution, malice, an essential element of murder, is implied from the intentional commission of the underlying felony even though the actual killing may have been accidental. D.C. Code § 22-2401. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

Where defendant is shown to have fired three shots into deceased at close quarters, in the absence of other evidence, the act is presumed to have been malicious and premeditated. *U.S. v. Schneider*, 21 D.C. 381, 1893 U.S. App. LEXIS 3081 (D.C.Supp. 1893).

— Nature and elements of offenses.

It is not permissible to assume, without the Government introducing some evidence, that hammer which was used as murder weapon

was brought to scene of murder by defendant. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

— Self-defense, presumptions and burden of proof.

Where defendant has introduced evidence of provocation, government must prove its absence beyond reasonable doubt in order to show malice and convict defendant of assault with intent to murder while armed; government must prove absence of mitigating circumstances because presence of mitigating circumstances may preclude finding of malice. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Once there is sufficient evidence to justify a self-defense instruction in homicide case, burden is on government to disprove self-defense, by meeting its burden of proof negating defendant's subjective actual belief or objective reasonableness. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Prosecutor's statements.

Prosecutor's statement during opening remarks to second jury in joint murder prosecution that first trial ended in a "hung" jury did not, in combination with the playing of tape-recorded conversation between one defendant and his wife discussing an eleven-to-one split among jurors, improperly convey to second jury that defendants would have been convicted at first trial if not for one defendant's tampering with juror. *Fortson v. United States*, 979 A.2d 643, 2009 D.C. App. LEXIS 378 (2009), amended by 2009 D.C. App. LEXIS 692 (D.C. Sept. 3, 2009).

Purposes and legislative intent.

Societal interests which Congress sought to protect by enactment of provisions penalizing felony-murder and rape are separate and distinct; rape statute is to protect women from sexual assault while felony-murder statute purports to protect human life by permitting jury to infer requisite intent from fact that felony was committed. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Thrust of that part of felony-murder statute which relates to nonpurposeful killings is to increase the penalty for such killings during commission of certain enumerated felonies by implying from the commission of such felonies premeditation and deliberation. D.C. Code § 22-2401. *Blango v. United States*, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

Questions of law and fact.

— Confessions and admissions, questions of law and fact.

In prosecution of three defendants jointly

indicted on charge of murder in perpetration of robbery, where two of three defendants testified that written statements given by them to officers were extorted by physical mistreatment, and officers denied having mistreated defendants, question as to whether written statements were voluntary and admissible was for jury. D.C. Code 1940, § 22-2401. *Hall v. U.S.*, 168 F.2d 161, 1948 U.S. App. LEXIS 2025 (1948).

— Credibility of witnesses, questions of law and fact.

Statute abolishing mandatory death penalty in District of Columbia leaves for jury's determination the question of whether sentence shall be death or life imprisonment or, if jury cannot agree on punishment, question is for the judge. D.C. Code 1961, §§ 22-2401, 22-2404. *Coleman v. United States*, 357 F.2d 563, 1965 U.S. App. LEXIS 4172 (C.A.D.C. 1965).

It was within province of jury to believe or disbelieve eyewitness' testimony, in prosecution of co-defendants for first-degree murder while armed, that he had initially refused to identify the gunmen to detective because he was afraid he or his family might get hurt. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

Fact that eyewitness may have misidentified one of the other occupants of the moving car from which gunmen had shot victim did not make eyewitness' identification of the co-defendants, in prosecution for first-degree murder while armed, incredible as a matter of law. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

— Defense of another, questions of law and fact.

Whether victim was merely attempting to awaken woman in defendant's house or to rape her at time he was killed by defendant was jury question. *Byrd v. U.S.*, 312 F.2d 357, 1962 U.S. App. LEXIS 3286 (C.A.D.C. 1962).

Evidence, including testimony that victim was beating third person, that victim was kicking and stomping on her and threatening to break her neck, that third person was intoxicated and lying on ground, unable to defend herself effectively, and that victim had on previous occasions threatened others with injury and death and had beaten up several persons, was sufficient to present jury question as to whether defendant reasonably believed third person was in imminent danger of serious bodily harm, and thus, whether defendant was

entitled to use deadly force. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

— **Grade or degree of offense, questions of law and fact.**

Evidence as to circumstances surrounding and defendant's state of mind during stabbing of victim was sufficient on issue of deliberation and premeditation for submission of charge of first-degree murder. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

Jury may consider issue of second-degree murder on indictment of first-degree felony-murder only if it finds some defect with proof as to felony-murder. D.C. Code §§ 22-2401, 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Where government testimony did not show any motive for killing of victim who had been in company of defendant the night of homicide nor was there any showing of prior threats or quarrels which might supply inference of premeditation and deliberation in defendant's killing of victim by multiple stab wounds inflicted with knife defendant had been carrying with him, that night, government's evidence was insufficient to warrant submission of an issue of premeditation and deliberation to jury and defendant's motion for acquittal of first-degree murder should have been granted at conclusion of prosecution's case. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

In prosecution for perpetrating a robbery and for killing a person in course of perpetrating it, evidence was sufficient to submit issue of second-degree murder to jury. *Kitchen v. U.S.*, 221 F.2d 832, 1955 U.S. App. LEXIS 3583 (C.A.D.C. 1955).

Whether or not reflection and consideration amounting to deliberation required for first-degree murder actually occurred must be determined by jury, properly instructed by court, from circumstances preceding, and surrounding the killing. *Weakley v. U.S.*, 198 F.2d 940, 1952 U.S. App. LEXIS 3260 (C.A.D.C. 1952).

Evidence that defendant found deceased with a woman with whom defendant was friendly, that some discussion ensued, and that later all went outside, where an altercation occurred and defendant cut deceased with a knife resulting in death, was sufficient evidence of deliberation and premeditation to go to jury upon charge of first-degree murder. D.C. Code 1940, §§ 22-2401, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

Where the evidence was sufficient for jury on charge of first-degree murder and jury was properly instructed, court's refusal to direct a verdict on first-degree murder charge could not be held to have erroneously influenced jury in reaching its verdict of second-degree murder. D.C. Code 1940, §§ 22-2401, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

The trial court in murder prosecution was not under duty to weigh evidence and determine whether defendant was guilty of murder or manslaughter, but merely to determine the preliminary question whether there was such a complete absence of evidence on issue of manslaughter as to require that it be taken from the consideration of the jury. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

Whether reflection and consideration amounting to the deliberation required for first-degree murder actually occurred, must be determined by the jury from the circumstances preceding and surrounding the killing. *Bostic v. U.S.*, 94 F.2d 636, 1937 U.S. App. LEXIS 4133 (1937).

— **In general.**

Evidence in prosecution for robbery and felony-murder was sufficient to send case to the jury. D.C. Code §§ 22-2401, 22-2901. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

In prosecution for felony-murder committed in apartment building, whether two defendants and another person seen by witnesses going into building shortly before the crime and running out just after had committed the crime was for jury. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Where knife which defendant used was cause of victim's death, question of whether penknife was a deadly weapon did not need to be left to jury. *Williams v. United States*, 403 F.2d 176, 1968 U.S. App. LEXIS 5323 (C.A.D.C. 1968).

Accused who put on defense to first-degree murder case did not thereby waive earlier motion for acquittal or expose himself to death penalty which government was not entitled to pursue in view of fact that at close of prosecution's case defendant was entitled to acquittal of first-degree murder charge because evidence adduced by prosecution was not sufficient to permit a reasonable man to find that elements of first-degree murder existed beyond reasonable doubt. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

Whether shooting committed during robbery involving automobile in which defendant was passenger was incidental to common design of

robbery was jury question in homicide prosecution of defendant charged with having aided or abetted in the shooting. *Coleman v. U.S.*, 313 F.2d 576, 1962 U.S. App. LEXIS 3289 (C.A.D.C. 1962).

In prosecution resulting in conviction of defendant for manslaughter following death of victim run over by taxicab while she lay unconscious in street as result of defendant's blows, evidence presented a jury question as to whether death was a reasonably foreseeable consequence of defendant's malicious conduct. *Hamilton v. U.S.*, 252 F.2d 862, 1958 U.S. App. LEXIS 3795 (C.A.D.C. 1958).

In prosecution for murder of woman with whom defendant had carried on a clandestine love affair, evidence was sufficient to justify submission of all issues to jury. *U.S. v. Wilson*, 178 F.Supp. 881, 1959 U.S. Dist. LEXIS 2601 (D.D.C.1959).

Trial judge properly denied defendant's motion for judgment of acquittal of felony-murder conviction based on ample evidence that defendant shot victim while he and codefendant were attempting to distribute cocaine. *Cowan v. United States*, 629 A.2d 496, 1993 D.C. App. LEXIS 182 (1993).

Testimony of eyewitness to attempted robbery and homicide was not inherently incredible as matter of law, and presented credibility issue for jury, notwithstanding that eyewitness had deliberately lied to defense investigators with regard to his age and background and had given differing estimates of distance from scene of crime and discrepant versions of nature of confrontation, in view of other evidence which corroborated trial testimony. *Coleman v. United States*, 515 A.2d 439, 1986 D.C. App. LEXIS 518 (1986), writ of certiorari denied by 481 U.S. 1006, 107 S. Ct. 1631, 95 L. Ed. 2d 205, 1987 U.S. LEXIS 1574, 55 U.S.L.W. 3675 (1987).

Based on the evidence presented, it was within the jury's province to determine whether they regarded defendant's total behavior as a "wrongful act" causing death or simply as behavior which showed wanton, reckless disregard for life. *Powell v. United States*, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

First-degree murder prosecution was properly submitted to jury on theory that defendant and now-deceased girl friend fought over money and that defendant did what he had previously threatened to do, i.e., killed her because she did not repay the money. *D.C. Code* 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

Evidence, including testimony of police officer as to what rape victim said at scene of crime, testimony of nurse and physician who examined and talked with victim at hospital,

and testimony of two witnesses who participated in crime but who testified for the Government, was sufficient for jury in prosecution on charges of rape and felony-murder. *D.C. Code* 1981, §§ 22-2401, 22-2801. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

Evidence tending to establish that murder victim had been forcibly raped and that defendant had been in the victim's room at the approximate time of the events giving rise to the charges was sufficient to warrant trial court's submission to jury of questions whether defendant was guilty of felony-murder and rape. *D.C. Code* §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

In deciding to submit to jury charges of felony-murder and rape, trial judge need only have been satisfied that the Government introduced enough evidence so that a reasonable person might find guilt beyond a reasonable doubt. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

— Insanity or intoxication, questions of law and fact.

Question of defendant's mental responsibility for act of shooting another was for jury in prosecution for first-degree murder. *United States v. Marshall*, 471 F.2d 1051, 1972 U.S. App. LEXIS 7096 (C.A.D.C. 1972).

Defendant's sanity at time of commission of offense was question for jury in murder prosecution. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

Expert testimony in support of insanity defense was not sufficient to compel a reasonable juror to entertain a reasonable doubt concerning the accused's responsibility and hence was not sufficient to require judge to direct a verdict of not guilty by reason of insanity, in murder prosecution. *King v. United States*, 372 F.2d 383, 1966 U.S. App. LEXIS 3952 (C.A.D.C. 1966).

Whether defendant was insane at time that he murdered his wife was a jury question to be determined upon consideration of both expert and lay testimony after proper instructions. *Barkley v. United States*, 323 F.2d 804, 1963 U.S. App. LEXIS 4989 (C.A.D.C. 1963).

Evidence, in prosecution for murder, presented question for jury as to defendant's insanity. *Blocker v. United States*, 320 F.2d 800, 1963 U.S. App. LEXIS 4742 (C.A.D.C. 1963), writ of certiorari denied by 375 U.S. 923, 84 S.

Ct. 269, 11 L. Ed. 2d 167, 1963 U.S. LEXIS 212 (1963).

In murder prosecution, where only three of eleven psychiatrists could say that killings in question were product of defendant's mental disease or defect, evidence was insufficient to raise, as a matter of law, reasonable doubt as to defendant's sanity and conflict in medical testimony became issue for jury. *Williams v. U.S.*, 312 F.2d 862, 1962 U.S. App. LEXIS 3538 (C.A.D.C. 1962).

Evidence of mental abnormality of defendant, in addition to evidence that his I.Q. was only 68, entitled defendant to submission of issue of mental defect in homicide prosecution. *Williams v. U.S.*, 312 F.2d 862, 1962 U.S. App. LEXIS 3538 (C.A.D.C. 1962).

Question whether defendant sustained defense of insanity in homicide prosecution was for jury. *Jones v. U.S.*, 307 F.2d 397, 1962 U.S. App. LEXIS 4450 (C.A.D.C. 1962).

Evidence in homicide prosecution on issue of defendant's defense of insanity was for jury. D.C. Code 1961, § 22-2401. *Turberville v. U.S.*, 303 F.2d 411, 1962 U.S. App. LEXIS 6036 (C.A.D.C. 1962).

Where there was strong showing of insanity of defendant in murder prosecution, more than minimal evidence of sanity was necessary to send case to jury. *Wright v. U.S.*, 250 F.2d 4, 1957 U.S. App. LEXIS 4105 (C.A.D.C. 1957).

Where four and one half years had elapsed between time of homicide and time of murder prosecution, and during that interval defendant had gone through long courses of treatment in two mental institutions, fact that defendant was of sound mind at time of prosecution was not sufficiently probative of sanity at time of homicide to take case to jury on issue of sanity. *Wright v. U.S.*, 250 F.2d 4, 1957 U.S. App. LEXIS 4105 (C.A.D.C. 1957).

In murder prosecution, wherein defendant relied on defense of insanity and introduced strong evidence of insanity, evidence of prosecution was insufficient to justify submission to jury of issue of insanity. *Wright v. U.S.*, 250 F.2d 4, 1957 U.S. App. LEXIS 4105 (C.A.D.C. 1957).

In prosecution for first degree murder committed in robbing a grocery store, defended on ground of insanity, it was jury's function to determine from all evidence, including expert testimony, whether defendant suffered from abnormal mental condition and whether nature and extent of condition from which defendant suffered relieved defendant of criminal responsibility under then prevailing standards. D.C. Code 1951, § 22-2401. *Stewart v. U.S.*, 214 F.2d 879, 1954 U.S. App. LEXIS 2790 (C.A.D.C. 1954).

In prosecution of defendant for killing of his wife's paramour who had engaged in improper relations with defendant's wife, wherein defendant asserted that he was of unsound mind at

time of commission of the homicide, and introduced evidence of two psychiatrists in support thereof, evidence warranted submission of question to jury. *Bell v. U.S.*, 210 F.2d 711, 1953 U.S. App. LEXIS 2708 (C.A.D.C. 1953).

Evidence that defendant had been drinking during afternoon and early evening prior to committing murder in course of attempted robbery is not sufficient to raise factual question as to whether he was so intoxicated at time of murder as to be incapable of intending to rob. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

In prosecution for murder in the first degree committed in attempt to rob, evidence that defendant had been drinking during the afternoon and early evening prior to the murder was insufficient to raise question for jury as to whether there had been only second degree murder because of defendant's intoxication, and instruction on second degree murder was more favorable than defendant deserved. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

Evidence of defendant's intoxication was properly submitted to jury on question whether he was mentally incapable of the deliberation and premeditation necessary to constitute first degree murder. *Mergner v. U.S.*, 147 F.2d 572, 1945 U.S. App. LEXIS 2170 (1945).

In first degree murder prosecution, whether by reason of drunkenness or otherwise accused's condition was such as to make him incapable of deliberation or premeditation was for jury under conflicting evidence. D.C. Code 1929, T. 6, § 21. *McAffee v. U.S.*, 111 F.2d 199, 1940 U.S. App. LEXIS 3609 (1940).

While intoxication per se is no defense to fact of guilt, stated condition of defendant's mind at time of killing in respect of ability to form intent to kill, or if formed to deliberate and premeditate thereupon, is proper subject for consideration, inquiry and determination by jury. *Bishop v. U.S.*, 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

In murder prosecution, evidence presented fact question for jury as to defendant's mental competency when crime was committed. D.C. Code 1951, § 24-301. *U.S. v. Fielding*, 148 F.Supp. 46, 1957 U.S. Dist. LEXIS 3974 (D.D.C.1957).

Extent of defendant's intoxication was properly submitted to jury in resolving issue whether defendant was incapable of forming requisite intent to kill or of premeditating and deliberating homicide. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

To survive Government's request for directed verdict, defendant charged with felony-murder has burden of establishing prima facie case of insanity. D.C. Code § 24-301(j). *Cooper v.*

United States, 368 A.2d 554, 1977 D.C. App. LEXIS 403 (1977).

There was ample, relevant evidence to require that insanity issue be submitted to jury on theory that alcoholic addiction and brain damage impaired defendant's behavioral control to extent that he lacked substantial capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of the law. *Cooper v. United States*, 368 A.2d 554, 1977 D.C. App. LEXIS 403 (1977).

— Juror misconduct.

Replacement of juror with alternate juror, during murder trial, was warranted, where juror had been approached at night at liquor store by a stranger who stated that he knew that the juror was on the jury, and there was testimony at trial that potential witness had been beaten, threatened, and warned not to testify against defendant; specter of intimidation might intrude on jury's deliberations, if the juror reflected on the testimony regarding the beating or if he told other jurors about the liquor store incident. *Watkins v. United States*, 846 A.2d 293, 2004 D.C. App. LEXIS 156 (2004).

— Nature and elements of offense, questions of law and fact.

Fact that there were two victims both sexually assaulted in apparently the same manner and both shot more than once with the same gun in close proximity of time and space to one another sufficed to take questions of motive and intent to jury in first-degree murder prosecution. *United States v. Henson*, 486 F.2d 1292, 1973 U.S. App. LEXIS 7496 (C.A.D.C. 1973).

Whether defendants, who had left victim's apartment upon victim's demand emphasized by his brandishing kitchen knife and who had lingered in hall outside apartment before reentering apartment and shooting victim had killed with premeditation was jury question. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Significance on issue of premeditation of victim's being beaten after he was shot was properly left for interpretation by jury and not the court. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Whether defendant was capable of and engaged in reflection necessary to warrant verdict of first-degree murder was question for jury. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of

certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

Where prosecution's evidence in murder case is insufficient to go to jury on issues of premeditation and deliberation it may not infuse vitality into the charge on theory that defendant, by going forward with evidence, has waived this critical defect. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Existence of premeditation or deliberation is determinable from circumstances of case as fact question by jury. *Aldridge v. U.S.*, 47 F.2d 407, 1931 U.S. App. LEXIS 3454 (1931).

Robbery had not ended as matter of law before police pursuit began, but, rather, jury could find that asportation phase of robbery was continuing at time of fatal accident, and, thus, fatal accident could provide basis for felony-murder charges, where pursuit began barely more than five minutes after robbery while one defendant was still rifling through contents of stolen purse; fact that officer who began pursuit did so because he witnessed traffic violation had no bearing on issue of whether robbery was continuing. *Johnson v. United States*, 671 A.2d 428, 1995 D.C. App. LEXIS 149 (1995).

Jury could have reasonably found that defendant's act in stabbing victim caused victim's viral hepatitis which resulted in victim's death, where jury could have reasonably found that criminal assault necessitated surgery and related treatment which could have caused viral hepatitis; thus, motion for judgment of acquittal was properly denied. *McKinnon v. United States*, 550 A.2d 915, 1988 D.C. App. LEXIS 210 (1988).

— Passion and provocation, questions of law and fact.

The adequacy of the provocation for the passion of the defendant, under the influence of which he killed the deceased, to reduce his crime to manslaughter, is a question for the jury. *Jackson v. U.S.*, 48 App.D.C. 272, 1919 U.S. App. LEXIS 2311 (1919).

In light of defendant's own admission, in murder prosecution, that he retrieved a pistol after fight with deceased and returned to the scene, where he waited approximately 30 minutes and then shot deceased, on ground that he "wasn't going to take no chance at that particular time," evidence failed to present an issue on provocation such as would reduce the offense to manslaughter. D.C. Code § 22-2401. *Hurt v. United States*, 337 A.2d 215, 1975 D.C. App. LEXIS 368 (1975).

— Principals and accessories, questions of law and fact.

In murder prosecution against two defendants one of whom shot the victim, whether the

codefendant had aided and abetted the offense was for jury under the evidence. D.C. Code §§ 22-105, 22-2403. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

In prosecution of Puerto Rican defendant, whose companion shot and killed guard in front of dwelling of President of the United States, for first-degree murder, wherein defendant interposed defense that he and companion had no intent to kill anyone but merely wished to create an incident in order to bring to the attention of the American people conditions in Puerto Rico, jury, in determining whether the killing by defendant's companion was within design or plan of defendant and his companion, was entitled to consider whether it was a natural and probable result of the acts which defendant and his companion concerted to perform. D.C. Code 1940, §§ 22-105, 22-2401. *Collazo v. U.S.*, 196 F.2d 573, 1952 U.S. App. LEXIS 2497 (C.A.D.C. 1952).

— Self-defense, questions of law and fact.

Evidence generated jury question whether conduct of homicide defendant, who engaged in exchange of verbal aspersions on discovering victim attempting to remove windshield wipers from defendant's inoperative automobile while it was parked in alley behind defendant's house, who reentered house and immediately appeared with pistol, which he loaded in yard, and who walked to rear gate and, while displaying pistol, dared victim to come in and threatened to kill victim if he did, despite fact that victim had made preparations to depart, and who assertedly intended only to scare victim when he discharged weapon as victim came at him with lug wrench, was such an invitation to provocation of encounter as to overcome claim of self-defense. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Whether defendant, who armed himself with a pistol following discovery of theft of tape deck from his automobile, who attempted to retrieve deck when companion discovered deck in service station and who shot and seriously wounded service station attendant following argument, had acted in self-defense was for jury. D.C. Code §§ 22-501, 22-3202, 22-3204. *United States v. McCrae*, 459 F.2d 1140, 1972 U.S. App. LEXIS 11221 (C.A.D.C. 1972).

It is the function of jury, where defendant urges, in the alternative, killing upon provocation in heat of passion and self-defense, under proper instructions to determine whether either defense is available to the defendant under the circumstances of the particular case. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

If the facts in the judgment of the court are not such as to admit of self-defense, that issue should not be left to the mere speculation of the jury. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

Accused testified that he shot twice in rapid succession from a second-story window of his house, but with no intention of hitting deceased, who, just prior to the shooting, had been throwing stones at him, one of which had gone through the window and broken a lamp, and that deceased was in the act of picking up stones when accused went to get his pistol. Deceased was shot in the back at some distance from the house. Held, it was not error to refuse to submit to the jury the question whether defendant acted in self-defense. *Fearson v. U.S.*, 10 App.D.C. 536, 1897 U.S. App. LEXIS 3189 (1897).

When defendant raises claim of self-defense, trial court must decide, as matter of law, whether there is record evidence sufficient to support the claim. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Generally, whether defendant lost right to claim self-defense in homicide case by acting as aggressor is for jury. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

When self-defense claim is raised, trial judge must first decide, as matter of law, if evidence in record supports defendant's theory of self-defense. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

It is for the jury to determine whether murder defendant had reasonable grounds to believe he was in imminent danger of bodily harm, thereby justifying appropriate self-defense measures. *Bowler v. United States*, 480 A.2d 678, 1984 D.C. App. LEXIS 571 (1984).

While issue of self-defense is always question of fact for jury, question of whether self-defense can be invoked under evidence adduced is question of law for trial court in first instance. *Mitchell v. United States*, 399 A.2d 866, 1979 D.C. App. LEXIS 296 (1979).

— Unlawful character of act of deceased, questions of law and fact.

Whether defendant knew official character of deceased police officer held for jury. *Holmes v. U.S.*, 11 F.2d 569, 1926 U.S. App. LEXIS 2541 (1926).

Relation to other law.

Attorney's conviction in Connecticut for capital felony, murder as an accessory, and conspiracy to commit murder, which were equivalent to commission of, or conspiracy to commit, first-degree premeditated murder under District of Columbia law, involved moral turpitude per se, and thus, disbarment was mandated. In

re Carpenter, 891 A.2d 223, 2006 D.C. App. LEXIS 11 (2006).

Review.

— Determination and disposition, review.

Since it could not be said that defendants, whose first trial on charge of second-degree murder ended with a declaration of mistrial and who were then reindicted and found guilty on charge of first-degree murder, were not prejudiced by having to defend, on the retrial, against the higher, illegal charge, the Court of Appeals would not, under those circumstances, remand the case with directions to simply enter convictions for second-degree murder. D.C. Code §§ 22-2401, 22-2403. *United States v. Jamison*, 505 F.2d 407, 1974 U.S. App. LEXIS 6511 (C.A.D.C. 1974).

Where prosecutor's improper closing and rebuttal arguments were so highly prejudicial as to require reversal of conviction of defendant who relied upon insanity as a defense and was convicted of first-degree murder and assault with intent to kill while armed, judgment of conviction of codefendant, who was charged as an aider and abettor, asserted lack of intent to commit murder, and was convicted of second-degree murder, would also be nullified. D.C. Code §§ 22-105, 22-501, 22-502, 22-2401, 22-2403, 22-3202. *United States v. Hawkins*, 480 F.2d 1151, 1973 U.S. App. LEXIS 9498 (C.A.D.C. 1973).

Conviction of juvenile of first-degree felony-murder, armed robbery, assault with dangerous weapon, assault upon police officer with dangerous weapon and carrying dangerous weapon would be remanded to district court to consider possibility of sentencing under Youth Corrections Act. D.C. Code §§ 22-502, 22-505(b), 22-2401, 22-3202, 22-3204; 18 U.S.C. § 5005 et seq. *United States v. Howard*, 449 F.2d 1086, 1971 U.S. App. LEXIS 9212 (C.A.D.C. 1971).

Where defendant's conviction for first-degree murder was set aside because of prosecution's failure to establish premeditation but evidence as to guilt of second-degree murder was overwhelming, case would be remanded to trial court for sentencing for second-degree murder without new trial. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

Where defendant in homicide prosecution was not prejudiced by trial court's alleged error of submission of first-degree murder when there was no evidence of premeditation and deliberation and jury returned verdict of second-degree murder, Court of Appeals would not remand cause to district court with directions to enter judgment of guilty of murder in second-degree unless district court determines that new trial is in interest of justice. *Howard v.*

United States, 389 F.2d 287, 1967 U.S. App. LEXIS 4276 (C.A.D.C. 1967).

Court of Appeals, sitting en banc, set aside death sentences, with directions that each defendant be resentenced to life imprisonment on verdicts of guilty of first-degree murder; four judges being of view that there was error in instruction as to penalty and that poll of jurors did not show unanimity as to punishment, and three judges being of view that guilt and punishment should have been tried in separate stages. D.C. Code 1961, §§ 22-2401, 22-2404; 18 U.S.C. § 2106. *Frady v. United States*, 348 F.2d 84, 1965 U.S. App. LEXIS 5665 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 909, 86 S. Ct. 247, 15 L. Ed. 2d 160, 1965 U.S. LEXIS 376 (1965).

Trial court did not commit plain error in denying defendant's motion for severance of murder trial on ground that introduction of evidence that co-defendant had previously been seen with gun was prejudicial to defendant; gun was admitted into evidence for limited, permissible purpose, to show that defendants had means to commit crime, and, even if evidence were only probative of the charges against co-defendant, there was no evidence that defendant's substantial rights were affected, since trial court gave limiting instructions to jury that they should think of proceedings as two separate trials and that they were to consider evidence against defendants separately. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

The Court of Appeals accords great deference to the trial judge's decision relating to the preliminary fact question of consciousness of impending death where reasonably supported by the evidence, but the perception of impending death must be exhibited in the evidence, and not left to conjecture. *Bell v. United States*, 801 A.2d 117, 2002 D.C. App. LEXIS 367 (2002), modified and rehearing denied by 817 A.2d 829, 2003 D.C. App. LEXIS 86 (D.C. 2003).

Cumulative errors of trial court, in admitting testimony that, without foundation, implicated defendant in plan to intimidate eyewitness, erroneously admitting under adoptive admission exception to hearsay rule false statements that defendant's girlfriend gave to officers regarding defendant's identity, allowing prosecution to elicit cumulative evidence of witness bias that suggested defendant's bad character, and allowing cross-examination regarding letters that one witness had written to defendant and that defendant had written to another witness, which had only marginal relevance to showing witness bias but contained prejudicial statements regarding defendant, warranted reversal of conviction for first-degree premeditated murder. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Remand to trial court of armed premeditated murder case was required in order for it to make findings of fact and to apply Brady standard to defendant's contentions that prosecution failed to disclose that it engaged in suggestive conduct during sole eyewitness's pretrial identification of defendant, that it improperly paid eyewitness on 10 to 20 occasions to appear at prosecution's office, and that a prosecutor loaned eyewitness \$100. *Gaither v. United States*, 759 A.2d 655, 2000 D.C. App. LEXIS 229 (2000), amended by, remanded by 816 A.2d 791, 2003 D.C. App. LEXIS 24 (D.C. 2003).

That prosecution's sole eyewitness was on drugs during the incident and at trial, that eyewitness falsely testified about where he saw the bullets hit the victim, that eyewitness illegally obtained duplicate witness payment vouchers, and that he lied to the trial judge concerning his tardiness at trial, which he claimed resulted from a threat by defendant against his niece, was impeachment evidence not of a nature that acquittal would likely result from its use, and thus, remand to trial court of armed premeditated murder case was not required for findings on defendant's motion for new trial on the alleged newly discovered evidence. *Gaither v. United States*, 759 A.2d 655, 2000 D.C. App. LEXIS 229 (2000), amended by, remanded by 816 A.2d 791, 2003 D.C. App. LEXIS 24 (D.C. 2003).

Even assuming that other crimes evidence of defendant's admission that he killed for codefendant in the past was relevant as direct proof of charged crime of conspiracy to commit first-degree murder while armed, the danger of unfair prejudice outweighed any probative value of the evidence, requiring reversal for its admission. *Sweet v. United States*, 756 A.2d 366, 2000 D.C. App. LEXIS 118 (2000).

Interests of justice did not require remand and retrial of homicide case following District of Columbia Court of Appeals' adoption of a new standard for an insanity defense, where defendant had not been prejudiced by application of the older standard and there was virtually no likelihood that a different result would have obtained had the jury been charged pursuant to the language of the new formulation. D.C. Code § 22-2401. *Bethea v. U.S.*, 365 A.2d 64, 1976 D.C. App. LEXIS 374 (1976).

Even if codefendant was granted a new trial on ground of insanity and was acquitted on that ground, defendant's conviction for aiding and abetting felony-murder would not be reversed for that reason, where killing was committed by codefendant in furtherance of a robbery. D.C. Code §§ 22-2401, 22-2901. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

Where trial court set secured money bonds of \$10,000 each for two defendants charged with murder during perpetration of robbery, but

record did not contain full information concerning nature and circumstances of offense and why other conditions of release would not be suitable, proceedings on appeal after defendants' motions for review of bond had been overruled would be remanded for supplementation of record by complete statement by trial court on those matters or, if trial court deemed it appropriate, entry of new orders respecting pretrial bail. D.C. Code §§ 22-2401, 23-1321, 23-1324; 18 U.S.C. §§ 3146 et seq., 3500. *Bouknight v. United States*, 305 A.2d 524, 1973 D.C. App. LEXIS 291 (1973).

— In general.

On appeal from first-degree murder conviction, defense of diminished responsibility, based on contention that defendant's mental condition precluded premeditation, was rejected by panel of the Court of Appeals in light of prior rejection of that doctrine by the Court en banc and of affirmation by the Supreme Court of another judgment of the Court of Appeals rejecting such doctrine. D.C. Code § 22-2401. *United States v. Bryant*, 471 F.2d 1040, 1972 U.S. App. LEXIS 9973 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1112, 93 S. Ct. 923, 34 L. Ed. 2d 693, 1973 U.S. LEXIS 3829 (1973).

Trial court error in admitting hearsay testimony that identified defendant as one of two individuals that kidnapped victim prejudiced defendant and warranted reversal of his convictions for kidnapping, first-degree murder while armed, and possession of a firearm during a crime of violence; defendant never confessed to the crimes, and girlfriend of co-defendant only testified that defendant possessed revolver that was later identified as weapon that killed victim and that he gave revolver to co-defendant the following day. *Randolph v. United States*, 882 A.2d 210, 2005 D.C. App. LEXIS 464 (2005).

— Presentation and reservation of grounds for review.

Proper standard for review of District of Columbia prisoner's collateral attack on malice instruction in first-degree murder prosecution was not "plain error" but "cause and actual prejudice." 18 U.S.C. § 2255; Fed. Rules Cr. Proc. Rule 52(b), 18 U.S.C.; D.C. Code 1981, §§ 22-2401, 22-2403. *U.S. v. Frady*, 102 S.Ct. 1584, 1982 U.S. LEXIS 95 (U.S. Dist. Col. 1982).

Instruction defining premeditation as "the formation of the intent to kill" was neither prejudicial nor plain error on theory that it equated premeditation with intent to kill. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

Although inclusion in standard first-degree murder charge of insanity instruction that in

determining whether premeditation and deliberation has been proved beyond a reasonable doubt the jury might consider the testimony as to the defendant's abnormal mental condition, coupled with instruction on role of an expert medical witness, would have been sufficient, giving of a more elaborate instruction which had been approved by defense counsel was not prejudicial and did not constitute plain error. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

Although paragraph as to presumption of sanity which was included in instruction on issue whether defendant's mental condition negated ability to form the requisite mental state for first-degree murder was surplusage, there was no plain error in light of the instruction's directive that the presumption no longer controlled when evidence of an abnormal mental condition was introduced. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

Instruction in first-degree murder prosecution as to whether defendant was "incapable" of premeditation did not constitute plain and prejudicial error where defendant's expert witness testified as to defendant's ability to premeditate and deliberate. D.C. Code § 22-2401. *United States v. Peterson*, 509 F.2d 408, 1974 U.S. App. LEXIS 5475 (C.A.D.C. 1974).

In murder prosecution, admission of testimony by decedent's wife that her marriage was trouble-free did not constitute plain error and hence was not reviewable, where no objection to its admission was made. D.C. Code §§ 22-2401, 22-2403; Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

Where trial judge's charge contained two erroneous instructions equating intent with malice as essential ingredient of murder and stating that law infers or presumes malice from use of deadly weapon in commission of homicide and both instructions were later reread to jury and jury returned verdict, not of first-degree murder, but of murder in second degree and jury did not accept whole of government's evidence bearing on degree of defendant's culpability, instructional errors would be noticed by Court of Appeals despite defendant's failure to object at trial and would require reversal of conviction of murder in second degree. D.C. Code §§ 22-2401, 22-3204; Fed.Rules Crim.Proc. rules 30, 52(b), 18 U.S.C. *United States v. Wharton*, 433 F.2d 451, 1970 U.S. App. LEXIS 11384 (C.A.D.C. 1970).

Challenge made for first time to Court of Appeals that judge who pronounced original sentence in homicide case was only judge competent to hear and act upon motions to reduce sentence or to vacate sentence came too late. D.C. Code 1961, §§ 22-2401, 22-2404; U.S.

Const. Amend. 5; Fed.Rules Crim.Proc. rules 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Conviction for first degree murder committed in robbing a grocery store would be reversed by Court of Appeals for District of Columbia where given instruction prejudicial to defendant was fatally defective, regardless of whether errors in instruction were properly preserved. D.C. Code 1951, § 22-2401. *Stewart v. U.S.*, 214 F.2d 879, 1954 U.S. App. LEXIS 2790 (C.A.D.C. 1954).

Error in the reception, on a prosecution for murder, of evidence tending to show accused was guilty of adultery, does not come within the exception of a plain error in a matter absolutely vital to defendant, to the rule requiring objection and exception to review error below. *Budd v. U.S.*, 48 App.D.C. 332, 1919 U.S. App. LEXIS 2319 (1919).

Driver/defendant preserved for review issue of whether admission of hearsay statement of passenger/driver that he argued with another passenger in driver/defendant's car over who would use knife to stab passerby required severance of driver/defendant's trial, in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, where driver/defendant filed a pre-trial motion to sever based on the possibility that incriminating out-of-court statements by codefendants might be admitted, and at trial driver/defendant objected that passenger/defendant's hearsay statement would incriminate him. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Murder defendant failed to preserve for appellate review his contention that trial court erred in redacting his statement to police to remove references to his reason for avoiding neighborhood in which murder occurred between date of fight alleged to have motivated murder and date of murder, by failing to seek to introduce that portion of his statement at trial upon being given opportunity to do so, or to revisit issue of its admissibility on cross-examination or in his own case. *Reams v. United States*, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

Murder defendant's failure to object to trial court's reinstruction after jury sent its second note asking for clarification of the term "premeditation" meant that he could only prevail on his claim that reinstruction was erroneous by demonstrating plain error so clearly prejudicial to substantial rights as to jeopardize very fair-

ness and integrity of trial. *Bates v. United States*, 834 A.2d 85, 2003 D.C. App. LEXIS 624 (2003).

Defendant's argument that introduction of evidence that co-defendant had previously been seen with gun was prejudicial to defendant was not raised as grounds for severing murder trial, nor did defendant object to admissibility of gun evidence on that ground during trial, and thus argument would be reviewed for plain error on appeal. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Defendant's claim that prosecutor improperly showed to jury graphic and inflammatory color photographs during rebuttal argument of murder prosecution, was properly preserved for appellate review, where trial judge considered the propriety of prosecutor's actions and gave curative instruction regarding such matter. *Chatmon v. United States*, 801 A.2d 92, 2002 D.C. App. LEXIS 359 (2002).

Defendant preserved for appellate review issue of trial court's admission, at his retrial on charge of first-degree premeditated murder, of girlfriend's false statements regarding defendant's identity to officer who came to girlfriend's home to arrest defendant, even if defendant failed to adequately specify grounds for the objection at retrial, where at the original trial the trial court made a pretrial ruling that the statements were admissible under adoptive admission exception to hearsay rule, and trial court's pretrial comments at retrial left some ambiguity as to whether defense counsel's attempt to preserve objections from first trial was accepted or rejected. *Foreman v. United States*, 792 A.2d 1043, 2002 D.C. App. LEXIS 44 (2002).

Prosecutor's unobjected-to statements in closing argument appealing to jurors' sympathy, describing four murders with which defendant was charged as "horrible story" and "nightmare," and describing murder of one victim as "execution followed by a burning," did not require trial court to intervene in order to avoid plain error. *Crutchfield v. United States*, 779 A.2d 307, 2001 D.C. App. LEXIS 182 (2001).

Defendant did not demonstrate plain error in eyewitness's testifying on redirect examination, after defendant first raised the matter on cross-examination, that he received collect calls from an inmate who told him not to testify against defendant in murder prosecution, where defense counsel made no objection to the redirect examination and never moved for a mistrial based on the phone calls. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

Defendant waived review of whether a mistrial should have been declared in murder prosecution after a juror fell asleep during a portion of the cross-examination of a government wit-

ness, where defendant's attorney declined the court's invitation to repeat the relevant questioning, and when it later became necessary to seat the juror as a regular, defendant's attorney made no objection. D.C. Code 1981, § 22-2401. *Fisher v. United States*, 749 A.2d 710, 2000 D.C. App. LEXIS 54 (2000), writ of certiorari denied by 531 U.S. 1180, 121 S. Ct. 1159, 148 L. Ed. 2d 1019, 2001 U.S. LEXIS 1634, 69 U.S.L.W. 3555 (2001).

Transferred intent instruction was not plain error; even if first shot was intended for other victim, jury need not have transferred that intent to actual victim to find defendant guilty of assaulting victim with intent to murder while armed, in light of overwhelming evidence of defendant's specific intent to assault actual victim. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Asserted error in permitting jury to "transfer" defendant's specific intent to murder victim to act of assaulting two unintended victims was not so obvious or readily apparent as to demonstrate plain error in giving of transferred intent instruction, where Maryland Court of Appeals decision in *Ford*, that doctrine of transferred intent did not apply where intended victim was injured, was decided after defendant's trial and where it was unclear whether *Ford*'s limitation on transferred intent could be reconciled with District of Columbia Court of Appeals' interpretation of statute under which defendant was charged. D.C. Code 1981, § 22-503. *Brooks v. United States*, 655 A.2d 844, 1995 D.C. App. LEXIS 46 (1995).

Defendant's claim of instructional error on issue of transferred intent had to be reviewed under plain error standards, where defendant did not object to transferred intent instruction, twice stating that he was satisfied with instruction as given. *Brooks v. United States*, 655 A.2d 844, 1995 D.C. App. LEXIS 46 (1995).

Trial court did not commit plain error in failing to instruct jury on lesser included offense of second-degree felony murder, given uncertainty as to whether such category even existed, or whether it would fit defendant's circumstances. *Everetts v. United States*, 627 A.2d 981, 1993 D.C. App. LEXIS 158 (1993), writ of certiorari denied by 513 U.S. 848, 115 S. Ct. 144, 130 L. Ed. 2d 84, 1994 U.S. LEXIS 5983, 63 U.S.L.W. 3260 (1994).

Defendant's failure to advance in trial court in her prosecution for murder and kidnapping her theory of admissibility for proffered testimony by her mother as to what defendant told her mother on the telephone after her encounter with murder victim on day he was kidnapped and murdered precluded her from relying upon such theory on appeal. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Even if it was error for trial court in murder and kidnapping prosecution to permit impeachment of defendant on basis of her omission to tell police of her encounter with murder victim on day of his death, it was not plain error affecting defendant's substantial rights, since evidence against her was strong. D.C. Code 1981, §§ 22-2101, 22-2401, 22-3202. *Ford v. United States*, 487 A.2d 580, 1984 D.C. App. LEXIS 584 (1984).

Error on part of trial court when, having agreed to instruct jury on both voluntary and involuntary manslaughter, it omitted latter instruction from its charge in prosecution for first-degree murder was not a basis for obtaining reversal under plain error rule in absence of a showing that defendant was deprived of substantial rights. D.C. Code 1981, §§ 22-2401, 22-2405, 22-3202, 22-3204; Criminal Rule 30. *Morris v. United States*, 469 A.2d 432, 1983 D.C. App. LEXIS 520 (1983).

Defendant could not argue for first time on appeal that District of Columbia felony-murder statute was unconstitutional. D.C. Code 1981, § 22-2401. *Garris v. United States*, 465 A.2d 817, 1983 D.C. App. LEXIS 455 (1983), writ of certiorari denied by 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243, 1984 U.S. LEXIS 967, 52 U.S.L.W. 3551 (1984).

— Scope of review.

Where defendant moved to dismiss jury after first part of bifurcated trial, he could not complain that finding on "sound memory and discretion" was made by the court in the second phase of the trial rather than in the first phase of the trial. D.C. Code § 22-2401. *United States v. Green*, 463 F.2d 1313, 1972 U.S. App. LEXIS 9026 (C.A.D.C. 1972).

Where evidence unmistakably showed accused's guilt of first degree murder, rule authorizing appellate court to notice plain error not assigned could not be applied. *Morris v. U.S.*, 61 F.2d 520, 1932 U.S. App. LEXIS 4322 (1932).

Murder defendant's unpreserved claim of error with respect to trial court's redaction of his statement to police was subject to appellate review for plain error only. *Reams v. United States*, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

Standard of review to determine whether trial court's error in admitting non-testifying co-defendant's videotaped confession, as well as plea allocutions of non-testifying co-defendants was for error of constitutional magnitude, in murder prosecution. *Morten v. United States*, 856 A.2d 595, 2004 D.C. App. LEXIS 422 (2004).

Trial court's adoption, without alteration, of Government's submission with respect to defendant's motion to vacate murder conviction necessitated a more careful review by appellate court. D.C. Code 1981, §§ 22-2401 to 22-3202,

23-110. *Frederick v. United States*, 741 A.2d 427, 1999 D.C. App. LEXIS 277 (1999).

Mixed question of law and fact presented on consolidated appeals of murder conviction and denial of motion to vacate conviction implicated a basic constitutional liberty, namely, the right of a criminal defendant to the effective assistance of counsel, and Court of Appeals' standard-of-review calculus was required to take into account that important reality. U.S.C. Const. Amend. 6; D.C. Code 1981, §§ 22-2401 to 22-3202, 23-110. *Frederick v. United States*, 741 A.2d 427, 1999 D.C. App. LEXIS 277 (1999).

Defendant's conviction for first-degree murder as aider and abettor in connection with street shooting was required to be affirmed if there was sufficient evidence from which reasonable juror could infer that he intentionally engaged in conduct from which death was likely to occur as a probable consequence. D.C. Code 1981, §§ 22-105, 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

On review of sufficiency of evidence for first-degree murder convictions arising from street shooting, Court of Appeals was required to determine whether facts supported inference that defendants intentionally killed another human being with premeditation and deliberation. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Claimed error in imposing consecutive sentences for robbery and felony-murder and in imposing additional consecutive sentences was rendered moot by resentencing during pendency of appeal. D.C. Code 1973, §§ 22-2401, 22-2901, 22-3202, 22-3202(a)(2). *Turner v. United States*, 443 A.2d 542, 1982 D.C. App. LEXIS 307 (1982).

Searches and seizures.

Testimony of eyewitness to crime of murder and robbery need not be suppressed because police had learned from defendants during period of illegal detention of the existence and identity of such eyewitness. D.C. Code 1961, § 22-2401; Fed. Rules Crim. Proc. rule 5(a), 18 U.S.C. *Smith v. United States*, 324 F.2d 879, 1963 U.S. App. LEXIS 4121 (C.A.D.C. 1963), writ of certiorari denied by 377 U.S. 954, 84 S. Ct. 1632, 12 L. Ed. 2d 498, 1964 U.S. LEXIS 1168 (1964).

Sentence and punishment.

— Good conduct credits, sentence and punishment.

Inmate serving mandatory minimum sentence of 20 years for conviction of first-degree felony-murder was entitled to credits under District of Columbia Good Time Credits Act; statute under which defendant was sentenced

was not specifically exempted from provisions for institutional good time credits under Act. D.C. Code 1981, §§ 22-2401, 22-2404, 24-428(a), 24-434. *Cunningham v. Williams*, 711 F. Supp. 644, 1989 U.S. Dist. LEXIS 5351 (1989), reversed by 954 F.2d 760, 293 U.S. App. D.C. 329, 1992 U.S. App. LEXIS 1059 (1992).

— Harmless or reversible error, sentence and punishment.

Under statutory proviso that in homicide cases tried prior to March 22, 1962, and before court for sentence or resentencing, judge, in sole discretion, may consider circumstances in mitigation and aggravation and make determination of whether case justifies life sentence, Congress intended and due process considerations required appropriate hearing as to all factors bearing upon choice of sentences, and failure to accord hearing required reversal. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 5; Fed.Rules Crim.Proc. rules 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Trial court committed plain error by sentencing felony murder defendant, in violation of Apprendi, to life without parole based on its determination that three aggravating factors existed; although jury's verdict supported the existence of the aggravating factor that the crime was committed during a robbery, the other aggravating factors, i.e., that the crime was heinous or cruel and that the victim was vulnerable due to age or infirmity, were not supported by corresponding jury findings. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

— Juvenile offenders, sentence and punishment.

Youth Corrections Act did not bar trial judge from sentencing defendant, who was under 22 years of age at time of conviction for first-degree felony murder, to a youth term against the recommendation of youth center officials. D.C. Code § 22-2401; 18 U.S.C. § 5010(e). *United States v. Dancy*, 510 F.2d 779, 1975 U.S. App. LEXIS 16781 (C.A.D.C. 1975).

Trial judge's conclusions that defendant who was under 22 years of age at time of conviction for first-degree felony murder was criminally oriented and sophisticated in the ways of the world did not amount to an explicit finding that defendant would not derive benefit from treatment under the Youth Corrections Act. D.C. Code § 22-2401; 18 U.S.C. § 5010(c-e). *United States v. Dancy*, 510 F.2d 779, 1975 U.S. App. LEXIS 16781 (C.A.D.C. 1975).

Trial court did not err in refusing sentencing under Youth Corrections Act to defendant who had past history of crime, who showed no remorse at murder, and who had previously

been sentenced under the Act but escaped from custody. 18 U.S.C. § 5005 et seq.; D.C. Code §§ 22-2401, 22-2901. *United States v. Butler*, 481 F.2d 531, 1973 U.S. App. LEXIS 9158 (C.A.D.C. 1973).

Twenty-year-old defendant, who had been convicted of first-degree felony-murder, as well as attempted robbery while armed and carrying a dangerous weapon, in violation of District of Columbia law, was ineligible to receive an indeterminate adult sentence pursuant to statute governing fixing of eligibility for parole at time of sentencing, as recommended in report prepared in accordance with Federal Youth Corrections Act. D.C. Code §§ 22-2401, 22-2404, 22-3202, 22-3204; Fed.Rules Crim.Proc. rule 35, 18 U.S.C.; 18 U.S.C. §§ 4208(a)(2), 5010(e). *United States v. Tillman*, 374 F. Supp. 215, 1974 U.S. Dist. LEXIS 9524 (1974).

Trial judge had discretionary authority to impose a sentence under Federal Youth Corrections Act against an accused who had been convicted of first-degree felony-murder. D.C. Code §§ 22-2401, 22-2404; 18 U.S.C. §§ 5005 et seq., 5010(a, b). *United States v. Stokes*, 365 A.2d 615, 1976 D.C. App. LEXIS 398 (1976).

— Life sentence, sentence and punishment.

Defendant was permissibly sentenced to life imprisonment without possibility of parole for first-degree murder while armed; aggravating circumstances, that murder was especially heinous, atrocious, or cruel and that 78-year-old victim was especially vulnerable due to her age, existed, crime involved violation of trust and extreme disregard for human life, and motive for killing was so defendant could avoid returning to jail because victim had seen defendant's face. D.C. Code 1981, §§ 22-2401, 22-2404.1(b)(4, 10), (c), 22-3202. *Henderson v. United States*, 678 A.2d 20, 1996 D.C. App. LEXIS 107 (1996).

— Nature and extent of punishment.

On remand of felony murder case, defendant was not entitled to have resentencing occur before a different judge, as he made no claim of actual or apparent bias by the trial judge who heard the evidence and was therefore presumptively best equipped to exercise sentencing discretion, and he did not provide any reason to establish a doubt that the judge would exercise that discretion conscientiously and in accordance with the law. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

Aggravating factor for sentencing purposes, that murder was especially heinous, atrocious, or cruel, existed in prosecution for first-degree murder while armed; medical testimony established that victim suffered numerous bruises, abrasions, scrapes, and stab wounds to her back, victim was attempting to avoid attack,

victim's throat was cut deeply while she was alive, and victim was strangled so as to result in death. D.C. Code 1981, §§ 22-2401, 22-2404.1(b)(4), (c), 22-3202. *Henderson v. United States*, 678 A.2d 20, 1996 D.C. App. LEXIS 107 (1996).

Aggravating factor for sentencing purposes, that 78-year-old victim was especially vulnerable due to her age, existed in prosecution for first-degree murder while armed, despite fact that victim was in excellent physical condition for woman of 78 years of age; at time of incident, defendant was 37-year-old man in good health who could easily overcome will of 78-year-old woman, and evidence suggested that defendant easily overcame victim's will. D.C. Code 1981, §§ 22-2401, 22-2404.1(b)(10), (c), 22-3202. *Henderson v. United States*, 678 A.2d 20, 1996 D.C. App. LEXIS 107 (1996).

Where course of action taken by defendant in taking part in burglary and attempted armed robbery during which a murder occurred violated two separate felony-murder statutes, which required proof of different elements for conviction, imposition of two concurrent sentences was permissible for one murder. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-3202. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Jury verdict that defendant was guilty of kidnapping while armed supported trial court's finding that murder was committed during the course of a kidnapping, as an aggravating factor in sentencing for first-degree murder while armed. *United States v. Parker*, 136 WLR 141 (Super. Ct. 2008).

— Powers of successor judge, sentence and punishment.

Judge who deemed himself competent to act upon post trial motions to reduce sentence and vacate sentence, after judge who had pronounced sentence retired and undertook no new assignments, was not disqualified from passing upon motions predicated upon proviso permitting life sentences in murder cases before court for sentence or resentencing by fact that he was not judge who had originally presided. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 5; Fed. Rules Crim. Proc. rules 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Speedy trial rights.

On record, defendant suffered no prejudice as result of pretrial delay in presenting coherent and comprehensive alibi defense, and accused was not denied his Sixth Amendment right to speedy trial by 17-month delay between first arrest and trial on charges of armed robbery and felony-murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202; U.S. Const. Amend. 6.

Tribble v. United States, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

Twenty-month delay between defendant's arrest and a second trial in which he was convicted of possession of dangerous weapon and four counts of first-degree murder was not so unreasonable, in absence of substantial showing of prejudice, as to require that charges be dismissed, in light of fact that there were no tactical or self-serving delays caused by Government, that most of the time chargeable to Government lapsed due to institutional delays and that defendant was responsible for or acquiesced in much of the delay. D.C. Code §§ 22-2401, 22-3204. *Strickland v. United States*, 389 A.2d 1325, 1978 D.C. App. LEXIS 478 (1978), writ of certiorari denied by 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 481, 1979 U.S. LEXIS 927 (1979).

Stipulations.

In homicide prosecution, testimony of four eyewitnesses to explosion which caused deaths was admissible notwithstanding defendants' offer to stipulate cause of death, which would have substantially diluted force of proof, and, considering restrictions imposed by the court, testimony of certain other witnesses and testimony concerning autopsies was properly admitted. D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Limited circumstances warranting exception to general rule that party may not be forced to accept stipulation in lieu of testimonial or tangible evidence were not present in murder case, and thus, trial court did not err in refusing to compel Government to accept stipulation as to medical examiner's testimony and number and place of gunshot wounds; there were significant differences between evidentiary value of challenged evidence, which included autopsy photographs, and that of proposed stipulation, and there was reasonable likelihood that jury was expecting testimony from medical examiner as well as autopsy photographs, and if that evidence were replaced with the reading of a stipulation, jury might well have felt that Government was trying to hide something and, as a result, penalized Government by drawing negative inferences against its case. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Validity.

Statute providing that whoever without purpose to do so kills another in perpetrating robbery is guilty of murder in first degree is not unconstitutionally vague. D.C. Code § 22-2401. *Waller v. United States*, 389 A.2d 801, 1978 D.C. App. LEXIS 482 (1978), writ of certiorari denied by 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253, 1980 U.S. LEXIS 2108 (1980).

Venue.

In homicide prosecution arising out of assas-

sination, no error was shown in denial of motion for change of venue. 18 U.S.C. §§ 1111, 1116, 1117; D.C. Code § 22-2401. *United States v. Sampol*, 636 F.2d 621, 1980 U.S. App. LEXIS 14134 (C.A.D.C. 1980).

Verdict or findings of fact.

Where separate counts charge both first-degree murder and second-degree murder, a defendant desiring to have submitted the second-degree count solely as a lesser included offense must make a request for striking that count, and in absence of such request, verdict of second-degree murder in addition to first-degree murder is akin to special finding sought by prosecution and acquiesced in by defense as to state of mind concerning homicide apart from intent as to felony. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Any error in submitting lesser included offense of manslaughter in prosecution on charge of first degree murder was not prejudicial when a verdict of manslaughter was not returned. D.C. Code 1961, § 22-2401. *Hansborough v. U.S.*, 308 F.2d 645, 1962 U.S. App. LEXIS 4033 (C.A.D.C. 1962).

It was within prerogative of jury to acquit, on a felony-murder charge, a codefendant who was not present at scene of the killing, and and to return a verdict of guilty of felony-murder as to defendant, even though both defendants were found guilty of the same robbery and even though jury could have returned a felony-murder verdict of guilty as to both defendants. D.C. Code 1951, § 22-2401. *Coleman v. U.S.*, 295 F.2d 555, 1961 U.S. App. LEXIS 3632 (C.A.D.C. 1961).

Permitting of jury to find defendant, charged with murder in first degree and defending solely on ground of insanity, guilty of murder in second degree, held not open to objection by defendant if defendant were guilty of first degree murder as matter of law if sane, since mistake in such case would not be to defendant's prejudice. *Owens v. U.S.*, 85 F.2d 270, 1936 U.S. App. LEXIS 4088 (1936).

Upon an indictment for assault and battery on H. with intent to kill him, a verdict, "Guilty of an assault by shooting H. with intent to kill," is substantially a verdict of guilty. *U.S. v. Lloyd*, 26 F.Cas. 987, 1834 U.S. App. LEXIS 269 (1834).

Alternate juror's being overheard by other jurors regarding her concerns of intimidation did not entitle defendant to a mistrial of murder prosecution on ground of juror intimidation, where defense counsel took contradicting position at trial and requested that alternate juror be substituted as a deliberating juror, which was denied, alternate juror was dis-

missed when the others retired to deliberate, and the remaining jurors assured the court that they could consider the case impartially. *Parker v. United States*, 757 A.2d 1280, 2000 D.C. App. LEXIS 198 (2000).

Jury could not have improperly convicted defendant of second-degree felony murder, even if such offense existed, instead of second-degree murder as a lesser included offense of felony murder, though trial court parenthetically coupled second-degree murder with the charged predicate felonies in felony murder verdict form; second-degree felony murder would involve a nonpurposeful killing during the commission of a felony not enumerated in the felony murder statute, but defendant was charged only with the enumerated felonies of armed burglary or housebreaking and robbery, and the court instructed that a conviction for second-degree murder required a finding of malice. D.C. Code 1981, § 22-2401. *Fisher v. United States*, 749 A.2d 710, 2000 D.C. App. LEXIS 54 (2000), writ of certiorari denied by 531 U.S. 1180, 121 S. Ct. 1159, 148 L. Ed. 2d 1019, 2001 U.S. LEXIS 1634, 69 U.S.L.W. 3555 (2001).

Inconsistent verdict that found defendant guilty of second-degree murder as a lesser included offense of felony murder, but acquitted defendant of second-degree murder as a lesser included offense of premeditated murder, did not warrant nullification of the conviction. D.C. Code 1981, § 22-2401. *Fisher v. United States*, 749 A.2d 710, 2000 D.C. App. LEXIS 54 (2000), writ of certiorari denied by 531 U.S. 1180, 121 S. Ct. 1159, 148 L. Ed. 2d 1019, 2001 U.S. LEXIS 1634, 69 U.S.L.W. 3555 (2001).

To convict defendant of felony-murder, jury was required to find that homicide was committed within scope of attempted burglary while armed, and not merely coincident thereto. *Harris v. United States*, 377 A.2d 34, 1977 D.C. App. LEXIS 361 (1977).

Weight and sufficiency of evidence.

— Commission of or attempt to commit other offense, weight and sufficiency of evidence.

Evidence that deceased's rings came into possession of one defendant immediately after deceased had been killed and evidence that defendant stated that she had gotten the rings from the victim and was going to keep them sustained conviction of both person who kept the ring and person who aided in the murder for felony-murder on the basis of robbery. D.C. Code §§ 22-2401, 22-2901. *United States v. Mackin*, 502 F.2d 429, 1974 U.S. App. LEXIS 7182 (C.A.D.C. 1974).

Evidence, including the testimony of an eyewitness involving all three defendants in the assault upon victim, was sufficient to support

verdict of jury finding defendants guilty of felony-murder and assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Evidence sustained conviction of first-degree felony-murder, first-degree premeditated murder and armed robbery. D.C. Code §§ 22-2401, 22-2901, 22-3202. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Evidence was sufficient to support conviction of murder in the first degree by homicide while attempting to perpetrate a robbery and of assault with intent to rob. *Bowles v. United States*, 439 F.2d 536, 1970 U.S. App. LEXIS 6322 (C.A.D.C. 1970), writ of certiorari denied by 401 U.S. 995, 91 S. Ct. 1240, 28 L. Ed. 2d 533, 1971 U.S. LEXIS 2615 (1971).

Proof in homicide prosecution was legally sufficient to support a verdict predicated on thesis that shotgun was discharged killing victim while a robbery was then being attempted. D.C. Code 1961, §§ 22-2401, 22-2404. *Harrison v. United States*, 387 F.2d 203, 1967 U.S. App. LEXIS 6332 (C.A.D.C. 1967), reversed by 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047, 1968 U.S. LEXIS 1349 (1968).

Evidence of eyewitness, corroborated by physical details otherwise in evidence, supported verdicts finding defendants guilty of first-degree murder and housebreaking. D.C. Code 1961, §§ 22-1801, 22-2401. *Brown v. United States*, 375 F.2d 310, 1966 U.S. App. LEXIS 3854 (C.A.D.C. 1966), writ of certiorari denied by 388 U.S. 915, 87 S. Ct. 2133, 18 L. Ed. 2d 1359, 1967 U.S. LEXIS 1180 (1967).

In prosecution under District of Columbia murder-during-robbery statute, for death of policeman whom defendant shot and killed while policeman, who began pursuit some minutes after robbery, was pursuing defendant, evidence whether asportation was continuing was sufficient to sustain conviction. D.C. Code 1951, § 22-2401. *Carter v. U.S.*, 223 F.2d 332, 1955 U.S. App. LEXIS 3964 (C.A.D.C. 1955).

Evidence supported conviction of murder while perpetrating robbery. D.C. Code 1940, § 22-2401. *Medley v. U.S.*, 155 F.2d 857, 1946 U.S. App. LEXIS 2290 (1946).

Evidence sustained conviction for murder committed while attempting to perpetrate robbery. D.C. Code 1940, § 22-2401. *Mumford v. U.S.*, 130 F.2d 411, 1942 U.S. App. LEXIS 3113 (1942).

Purpose to kill, in homicide in perpetration of felony, though essential under statute defining first-degree murder, may be inferred from circumstances attending killing. D.C. Code 1929,

T. 6, § 21. *Jordon v. U.S.*, 87 F.2d 64, 1936 U.S. App. LEXIS 2780 (1936).

Evidence held to sustain verdict of first-degree murder of restaurant cashier during robbery; jury being justified in rejecting testimony of accused that he became excited and shot unintentionally. D.C. Code 1929, T. 6, §§ 21, 23. *Jordon v. U.S.*, 87 F.2d 64, 1936 U.S. App. LEXIS 2780 (1936).

For purposes of proving robbery predicate to capital murder offense, evidence was sufficient to conclude that defendant intended to take victim's motorcycle and helmet and that such intention was at least in part motivation for killing where map found on defendant was marked in spot that corresponded to location where motorcycle was found, mark was made after murder had been occurred, and motorcycle and helmet had been moved to point where they were later found, showing defendant's guilty involvement in that movement. Code 1950, § 18.2-31(d) (1988). *George v. Angelone*, 901 F. Supp. 1070, 1995 U.S. Dist. LEXIS 15057 (1995), affirmed in part and modified in part by 100 F.3d 353, 1996 U.S. App. LEXIS 29571 (4th Cir. Va. 1996).

Evidence established beyond a reasonable doubt that robbery was committed in course of murder; eight dollars taken from defendant's pocket was wet with blood which was analyzed and found to be consistent with victim's blood type; area around victim, including inside of her purse, did not contain any money, and in victim's entire apartment only money found was a few coins on a bedroom dresser. *Clanton v. Blair*, 619 F. Supp. 1491, 1985 U.S. Dist. LEXIS 14795 (1985).

Defendant's conviction for first-degree felony murder while armed was supported by evidence that defendant knew of, and had interest in, large amount of money that victim was carrying in his sock, that defendant and victim went into bedroom and closed door, that defendant shot victim, and that when witness discovered victim dead in bedroom, victim's pant leg was pulled up, his sock was down, and his money was gone. D.C. Code 1981, §§ 22-2401, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Evidence was sufficient to support defendant's convictions for first-degree murder while armed, assault with intent to kill while armed, armed robbery, conspiracy to commit armed robbery, and first-degree burglary while armed; according to driver of get-away vehicle, defendant struggled to open stolen safe in vehicle following murders and made statement about apparent contents of safe, and other witnesses testified that defendant ran to vehicle from victims' house with codefendant, that defendant helped count out money, drugs, and other items found in safe, and that defendant ultimately took his own share, including a diamond

ring which he was seen wearing shortly after the murders. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Evidence was sufficient to sustain felony murder convictions, despite defendant's claim that government did not prove his liability as an aider and abettor because shootings were not within scope of shared or common purpose, and were not the natural and probable consequence of underlying felony of armed burglary; after entry into apartment of victims, defendant continued to assist in criminal enterprise after shooter had made clear his intention to kill victims, and jury could have found that shootings were a means of facilitating successful completion of burglary, and that burglary and killings were all part of one continuous chain of events. *Lee v. United States*, 699 A.2d 373, 1997 D.C. App. LEXIS 193 (1997).

Evidence of defendant's intent to rob one victim provided sufficient evidence of his intent to rob second victim at another location moments later to support finding of attempted robbery as predicate for felony murder conviction, where incidents were close to each other in time and place, there was somewhat distinctive manner of carrying out robbery, clothing seen on assailant attempting to rob was similar to clothing seen on assailant at murder scene, and there was no other discernable reason for defendant to approach other victim. D.C. Code 1981, §§ 22-2401, 22-2902, 22-3202. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

Evidence that defendant and two accomplices entered apartment building with an intent to commit an assault, and that initial assault resulted in subsequent encounter between defendant and victim resulting in death of victim was sufficient to support defendant's conviction for felony-degree murder; defendant's initial entry constituted burglary, and was "continuing offense" for purposes of felony-murder statute. D.C. Code 1981, §§ 22-2401, 22-3202. *Marshall v. United States*, 623 A.2d 551, 1992 D.C. App. LEXIS 165 (1992).

Although facts strongly suggested desire to complete illegal sale of drugs, there was insufficient evidence for jury to find specific intent to rob, as required for convictions of felony-murder while armed, assault with intent to commit robbery while armed, and attempted robbery while armed. D.C. Code 1981, §§ 22-501, 22-2401, 22-2902, 22-3202. *Jones v. United States*, 516 A.2d 929, 1986 D.C. App. LEXIS 519 (1987), writ of certiorari denied by 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848, 1987 U.S. LEXIS 2179, 55 U.S.L.W. 3776 (1987).

Defendant's conviction for felony-murder predicated on attempted armed robbery was supported by sufficient evidence; jury could

have concluded there existed joint scheme to rob truck's occupants including decedent, and that fatal shot, which was fired within minutes after robbery had commenced, was natural and probable consequence of attempted robbery, and not merely coincidental in time and place to robbery. *West v. United States*, 499 A.2d 860, 1985 D.C. App. LEXIS 515 (1985).

Defendant's conviction for felony-murder predicated on attempted armed robbery, was supported by sufficient evidence; defendant initiated confrontation by calling codefendants over to truck to "bust it up" upon victims' attempted escape, his behavior in close proximity and clear association with others worked to intimidate victims, and defendant pushed two victims up against truck and proceeded to check or search them during robbery. *West v. United States*, 499 A.2d 860, 1985 D.C. App. LEXIS 515 (1985).

Evidence that defendant aided and abetted codefendant in crime of robbing decedent and burglarizing her home was sufficient to sustain conviction of felony-murder. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Evidence sustained defendant's convictions for felony-murder, robbery, and first-degree burglary. D.C. Code §§ 22-1801(a), 22-2401, 22-2901. *Brown v. United States*, 464 A.2d 120, 1983 D.C. App. LEXIS 437 (1983).

Sufficient evidence connected robbery to deaths to sustain defendant's conviction of felony-murder while armed. D.C. Code 1973, §§ 22-2401, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

Defendant's corroborated admissions, coupled with Government's evidence of crime itself and circumstantial evidence of defendant's participation reasonably permitted finding of guilt beyond reasonable doubt, in prosecution for armed robbery and felony-murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Tribble v. United States*, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

Evidence was sufficient to support verdict finding defendant guilty of felony-murder. D.C. Code § 22-2401. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

In prosecution for first-degree premeditated murder, felony-murder, and first-degree burglary, evidence on issues of intent and premeditation and deliberation sustained defendant's conviction. D.C. Code §§ 22-1801(a), 22-2401. *Blango v. United States*, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

Evidence, mostly circumstantial, supported defendants' conviction for felony-murder allegedly perpetrated during robbery. D.C. Code

§§ 22-2401, 22-2901, 22-3204. *Calhoun v. United States*, 369 A.2d 605, 1977 D.C. App. LEXIS 421 (1977).

Evidence was sufficient to support convictions for aiding and abetting robbery and for felony-murder. D.C. Code §§ 22-2401, 22-2901. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

Evidence supported implied finding that murder took place in course of robbery, in prosecution in which defendant contended that evidence was equally consistent with lawful possession of goods or with larceny after the homicide. *Womack v. United States*, 339 A.2d 37, 1975 D.C. App. LEXIS 400 (1975).

— **Commission of or participation in act by accused, weight and sufficiency of evidence.**

Direct and circumstantial evidence which included testimony of eyewitnesses and of accomplice who drove truck in which assailants departed from murder scene was sufficient to allow jury to find beyond a reasonable doubt that defendant was the short, stocky man with a .38-caliber firearm who was at the scene of a double murder and had shot the two victims. D.C. Code §§ 22-2401, 22-3204. *United States v. De Loach*, 530 F.2d 990, 1975 U.S. App. LEXIS 11259 (C.A.D.C. 1975), writ of certiorari denied by 426 U.S. 909, 96 S. Ct. 2232, 48 L. Ed. 2d 834, 1976 U.S. LEXIS 1882 (1976).

Evidence supported conviction of codefendant who participated in robbery but who did not do the shooting or killing of another in perpetrating a robbery. D.C. Code 1940, § 22-2401. *Wheeler v. U.S.*, 165 F.2d 225, 1947 U.S. App. LEXIS 2054 (1947).

Evidence was sufficient to establish defendant's identity as a perpetrator of a murder, even though defendant argued that the only eyewitness to the shooting did not recognize him as one of victim's assailants and that the only witness who directly implicated him in the crime was heavily impeached, most notably by the witness's repeated failure to select defendant's photograph even though she professed to know him; the core of the witness's testimony was corroborated by substantial independent evidence at trial, including testimony of the eyewitness, who stated in part that it was defendant who fired a particular handgun outside her building on the night before the murder. *McCraney v. United States*, 983 A.2d 1041, 2009 D.C. App. LEXIS 604 (2009).

Evidence was sufficient to support convictions of fifth defendant for conspiracy to assault and to commit murder, and first-degree premeditated murder while armed, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; three of the four eyewitnesses who testified for the prosecution testi-

fied that fifth defendant joined in the attack against the homeless man and the passerby who was stabbed to death. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Instruction on felony murder with predicate felony of carjacking, stating that defendant was guilty as an aider and abettor even if he did not intend it, so long as it was a natural and probable consequence of the carjacking, was improper, as carjacking was not a felony enumerated by felony murder statute, which, in turn, meant that defendant was not guilty of felony murder on basis of carjacking unless he had specific intent to kill victim. *Kitt v. United States*, 904 A.2d 348, 2006 D.C. App. LEXIS 440 (2006), writ of certiorari denied by 552 U.S. 824, 128 S. Ct. 180, 169 L. Ed. 2d 35, 2007 U.S. LEXIS 9135, 76 U.S.L.W. 3157 (2007).

Evidence was sufficient to support jury's finding that defendant aided and abetted the codefendant in committing murder, kidnapping, and carjacking, where defendant had the opportunity to disassociate himself from the codefendant at several points, but chose to stay when victim was kidnapped, stabbed, and shot, and defendant displayed his consciousness of guilt by fleeing from the police and attempting to conceal himself in some bushes. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Sufficient evidence supported conviction for first-degree premeditated murder while armed; victim died from wounds coming from small gun, eyewitnesses had seen defendant with such a gun, defendant's father had heard defendant's voice coming from direction of apartment where shooting took place, and eyewitnesses saw defendant flee from apartment complex where murder took place. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Convictions on an aiding and abetting theory for first-degree premeditated murder and first-degree felony murder were supported by evidence that defendant arranged meeting for ostensible purpose of buying marijuana from victim, that he came to meeting with a gun, that he and co-defendants all drew their weapons as if on cue when defendant asked codefendant what he thought of the "weed," that defendant during armed robbery took marijuana from victim and pager from victim's associate, and that he shot at victim's associate as victim sustained fatal gunshot wound to head. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Evidence was sufficient to establish defendant's liability as codefendant's accomplice in victim's murder; evidence fairly allowed jury to find either that defendant advised and incited codefendant to shoot victim or, at the least, that defendant knowingly participated in shooting, and there was evidence that defendant and victim had words, that defendant then conferred with codefendant and warned bystanders to leave because something was about to happen, and that codefendant, accompanied by defendant, then pursued victim and shot him. *Lloyd v. United States*, 806 A.2d 1243, 2002 D.C. App. LEXIS 531 (2002).

Evidence was sufficient to support defendant's conviction for first-degree murder in connection with street shooting, even though there was no direct substantive evidence identifying defendant by name in the act of shooting victim; two men, using different weapons, participated in shooting, other man admitted that he was one of two men involved, defendant stated that he was "with" other man in intending to "wet the Bama," defendant got out of vehicle with other man while carrying what appeared to be a big gun, and victim was shot 13 times. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Sufficient evidence to establish defendant's identity as murderer was provided by one witness' testimony that defendant threatened her and that she then saw defendant point gun in victim's direction and shoot him, by testimony of two other witnesses that they saw defendant shoot victim, and by testimony of two witnesses that they saw defendant in vicinity of murder at time of murder. *Harris v. United States*, 668 A.2d 839, 1995 D.C. App. LEXIS 247 (1995).

Defendant's conviction of first-degree murder while armed was supported by evidence showing that defendant had motive to kill victim as result of events relating to their drug partnership, that defendant was in geographical and temporal proximity to murder, that he was linked to codefendant who possessed pistol stolen from apartment on night of murder in subsequent break-in, that murder was connected to break-in, and that victim's car, in which he was shot, was neatly parked, suggesting that he was coaxed to stop; deliberation and premeditation could be inferred from defendant's subsequent participation in break-in of apartment, which was used in drug business. D.C. Code 1981, §§ 22-2401, 22-3202. *Void v. United States*, 631 A.2d 374, 1993 D.C. App. LEXIS 226 (1993).

Fact that defendant had been reading newspapers, that newspapers had identified another person as being involved with particular homicide, and that defendant had gone to jail to visit codefendant was insufficient to show that defendant was aware of the participation of the

other in the homicide and was thus insufficient to sustain a conviction of the accessory of the fact. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

Evidence that defendant knew person who committed murder, that the person had a key to defendant's apartment, that the person changed into a postal uniform, which he used to gain access to the victim, in the defendant's apartment while the defendant was present, that defendant participated in the scheme by assisting the murderer in acquiring a postal vehicle, and that the murderer left his gun in defendant's apartment was sufficient to sustain defendant's conviction as an accessory after the fact to the murder. *Butler v. United States*, 481 A.2d 431, 1984 D.C. App. LEXIS 433 (1984), writ of certiorari denied by 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786, 1985 U.S. LEXIS 1273, 53 U.S.L.W. 3634 (1985).

In prosecution for first-degree murder, evidence indicating friendship between decedent and her work supervisor was insufficient to suggest romantic relationship so as to link supervisor with the murder where sole witness admitted that he had seen supervisor and decedent only talking together and only during working hours and there was no evidence of kissing, handholding, or any other overt signs of a romantic or sexual relationship between decedent and supervisor. *Hall v. United States*, 454 A.2d 314, 1982 D.C. App. LEXIS 507 (1982).

— Defense of another, weight and sufficiency of evidence.

Evidence was sufficient to disprove defense of a third party in second-degree murder prosecution, though defendant claimed he shot the victim to save his neighbor, who was being held by victim in a "head lock," where it would have been unreasonable to believe that neighbor was in serious danger, given relative age, size, and physical condition of the combatants, defendant did not act from an honest belief that deadly force was necessary, as he shot an unarmed man in the back of the head without giving him time to release the neighbor and retreat, and the situation had escalated only when defendant drew his gun. *Fisher v. United States*, 779 A.2d 348, 2001 D.C. App. LEXIS 180 (2001), writ of certiorari denied by 534 U.S. 1095, 122 S. Ct. 844, 151 L. Ed. 2d 722, 2002 U.S. LEXIS 72, 70 U.S.L.W. 3428 (2002).

— Degree of homicide, weight and sufficiency of evidence.

Evidence, including testimony as to statements of defendant and codefendant describing events and circumstances at time of shooting of

cab driver, sustained convictions of robbery and felony murder. D.C. Code §§ 22-2401, 22-2901. *United States v. Carter*, 445 F.2d 669, 1971 U.S. App. LEXIS 10458 (C.A.D.C. 1971), writ of certiorari denied by 405 U.S. 932, 92 S. Ct. 988, 30 L. Ed. 2d 806, 1972 U.S. LEXIS 3775 (1972).

Evidence, including testimony of girl friend of one defendant as to incriminating statements which both defendants made to her, sustained convictions for felony murder and for attempted robbery. D.C. Code §§ 22-2401, 22-2902. *Calloway v. United States*, 399 F.2d 1006, 1968 U.S. App. LEXIS 6138 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 987, 89 S. Ct. 464, 21 L. Ed. 2d 448, 1968 U.S. LEXIS 157 (1968).

Evidence was sufficient to sustain conviction of one defendant of felony murder. D.C. Code 1961, §§ 22-2401, 22-2404. *Harrison v. United States*, 387 F.2d 203, 1967 U.S. App. LEXIS 6332 (C.A.D.C. 1967), reversed by 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047, 1968 U.S. LEXIS 1349 (1968).

Evidence sustained conviction for robbery and felony-murder. D.C. Code 1951, § 22-2401. *Coleman v. U.S.*, 295 F.2d 555, 1961 U.S. App. LEXIS 3632 (C.A.D.C. 1961).

In murder prosecution, evidence that after altercation with deceased at third person's home, defendant went to his own home and procured pistol, and, after accosting deceased on street, knocked him down and shot him several times, held to sustain conviction; conflict in evidence being for jury. *Preston v. U.S.*, 80 F.2d 702, 1935 U.S. App. LEXIS 3399 (1935).

— Degree of murder, weight and sufficiency of evidence.

Evidence was sufficient to support a verdict of murder in the first degree. D.C. Code 1940, § 22-2401. *Fisher v. U.S.*, 66 S.Ct. 1318, 1946 U.S. LEXIS 2178 (U.S. Dist. Col. 1946).

Evidence that defendant was armed and was threatening one individual with serious bodily injury, that he was aware that he was being followed by uniformed special officer and that defendant turned and shot uniformed officer was sufficient, apart from issue of mental responsibility, to support verdict finding defendant guilty of second-degree murder of the officer and of carrying a dangerous weapon. D.C. Code §§ 22-2401, 22-3204. *United States v. Taylor*, 510 F.2d 1283, 1975 U.S. App. LEXIS 15297 (C.A.D.C. 1975).

Eyewitness testimony describing shooting together with notes written by defendant prior to shooting indicating he contemplated murder and suicide were sufficient to establish elements of premeditation and deliberation in prosecution for first-degree murder. D.C. Code § 22-2401. *United States v. Sutton*, 426 F.2d 1202, 1969 U.S. App. LEXIS 10136 (C.A.D.C. 1969).

Sufficient evidence existed from which reasonable jury could conclude that defendant and his companions saw victim as a likely prospect for a robbery, followed him to his house, and shot him in course of robbery attempt. *United States v. Harrison*, 419 F.2d 691, 1969 U.S. App. LEXIS 11716 (C.A.D.C. 1969), US Supreme Court certiorari denied by 396 U.S. 974, 90 S. Ct. 465, 24 L. Ed. 2d 442, 1969 U.S. LEXIS 250 (1969).

While there was ample evidence that defendant intentionally killed ten-year-old boy who was asleep, evidence was insufficient to establish necessary premeditation to sustain verdict of first-degree murder. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

Evidence sustained conviction for second degree murder. D.C. Code 1961, § 22-2401. *Turberville v. U.S.*, 303 F.2d 411, 1962 U.S. App. LEXIS 6036 (C.A.D.C. 1962).

In prosecution for murder in first degree committed in perpetration of offense of house-breaking while armed with a deadly weapon, without considering defendant's written confession, evidence was sufficient to justify submission of case to jury and to support verdict of guilty. D.C. Code 1940, §§ 22-2401, 22-2404. *Tyler v. U.S.*, 193 F.2d 24, 1951 U.S. App. LEXIS 2855 (C.A.D.C. 1951).

Evidence was sufficient to sustain conviction for murder in first degree. D.C. Code 1940, § 22-2401. *Pritchett v. U.S.*, 185 F.2d 438, 1950 U.S. App. LEXIS 3304 (C.A.D.C. 1950).

Evidence sustained conviction of murder in the first degree committed in attempted perpetration of robbery. D.C. Code 1940, §§ 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

Evidence held sufficient to warrant conviction of first degree murder by purposely killing deceased while perpetrating offense punishable by imprisonment in penitentiary. D.C. Code 1929, T. 6, § 21. *Goodman v. U.S.*, 70 F.2d 741, 1934 U.S. App. LEXIS 4290 (1934).

Evidence sustained conviction of two defendants for first degree murder by shooting prohibition agent. *Borum v. U.S.*, 56 F.2d 301, 1932 U.S. App. LEXIS 2746 (1932).

Evidence was sufficient to support petitioner's conviction for murder in first degree for having given a lethal injection to an elderly patient in hospital where petitioner was employed as a nurse's aide. *Hargrave v. Landon*, 584 F. Supp. 302, 1984 U.S. Dist. LEXIS 17686 (1984), affirmed without opinion by 751 F.2d 379 (4th Cir. Va. 1984).

Evidence was sufficient to support conviction for conspiracy to commit first-degree murder; there was evidence that two individuals robbed the mother of defendant's child of \$17,000 he had given her for child care, that defendant told various individuals after the robbery that he

was going to get revenge, that defendant drove around the neighborhood with another individual seeking information on who was responsible for the robbery and that several individuals told him that victim was one of the robbers, that defendant spoke in slang regarding getting an acquaintance to kill or harm the robber, that 31 hours after the money was stolen the victim was shot 10 times, that after the murder defendant was no longer angry, and that defendant made incriminating statement after the murder that he did not know what happened to the victim just like nobody knew who robbed his house. *Wheeler v. United States*, 977 A.2d 973, 2009 D.C. App. LEXIS 343 (2009), amended by 987 A.2d 431, 2010 D.C. App. LEXIS 211 (D.C. 2010), writ of certiorari denied by 131 S. Ct. 325, 178 L. Ed. 2d 211, 2010 U.S. LEXIS 7488, 79 U.S.L.W. 3204 (U.S. 2010).

In relation to felony murder, a conviction of second-degree murder is proper if there is proof from which the jury might reasonably find that the defendant did not commit one of the statutorily enumerated felonies but was guilty of an intentional killing on impulse. D.C. Code 1981, § 22-2401. *Fisher v. United States*, 749 A.2d 710, 2000 D.C. App. LEXIS 54 (2000), writ of certiorari denied by 531 U.S. 1180, 121 S. Ct. 1159, 148 L. Ed. 2d 1019, 2001 U.S. LEXIS 1634, 69 U.S.L.W. 3555 (2001).

Defendant's conviction for first-degree murder while armed was supported by evidence that defendant shot bicyclist, who was first surrounded by group of five or six young men, in apparent dispute over turf between two groups of young men. D.C. Code 1981, §§ 22-2401, 22-3202. *Davis v. United States*, 735 A.2d 467, 1999 D.C. App. LEXIS 165 (1999).

Defendants' convictions for premeditated first-degree murder while armed, assault with intent to kill, carrying pistol without license, and possessing firearm during crime of violence were supported by testimony of officer who witnessed shooting, testimony of two surviving victims, and testimony of defendants' acquaintance. D.C. Code 1981, §§ 22-501, 22-2401, 22-3202, 22-3204(a, b). *Payne v. United States*, 697 A.2d 1229, 1997 D.C. App. LEXIS 163 (1997).

There was sufficient evidence of premeditation and deliberation to support first-degree murder conviction, where defendant displayed anger over theft of his bicycle, said that he was going to "do something," shot at two cars, walked across street, threatened three people, aimed at victim's chest, shot him twice, threatened to shoot entire neighborhood, and calmly retreated to his house. D.C. Code 1981, § 22-2401. *Harris v. United States*, 668 A.2d 839, 1995 D.C. App. LEXIS 247 (1995).

To support finding of premeditation required for first-degree murder, government must show that before acting, accused gave thought to idea

of taking human life and reached definite decision to kill; deliberation requires showing that accused acted with consideration and reflection upon preconceived design to kill, and may occur in period as brief as a few seconds. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

Evidence supported premeditation and deliberation on part of defendant to sustain conviction for first-degree murder; evidence indicated that defendant and four others, all armed, positioned car in which they were riding beside that of intended victim, with whom they had ongoing dispute, and opened fire upon him. D.C. Code 1981, §§ 22-2401, 22-3202. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

Defendant was guilty beyond reasonable doubt of first-degree murder while armed, where victims were stabbed repeatedly over their entire bodies and suffered numerous blunt force injuries on their heads, defendant used kitchen knife in murders, and victims were killed in different rooms at different times. *Patton v. United States*, 633 A.2d 800, 1993 D.C. App. LEXIS 286 (1993).

Government introduced sufficient evidence to support jury finding of premeditation required to sustain conviction for first-degree premeditated murder; evidence showed that defendant brought knife to victim's apartment, screamed at victim about his involvement with codefendant and then proceeded to stab victim repeatedly while victim pleaded for his life, and bringing of knife was highly probative of premeditation and deliberation. D.C. Code 1981, §§ 22-2401, 22-3202. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

There was sufficient evidence that defendant acted with deliberation in killing victim assessed to sustain conviction for first-degree premeditated murder; defendant stabbed victim at least five times while victim repeatedly pleaded for his life and victim attempted to crawl away before defendant inflicted final stab wound which gave supporting inference that defendant gave killing a "second thought" before inflicting final wound. D.C. Code 1981, §§ 22-2401, 22-3202. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

Finding of deliberation and premeditation required for first-degree murder conviction, arising from shooting of officer who confronted defendant in midst of burglary was sufficiently supported by evidence that defendant wrestled officer's gun out of his hand, disabled him with several shots, and, in anger at having been struck in hand by bullet during struggle, deliberately shot and killed officer despite officer's warning, "Don't do it." *Perry v. United States*, 571 A.2d 1156, 1990 D.C. App. LEXIS 57 (1990).

Evidence indicating that upon arriving at scene, defendant entered into an altercation with victim and, without any immediate provocation, proceeded to inflict a severe beating upon victim, and then, as victim fell to ground, stood over him and shot him in head from very close range was sufficient, when combined with evidence of verbal epithets expressed during course of assault, to establish premeditation and deliberation necessary for crime of first-degree murder while armed. D.C. Code 1981, §§ 22-2401, 22-3202. *McAdoo v. United States*, 515 A.2d 412, 1986 D.C. App. LEXIS 432 (1986).

For purposes of establishing murder in first degree, evidence of premeditation and deliberation must be sufficient to persuade, not compel, reasonable juror to finding of guilty. *Watson v. United States*, 501 A.2d 791, 1985 D.C. App. LEXIS 549 (1985).

There was sufficient evidence of premeditation and deliberation to sustain conviction for first-degree murder arising from defendant's shooting police officer who had been chasing him; reasonable jury could have found from evidence that defendant had formed decision to kill upon reaching for loose gun during scuffle with police officer and that he gave further thought about decision when officer pleaded for his life. *Watson v. United States*, 501 A.2d 791, 1985 D.C. App. LEXIS 549 (1985).

Evidence was sufficient to support defendant's first-degree murder of conviction; evidence included fact that victim was shot while leaving her apartment lightly dressed, although snow was on the ground, defendant was seen walking away from victim's fallen body carrying his shotgun, and prior threats. *Hairston v. United States*, 497 A.2d 1097, 1985 D.C. App. LEXIS 481 (1985).

In murder prosecution, evidence, including evidence that defendant was former lover of victim with motive to kill, that he carried murder weapon to scene of crime, and that he fired eight shots into decedent's torso while stopping once to assist manually in firing the final bullet, was sufficient to sustain conviction of first-degree murder. D.C. Code 1981, §§ 22-2401, 22-3202. *Hall v. United States*, 454 A.2d 314, 1982 D.C. App. LEXIS 507 (1982).

Evidence, although primarily circumstantial, was sufficient to allow reasonable juror to find that defendant acted with premeditation and deliberation and thus was sufficient to support his first-degree premeditated murder convictions. D.C. Code 1973, §§ 22-2401, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

In prosecution for first-degree murder, felony-murder and rape, defendant's statement supplied sufficient evidence to justify verdict of guilty of first-degree murder where defendant admitted that he not only choked victim with

his hands, but had also gone into another room, brought back electric cord and wrapped it around her neck until he was certain of fatal strangulation. D.C. Code 1973, § 22-2401. *Doepel v. United States*, 434 A.2d 449, 1981 D.C. App. LEXIS 345 (1981), writ of certiorari denied by 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483, 1981 U.S. LEXIS 4463, 50 U.S.L.W. 3376 (1981).

In prosecution, inter alia, for felony-murder and attempted robbery while armed, evidence was sufficient to support the convictions. D.C. Code §§ 22-2401, 22-2902. *Dobson v. United States*, 426 A.2d 361, 1981 D.C. App. LEXIS 219 (1981).

Evidence that defendant brought gun with her to scene of the murder, that, on day of shooting, she was carrying her passport and a large amount of money, thus indicating that she had formulated an escape plan before the murder, that, on a few occasions in the weeks before the murder, she had followed the victim as he left work, and that, shortly before the homicide, she followed the victim out of the office in which they worked and then shot him in the lobby of the building sustained determination that defendant acted with premeditation and deliberation and thus was guilty of first-degree murder. (Per Ferren, J., with two Judges concurring specially.) D.C. Code § 22-2401. *Freundak v. United States*, 408 A.2d 364, 1979 D.C. App. LEXIS 463 (1979).

Evidence in prosecution for murders and other crimes was sufficient to demonstrate premeditation and deliberation on which a jury could reasonably base a conviction of murder in the first degree. *Byrd v. United States*, 388 A.2d 1225, 1978 D.C. App. LEXIS 483 (1978).

Evidence of prior threats or hostile conversations between parties may support a conclusion in a first-degree murder case that defendant acted under impetus of calm reflection rather than impulse. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

Evidence that defendant openly threatened to kill victim unless he gave him a gun and that defendant brandished an ice pick in victim's face, forceably escorted him across street and into a nearby alley and then stabbed him repeatedly with an ice pick was sufficient to sustain conviction of first-degree murder in that period of time between argument and threat in liquor store and final confrontation in alley was clearly sufficient for defendant to calmly reflect on his determination to kill. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

Testimony that decedent told police officer that he had attempted to close the door to his house "as the man pulled the gun out and started in the house" and evidence that defendants and their colleagues were out to "get" an

alleged rapist and wanted to find and beat up the alleged rapist was sufficient to show an attempted burglary as the felony underlying charge of felony murder. D.C. Code §§ 22-1801(a), 22-2401, 22-3202. *Harris v. United States*, 373 A.2d 590, 1977 D.C. App. LEXIS 475 (1977).

— **Deliberation and premeditation, weight and sufficiency of evidence.**

While there was no evidence of motive in homicide prosecution, evidence that defendant brought shotgun and knife to scene of the crime was sufficient to permit jury to infer that the killing was premeditated, where sawed-off shotgun which was carried in briefcase to scene of crime was not a weapon that had innocent uses, where there was no evidence that defendant habitually carried it with him, and where in addition the single knife wound in decedent's throat was made at a place calculated to make death an unmistakable result. *United States v. Brooks*, 449 F.2d 1077, 1971 U.S. App. LEXIS 9255 (C.A.D.C. 1971).

Jury finding of premeditation may not be upheld where evidence was so skimpy that reasonable man must have reasonable doubt. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

Prosecutor has burden of proving premeditation and deliberation beyond reasonable doubt. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

Evidence that deceased was assaulted, bound with rope, tied to a chair and then killed by strangulation from behind while still tightly bound was sufficient to support finding of premeditation. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

Evidence that defendant first struck his victim because she had complained about his work, that he went to floor above, obtained a stick from a fireplace, returned downstairs and killed her, that in the killing he used the stick and also choked her, and that to insure her death he used a knife, was sufficient to permit jury to find deliberation. *Fisher v. U.S.*, 149 F.2d 28, 1945 U.S. App. LEXIS 2550 (1945).

Evidence of premeditation and deliberation was sufficient to sustain conviction for first degree murder. *Mergner v. U.S.*, 147 F.2d 572, 1945 U.S. App. LEXIS 2170 (1945).

Evidence was insufficient to show that the killing of a police officer was deliberate and premeditated and hence was insufficient to support a conviction of first-degree murder. D.C. Code 1929, T. 6, § 21. *Bullock v. U.S.*, 122 F.2d 213, 1941 U.S. App. LEXIS 2942 (1941).

Evidence sustained conviction for murder in first degree on ground act was done with delib-

eration and premeditation. *Aldridge v. U.S.*, 47 F.2d 407, 1931 U.S. App. LEXIS 3454 (1931).

In prosecution for murder of woman with whom defendant had carried on a clandestine love affair, evidence was insufficient to support hypothesis that defendant arrived in vicinity of premises of woman, lay in wait until her son left the apartment, and then rushed in to kill her. *U.S. v. Wilson*, 178 F.Supp. 881, 1959 U.S. Dist. LEXIS 2601 (D.D.C.1959).

Evidence was sufficient for the jury to find the requisite "premeditation" and "deliberation" to support joint defendants' first-degree premeditated murder convictions for the murder of two victims; witnesses testified that one defendant bragged that he followed one of the victims and then shot him, medical examiner testified that such victim was shot eight times, including in the head and neck, at close range, and other testimony indicated that the other victim was shot in the head as he sat in his car, that one of the defendants had been "looking for" such victim, that other defendant had told others he and another gang member had shot victim, and witness saw the victim get shot in the head from a distance, and then saw perpetrators get out of their car and shoot victim "some more." *Castillo-Campos v. United States*, 987 A.2d 476, 2010 D.C. App. LEXIS 10 (2010), writ of certiorari denied by 131 S. Ct. 1514, 179 L. Ed. 2d 336, 2011 U.S. LEXIS 1556, 79 U.S.L.W. 3477 (U.S. 2011).

Evidence was sufficient to establish premeditation and deliberation, as required in order to convict defendant of two counts of first-degree murder while armed with aggravating circumstances, at trial of two defendants for murder and other crimes arising out of a retaliatory shooting; two victims died from gunshot wounds, witnesses to the shooting testified that such defendant emerged from behind a dumpster and began shooting without provocation, and police officer who heard the shooting testified that he noticed a black sports utility vehicle (SUV) with its engine running near the scene of the crime and saw two men run from the direction of the shooting and get into the SUV. *Mitchell v. United States*, 985 A.2d 1125, 2009 D.C. App. LEXIS 651 (2009), writ of certiorari denied by 131 S. Ct. 226, 178 L. Ed. 2d 150, 2010 U.S. LEXIS 6110, 79 U.S.L.W. 3201 (U.S. 2010).

Carrying a gun to the scene of the murder is highly probative of premeditation and deliberation, because it suggests that the defendant arrived on the scene with a preconceived plan to kill. *West v. United States*, 866 A.2d 74, 2005 D.C. App. LEXIS 9 (2005).

Evidence established premeditation, as element of first-degree murder; defendant told jailhouse informant that he had been involved in an earlier fight with victim and that he had wanted to see the victim again, and when

defendant learned that victim was at outdoor cookout, he went to the cookout armed with a gun, waited for victim to approach, and, when victim was close, drew the gun and fired repeatedly before fleeing. *West v. United States*, 866 A.2d 74, 2005 D.C. App. LEXIS 9 (2005).

To support charge of premeditated murder, evidence must be sufficient to show that the accused did not act impulsively or in the heat of passion. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Evidence was sufficient to show premeditation and deliberation required for conviction of first-degree murder of bystander, where government established that defendant and intended victim were engaged in heated argument immediately prior to shooting, intended victim ran as defendant walked to nearby car, and defendant then retrieved gun from car, pointed his arms while reaching over car, fired gun twice at intended victim at relatively close range, and subsequently fled the scene. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Both premeditation and deliberation elements of first-degree murder may be inferred from the surrounding facts and circumstances, and may occur in a period as brief as a few seconds. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

Circumstantial evidence was sufficient to infer premeditation element of first-degree murder, in prosecution arising from incident in which victim was shot once in the head in bedroom; defendant stated that he wanted to talk with victim alone before entering bedroom, defendant closed door, witnesses heard no loud argument nor anything to suggest that murder was an unplanned act of anger precipitated by an unexpected dispute or provocation, and defendant appeared calm when he left bedroom. D.C. Code 1981, § 22-2401. *Bussey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Carrying gun to scene of murder is highly probative of premeditation and deliberation elements of first-degree murder, as it suggests that defendant arrived on scene with preconceived plan to kill. D.C. Code 1981, § 22-2401. *Bussey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Fact that the accused carried murder weapon, or indeed any deadly weapon, to murder scene is highly probative of premeditation and deliberation elements of first-degree murder. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

Jury in first-degree murder prosecution could have fairly concluded beyond reasonable doubt, based on circumstantial evidence in record, that crime was committed with premeditation and deliberation. D.C. Code 1981, § 22-2401.

Garris v. United States, 465 A.2d 817, 1983 D.C. App. LEXIS 455 (1983), writ of certiorari denied by 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243, 1984 U.S. LEXIS 967, 52 U.S.L.W. 3551 (1984).

Evidence that defendant brought murder weapon to scene of crime permits inference that defendant arrived on scene already possessed of calmly planned and calculated intent to kill. D.C. Code 1981, §§ 22-2401, 22-3202. *Hall v. United States*, 454 A.2d 314, 1982 D.C. App. LEXIS 507 (1982).

Proof of deliberation requires evidence that defendant acted with consideration and reflection upon preconceived design to kill; a jury may infer premeditation and deliberation from sufficiently probative facts and circumstances but evidence must show that accused reached decision to kill calmly and in cold blood, not on impulse or in heat of passion. D.C. Code 1973, §§ 22-2401, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

Fact that defendant brought the gun to the scene of the murder is, in itself, highly probative of premeditation and deliberation. (Per *Ferren, J.*, with two Judges concurring specially.) D.C. Code § 22-2401. *Freundak v. United States*, 408 A.2d 364, 1979 D.C. App. LEXIS 463 (1979).

— Hearsay, weight and sufficiency of evidence.

Even if statements made by petitioner prior to and immediately following his arrest were not voluntary or the product of a rational mind, deceased's dying declaration and testimony of other eyewitnesses served to establish, without petitioner's statements, each and every element of crimes beyond a reasonable doubt and supported conviction on three-count indictment charging felony-murder, first-degree murder, and arson. *United States v. Barnes*, 520 F. Supp. 946, 1981 U.S. Dist. LEXIS 14045 (1981).

— Identity of accused, weight and sufficiency of evidence.

Identification evidence was sufficient to establish that defendant was present during the sequence of events that led to victim's murder, where two eyewitnesses saw a man that looked like defendant in the car with victim, defendant's fingerprint was found on a bag in victim's car, defendant's identification card was found in car, and defendant fled from the scene after crashing victim's car. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Eyewitness' identification of both co-defendants from separate photographic arrays shown to him by detective, his testimony, during in-court identification, that he was sure the co-defendants were the gunmen and that he

had known the co-defendants personally for several years before the shooting, and that stroboscopic light of muzzle flashes illuminated co-defendants' faces as they shot victim from moving car, supported conviction of each co-defendant for first-degree murder while armed. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

Evidence that gunmen had been in moving car at distance of 40 to 50 feet from eyewitness, with only stroboscopic light of muzzle flashes to illuminate their faces, did not preclude jury from believing eyewitness' identification of the co-defendants as gunmen, in prosecution for first-degree murder while armed. *Robinson v. United States*, 797 A.2d 698, 2002 D.C. App. LEXIS 98 (2002), writ of certiorari denied by 540 U.S. 1212, 124 S. Ct. 1491, 158 L. Ed. 2d 139, 2004 U.S. LEXIS 1541, 72 U.S.L.W. 3538 (2004).

Reliability of witness's identification of defendant as shooter was sufficiently established by witness's observation of shooter for significant amount of time while shooter argued with intended victim, retrieved gun from car, and aimed and fired at intended victim, by witness's positive identification of shooter as defendant by name, and by witness's certainty that defendant was shooter based on her prior knowledge of both shooter and intended victim. *Black v. United States*, 755 A.2d 1005, 2000 D.C. App. LEXIS 166 (2000).

— Identity of deceased, weight and sufficiency of evidence.

In prosecution for first-degree premeditated murder, felony-murder and first-degree burglary, identification evidence sustained defendant's conviction. D.C. Code §§ 22-1801(a), 22-2401. *Blango v. United States*, 373 A.2d 885, 1977 D.C. App. LEXIS 315 (1977).

— In general.

Kentucky Supreme Court's initial assessment of evidence of defendant's extreme emotional disturbance (EED) and reliance in resolving appeal on case that involved retroactive application of "unexpected and indefensible" judicial revision of Kentucky murder statute was irrelevant in habeas proceeding, as it did not form sole basis for that court's denial of defendant's sufficiency of the evidence claim. *Parker v. Matthews*, 132 S. Ct. 2148, 183 L. Ed. 2d 32, 2012 U.S. LEXIS 4306 (2012).

Evidence was sufficient to support conviction for second-degree murder while armed; defendant threatened to hurt victim if he failed to pay a debt that allegedly he owed to defendant, defendant frightened victim into carrying a bat for protection, victim was overheard crying

while money was being demanded from him, and shortly thereafter, defendant was seen running away from murder scene with bat that was found to have victim's blood on it, and victim's death was caused by "blunt impact, head and neck trauma," an injury that was consistent with type of injury that would have been inflicted by long and linear object such as bat. *Robinson v. United States*, 928 A.2d 717, 2007 D.C. App. LEXIS 466 (2007).

Sufficient evidence supported conviction for first-degree premeditated murder while armed; victim died from wounds coming from small gun, eyewitnesses had seen defendant with such a gun, defendant's father had heard defendant's voice coming from direction of apartment where shooting took place, and eyewitnesses saw defendant flee from apartment complex where murder took place. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

While evidence that assault victim had, on two prior occasions, seen defendant in possession of .32 caliber chrome-colored automatic pistol with black or brown handle established only a reasonable probability, and not a certainty, that defendant had possessed the weapon used in the murder and assault, such lack of certainty went only to the weight of the evidence, not its admissibility, in prosecution for second-degree murder while armed and assault with intent to kill while armed. *McConnaughey v. United States*, 804 A.2d 334, 2002 D.C. App. LEXIS 436 (2002).

In prosecution for crimes including felony-murder, there was sufficient evidence of intent to steal or rob murder victim's property. D.C. Code 1981, §§ 22-2201, 22-2204, 22-2401, 22-2901. *Garris v. United States*, 465 A.2d 817, 1983 D.C. App. LEXIS 455 (1983), writ of certiorari denied by 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243, 1984 U.S. LEXIS 967, 52 U.S.L.W. 3551 (1984).

— Insanity, weight and sufficiency of evidence.

Where defendant, accused of murder and robbery, introduced evidence that on date thereof he was suffering from mental disease or defect, it became duty of government to prove him sane beyond reasonable doubt at time of commission of crimes charged. D.C. Code 1951, §§ 22-2401, 22-2901. *Carey v. U.S.*, 296 F.2d 422, 1961 U.S. App. LEXIS 3480 (C.A.D.C. 1961).

In murder prosecution, when the issue of insanity is properly raised by the evidence, the burden is on the government to prove sanity beyond a reasonable doubt. *Carter v. U.S.*, 252 F.2d 608, 1957 U.S. App. LEXIS 4250 (C.A.D.C. 1957).

— Intent or motive, weight and sufficiency of evidence.

Evidence was sufficient to support jury's find-

ing that defendant intended to kill stabbing victim who attempted to escape from house; at time of victim's escape, defendant had already killed three people, including one who had merely resisted the defendant's demands. *Bailey v. United States*, 831 A.2d 973, 2003 D.C. App. LEXIS 554 (2003), writ of certiorari denied by 540 U.S. 1167, 124 S. Ct. 1183, 157 L. Ed. 2d 1215, 2004 U.S. LEXIS 925, 72 U.S.L.W. 3487 (2004).

Evidence of defendant's knowledge of, and interest in, large amount of money that victim was carrying in his sock was sufficient to permit jury to conclude that defendant had a motive for planning to murder victim, namely robbery, and that proof corroborated other evidence of premeditation required for first-degree murder conviction. D.C. Code 1981, § 22-2401. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Although proof of motive to kill is not necessarily inconsistent with a sudden overpowering rage, it does tend to suggest a purposeful or reasoned killing, as would support first-degree murder conviction. D.C. Code 1981, § 22-2401. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Determination that defendant intended to murder victim he shot at was supported by evidence that defendant shot victim because victim was allegedly going to rob defendant and that defendant fired succession of shots at victim from short distance. *Brooks v. United States*, 655 A.2d 844, 1995 D.C. App. LEXIS 46 (1995).

Strong circumstantial evidence of intent of victim's former boyfriend who broke into apartment and, while holding hatchet, pursued victims established specific intent to kill and supported conviction for assault with intent to kill while armed; boyfriend made comment about desire to kill victim as he fled when police approached. D.C. Code 1981, § 22-501. *Kelly v. United States*, 590 A.2d 1031, 1991 D.C. App. LEXIS 110 (1991).

Evidence that during an argument with decedent shortly before shooting death the defendant had returned to his apartment and procured a loaded pistol and had assaulted victim and forced her to return to defendant's apartment was highly probative of premeditation and deliberation and evidence that defendant rejoined victim armed with a loaded, working pistol warranted inference that he ordered her into apartment with a calculated intent to kill, for purpose of first-degree murder conviction. D.C. Code 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

— Intoxication, weight and sufficiency of evidence.

Evidence that defendant expressed a desire to kill victim in liquor store and that defendant

followed codefendant and victim into alley and actively assisted in fatal stabbing of victim was sufficient to sustain conviction of first-degree murder despite claim that due to intoxication defendant was incapable of forming requisite intent to kill or premeditated and deliberative homicide. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

— Juvenile offenders, weight and sufficiency of evidence.

In delinquency proceeding, evidence that victim was shot during juvenile's robbery of another victim in same car, together with juvenile's confession, was sufficient to support finding of juvenile's involvement in offense and adjudication as delinquent. D.C. Code 1981, §§ 16-2317, 16-2319, 22-501, 22-2401, 22-2901, 22-3202. *In re C.L.W.*, 467 A.2d 706, 1983 D.C. App. LEXIS 460 (1983).

Evidence that a spree of cab driver robberies took place from 4:30 a. m. to 6:30 a. m., that, in the first two robberies, juvenile sat behind the driver while his companion sat on the right of the rear seat, that in both instances the companion pulled a gun and cab driver was robbed of his money, jewelry, and pocket chattels, that third victim was shot, that items taken during the two earlier robberies were found at the murder scene, and that the two persons seen fleeing from the murder scene were wearing clothing consistent with that described by occupant of apartment at the time that juvenile and his accomplice arrived with other loot and a bloody appearance was sufficient to sustain juvenile's convictions for felony-murder and attempted robbery. D.C. Code §§ 22-2401, 22-2901, 22-3202. *In re A.L.S.*, 377 A.2d 1149, 1977 D.C. App. LEXIS 393 (1977).

— Malice, weight and sufficiency of evidence.

Evidence, including evidence that bullet entered victim's head on trajectory horizontal to floor and that defendant intentionally fired gun at floor in room where several persons were present was sufficient, in second degree murder prosecution, to support finding of express or implied malice. D.C. Code § 22-2403. *Mitchell v. United States*, 434 F.2d 483, 1970 U.S. App. LEXIS 9263 (C.A.D.C. 1970), writ of certiorari denied by 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106, 1970 U.S. LEXIS 775 (1970).

— Place and time of death, weight and sufficiency of evidence.

Trial court's erroneous redaction of murder defendant's statement to police to remove his account of his whereabouts at time of murder did not rise to level of plain error requiring reversal, where prejudice resulting from exclusion of defendant's account of his whereabouts at time of murder was minimal, in that prose-

cution never suggested that paucity of defendant's blanket denial that he was present at murder scene was itself proof of his guilt as false exculpatory admission, and aggregate eyewitness testimony and evidence of motive was sufficient to establish defendant's guilt. *Reams v. United States*, 895 A.2d 914, 2006 D.C. App. LEXIS 150 (2006).

In prosecution for murder of victim, who was assaulted in purse-snatching incident and who died six days later at hospital after decision was made to discontinue heroic measures to keep her alive, record did not support conclusion that assault was separate from physician's discontinuance of heroic measures; trial court reasonably could have concluded that physician's act was a reasonable medical procedure and thus did not insulate defendant, who participated in the incident but who neither touched the victim nor her purse, from liability for felony-murder. D.C. Code § 22-2401. In re N., 406 A.2d 1275, 1979 D.C. App. LEXIS 452 (1979).

— Principals and accessories, weight and sufficiency of evidence.

Evidence held sufficient to sustain conviction for murder as to companion of one firing fatal shot. *Robinson v. U.S.*, 63 F.2d 147, 1933 U.S. App. LEXIS 3344 (1933).

Evidence was sufficient to sustain conviction for aiding and abetting armed first-degree murder under District of Columbia law; defendant drove shooter to obtain firearm and then drove to location where victim was located. *United States v. Wilson*, 720 F.Supp.2d 51, 2010 U.S. Dist. LEXIS 65983 (2010).

Evidence was sufficient to support conviction for first-degree premeditated murder under theory of aiding and abetting; defendant, after he and three cohorts planned to rob someone, told second cohort to give a gun to first cohort, first cohort testified that defendant proposed killing victim, who was with them in her vehicle after carjacking, before anyone else and that discussion about killing victim lasted a long time, defendant suggested location where victim was killed and gave directions to that location, and defendant stood within a few feet of third cohort when third cohort shot and killed victim. *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari denied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

There was insufficient evidence of premeditation and deliberation on part of defendant to support his conviction for first-degree murder as an aider and abettor; the only eyewitness account of shooting was defendant's version of what happened, as testified to by witness, which was that defendant neither anticipated nor intended the shooting, and there was no

evidence that defendant was carrying a handgun or that he, rather than co-defendant, was the shooter. *Kitt v. United States*, 904 A.2d 348, 2006 D.C. App. LEXIS 440 (2006), writ of certiorari denied by 552 U.S. 824, 128 S. Ct. 180, 169 L. Ed. 2d 35, 2007 U.S. LEXIS 9135, 76 U.S.L.W. 3157 (2007).

Sufficient evidence supported conviction for first-degree murder under theory of aiding and abetting; record indicated that defendant was seen with co-defendant and others deliberating on victim's fate, defendant confessed that he participated in planning and murder of victim, and several witnesses identified defendant as fleeing scene in getaway car. *McCullough v. United States*, 827 A.2d 48, 2003 D.C. App. LEXIS 425 (2003).

Evidence was sufficient to support defendant's convictions for first-degree premeditated murder and assault with intent to kill on an aiding and abetting theory; there was evidence that defendant agreed "in principle" to kill victim, dressed for occasion, and went to place where murder was to occur with people with whom he conspired to engage in the criminal endeavor, defendant stood near scene, and after codefendants started to chase victims, defendant covered his head with hood and had gun in his hand, and there was some evidence that only because his gun jammed did defendant not succeed in personally shooting victim. *McCoy v. United States*, 760 A.2d 164, 2000 D.C. App. LEXIS 264 (2000), writ of certiorari denied by 532 U.S. 987, 121 S. Ct. 1636, 149 L. Ed. 2d 496, 2001 U.S. LEXIS 3147, 69 U.S.L.W. 3672 (2001), writ of certiorari denied by 533 U.S. 909, 121 S. Ct. 2257, 150 L. Ed. 2d 243, 2001 U.S. LEXIS 4446, 69 U.S.L.W. 3763 (2001), writ of certiorari denied by 534 U.S. 900, 122 S. Ct. 227, 151 L. Ed. 2d 163, 2001 U.S. LEXIS 6714, 70 U.S.L.W. 3241 (2001), writ of certiorari denied by 534 U.S. 1005, 122 S. Ct. 486, 151 L. Ed. 2d 399, 2001 U.S. LEXIS 10160, 70 U.S.L.W. 3316 (2001).

State presented sufficient evidence that defendant knew offense of first-degree murder while armed had been committed to support conviction of accessory after the fact to first-degree murder while armed, in light of evidence that defendant was placed as witness to event, and victim was shot seven times at close range from which defendant could infer that victim's death was instantaneous. D.C. Code 1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

State presented sufficient evidence that defendant personally aided or assisted principal of shooting to avoid detection or apprehension after shooting to support conviction of accessory after the fact to first-degree murder while armed, in light of evidence that defendant shot at or otherwise threatened witness in attempt to eliminate eyewitness to murder or at least

intimidate him to not speak with authorities about matter or testify at trial. D.C. Code 1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

State presented sufficient evidence that defendant rendered his assistance with specific intent that it prevent principal's arrest, trial, or punishment for murdering victim to support conviction of accessory after the fact to first-degree murder while armed, in light of evidence that defendant attempted to eliminate or frighten eyewitness to prevent him from testifying against principal, defendant wrote letter to third party asking for help in covering up facts of case, and defendant was closely associated with principal, including at scene of murder itself. D.C. Code 1981, § 22-106. *Jones v. United States*, 716 A.2d 160, 1998 D.C. App. LEXIS 136 (1998).

Sufficient evidence supported finding that defendant was guilty, as aider and abettor, of murder where defendant shared common purpose with codefendant to kill victim in retaliation for stealing cocaine from them, witness saw defendant, codefendant, and murderer arguing with victim, codefendant told murderer to go get pistol, and defendant furnished murderer with weapon. D.C. Code 1981, §§ 22-2403, 22-3202. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

Evidence was sufficient to sustain defendant's conviction for aiding and abetting assault with intent to commit murder while armed on grounds that he took actions that facilitated the unlawful deed, rather than merely being present; codefendant testified that defendant helped him to get weapons, accompanied him to site of shooting, held one of the guns, warned codefendant that he was in danger, handed gun to codefendant so he could shoot victim, and left scene with codefendant. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Evidence was sufficient to convict defendant of aiding and abetting first-degree murder; he entered car while kidnapping was underway and assisted in strangulation of victim by kicking victim while he was being choked. D.C. Code 1981, § 22-2402. *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

Evidence in felony-murder prosecution of two defendants, neither one of whom entered apartment where murder was committed, established that murder of victim was the natural and probable consequence of defendants' prior preparation to kill victim's brother, and thus, such murder served as a predicate crime for aiding and abetting conviction, where defendants were part of a group of persons arrayed outside the brother's residence, prepared to kill him, and when they heard that the brother was not home turned and charged directly across

the street to the victim's apartment and shot him; under the circumstances, trial court's addition of "natural and probable consequence" language in aiding and abetting instruction did not render the charge erroneous. D.C. Code 1981, §§ 22-2401, 22-3202. *Williams v. United States*, 483 A.2d 292, 1984 D.C. App. LEXIS 524 (1984), writ of certiorari denied by 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236, 1985 U.S. LEXIS 4003 (1985).

Evidence in first-degree murder prosecution, including fact that two witnesses placed defendant close by when his brother shot victim and testified as well that shots came from area where defendant was standing, that one of the witnesses saw defendant's arm outstretched, apparently in a firing position, that more than one gun was involved in the shooting, and that defendant fled scene with his brother, was sufficient to sustain his conviction as a principal. *Miller v. United States*, 479 A.2d 862, 1984 D.C. App. LEXIS 430 (1984).

Evidence in first-degree murder prosecution, including fact that defendant encouraged brother's retaliatory attack on victim and sought by his presence to make it succeed, was sufficient to support defendant's conviction as an aider and abettor. *Miller v. United States*, 479 A.2d 862, 1984 D.C. App. LEXIS 430 (1984).

Evidence that defendant was present when murder occurred, that he moved from back seat of car to driver's seat during altercation and drove off when his associates got back in the car, and warned unwitting passenger not to tell anyone what he had witnessed was sufficient to support defendant's conviction for being accessory after the fact to felony-murder and armed robbery. D.C. Code 1981, § 22-105. *Jefferson v. United States*, 463 A.2d 681, 1983 D.C. App. LEXIS 420 (1983).

Fact that there was some evidence in first-degree murder prosecution that defendant attempted to break up earlier fight between his codefendant and murder victim and later cautioned his codefendant against shooting victim did not exonerate defendant as aider and abettor; such evidence was controverted and, in any event, did not otherwise negate account of his assisting with commission of homicide. D.C. Code § 22-105. *Byrd v. United States*, 364 A.2d 1215, 1976 D.C. App. LEXIS 394 (1976).

— Self-defense, weight and sufficiency of evidence.

Jury could not reasonably find defendant exceeded the bounds of lawful self-defense where the only government witness actually to see defendant shoot deceased and their actions just prior to the shooting testified that deceased came after defendant with an upraised bar stool and defendant shot him only after retreating and warning deceased verbally and by fir-

ing several shots into the floor and only after further retreat was impossible, and the government did not show that there were no bullet holes in the floor. *United States v. Bush*, 416 F.2d 823, 1969 U.S. App. LEXIS 11087 (C.A.D.C. 1969).

Evidence that defendant, though a stranger to both the deceased and his young woman acquaintance, accosted the latter, and a few minutes later spoke in an uncomplimentary manner to the deceased about her, and after five or ten minutes again approached and addressed them with provocative language, and that, after deceased allegedly reached for a knife or other weapon, defendant shot him and shot a second time at the deceased while the latter was running from him, held to sustain a conviction for first-degree murder as against the claim of self-defense. *Bostic v. U.S.*, 94 F.2d 636, 1937 U.S. App. LEXIS 4133 (1937).

Evidence held to warrant finding defendant

in matter of self-defense exceeded all necessities of case. *Holmes v. U.S.*, 11 F.2d 569, 1926 U.S. App. LEXIS 2541 (1926).

Once self-defense issue was introduced, Government was required to prove beyond reasonable doubt that defendant had not acted in self-defense. *Allen v. United States*, 603 A.2d 1219, 1992 D.C. App. LEXIS 58 (1992), writ of certiorari denied by 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916, 1992 U.S. LEXIS 4713, 60 U.S.L.W. 3879 (1992).

Once raised, self-defense is element of homicide which must be disproved by Government beyond reasonable doubt. *Gray v. United States*, 589 A.2d 912, 1991 D.C. App. LEXIS 80 (1991).

Evidence in homicide prosecution was sufficient for jury to reasonably reject defendant's claim that he acted in self-defense. D.C. Code § 22-2403. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

§ 22-2102. Same — Placing obstructions upon or displacement of railroads.

Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree. For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the first degree is a Class A felony.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 799; June 8, 2001, D.C. Law 13-302, § 4(b), 47 DCR 7249.)

Cross references. — Offenders convicted under this section, eligibility for furlough, see § 24-251.02.

Section references. — This section is referred to in §§ 11-502, 22-2103, and 24-2403.

Prior Codifications. — 1981 Ed., § 22-2402.

1973 Ed., § 22-2402.

Effect of amendments. — D.C. Law 13-302 added the last sentence.

Emergency legislation. — For temporary (90-day) amendment of section, see § 4(b) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of sec-

tion, see § 4(b) of the Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 4(b) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(b) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

CASE NOTES

ANALYSIS

Instructions.

Sentence and punishment.

Weight and sufficiency of evidence.

Instructions.

Where both Government and defendant opposed instructions on lesser included offenses as to defendant charged with burglary, attempted robbery, assault, and murder, trial

court's refusal to so instruct jury on request of codefendant was not error. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Sentence and punishment.

District of Columbia Good Time Credit Act did not supersede provision of statute providing for 20-year minimum year period of incarceration prior to parole eligibility for persons convicted of first-degree murder. D.C. Code 1981,

§§ 22-428(a), 22-2402, 22-2404(b). *Poole v. Kelly*, 954 F.2d 760, 1992 U.S. App. LEXIS 1059 (C.A.D.C. 1992).

Weight and sufficiency of evidence.

Evidence that defendant aided and abetted codefendant in crime of robbing decedent and burglarizing her home was sufficient to sustain conviction of felony-murder. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2401, 22-2402, 22-3202, 22-3204. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

§ 22-2103. Murder in the second degree.

Whoever with malice aforethought, except as provided in §§ 22-2101, 22-2102, kills another, is guilty of murder in the second degree. For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the second degree is a Class A felony.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 800; June 12, 1940, 54 Stat. 347, ch. 339; June 8, 2001, D.C. Law 13-302, § 4(c), 47 DCR 7249.)

Cross references. — Furlough eligibility, persons convicted under this section, see § 24-251.02.

Section references. — This section is referred to in §§ 11-502 and 23-546.

Prior Codifications. — 1981 Ed., § 22-2403.

1973 Ed., § 22-2403.

Effect of amendments. — D.C. Law 13-302 added the last sentence.

Emergency legislation. — For temporary (90-day) amendment of section, see § 4(c) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of sec-

tion, see § 4(c) of the Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 4(c) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(c) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

CASE NOTES

ANALYSIS

Adequacy of representation.

Admissibility of evidence.

—Admissions or declarations of accused, admissibility of evidence.

—Character and habits of accused, admissibility of evidence.

—Character and habits of decedent, admissibility of evidence.

—Circumstances preceding act, admissibility of evidence.

—Documentary evidence, admissibility of evidence.

—Dying declarations, admissibility of evidence.

—Evidence incriminating others, admissibility of evidence.

—Excuse or justification generally, admissibility of evidence.

—Expert testimony, admissibility of evidence.

—Harmless or reversible error, admissibility of evidence.

—Hearsay, admissibility of evidence.

—In general.

—Intent, malice, deliberation, and premeditation, admissibility of evidence.

—Intoxication, admissibility of evidence.

—Motive, admissibility of evidence.

—Opinion evidence, admissibility of evidence.

—Other offenses, admissibility of evidence.

—Res gestae, admissibility of evidence.

—Self-defense, admissibility of evidence.

—Subsequent incriminating or exculpatory circumstances, admissibility of evidence.

Arguments and conduct of counsel.

Arrest.

Collateral estoppel.

Constitutional rights of defendant.

Defenses generally.

Degree of offense.

—Common law, degree of offense.

—Distinction between first and second degree offense.

—First degree murder, degree of offense.

—In general.

—Manslaughter, degree of offense.

—Second degree murder, degree of offense.

Discovery.

Double jeopardy.

Examination of witnesses—Capacity and qualification of witnesses.

—Compelling calling of witness, examination of witnesses.

—Cross-examination of witnesses.

—Cross-examination of accused, examination of witnesses.

—Cumulative evidence, examination of witnesses.

—Scope of evidence in rebuttal, examination of witnesses.

—Separation and exclusion of witnesses, examination of witnesses, generally.

Harmless or reversible error, generally.

Indictment or information.

—Act or omission causing death, indictment or information.

—In general.

—Lesser included offenses, indictment or information.

—Malice, indictment or information.

—Specification of grade or degree of homicide, indictment or information.

Instructions.

—Accident or misfortune, instructions.

—Commission of or attempt to commit other offense, instructions.

—Defense of another, instructions.

—Defense of habitation, instructions.

—Deliberation and premeditation, instructions.

—Discharge of jury before verdict, instructions.

—Grade or degree of murder, instructions.

—Grade or degree of manslaughter, instructions.

—Grade or degree of offense generally, instructions.

—Harmless or reversible error, instructions.

—In general.

—Instructions after submission of cause.

—Intoxication, instructions.

—Lesser-included offenses, instructions.

—Malice, instructions.

—Motive, instructions.

—Necessity and sufficiency, instructions.

—Passion and provocation, instructions.

—Principals and accessories, instructions.

—Self-defense, instructions.

Joint or separate trial of charges.

Joint or separate trials of codefendants.

Juvenile adjudications, generally.

Merger of offenses.

Mistrial.

Nature and elements of homicide offenses—In general.

—Different offenses in same transaction, nature and elements of homicide offenses.

—Express malice, nature and elements of homicide offenses.

—Implied malice, nature and elements of homicide offenses.

—Intent or design to effect death, nature and elements of homicide offenses.

—Malice generally, nature and elements of homicide offenses.

—Time of death, nature and elements of homicide offenses.

Persons liable.

Pleas.

Presumptions and burden of proof.

—Excuse or justification, presumptions and burden of proof.

—Grade or degree of offense, presumptions and burden of proof.

—Malice.

—Self-defense, presumptions and burden of proof.

Questions of law and fact.

—Defense of another, questions of law and fact.

—Elements of offense, questions of law and fact.

—Grade or degree of offense, questions of law and fact.

—In general.

—Insanity or intoxication, questions of law and fact.

—Principals and accessories, questions of law and fact.

—Self-defense, questions of law and fact.

Review.

—Determination and disposition, review.

—In general.

—Matters reviewable.

—Presentation and reservation of grounds for review.

—Right of review.

Self-defense.

—Aggression or provocation, self-defense.

—Apprehension of danger, self-defense.

—Duty to retreat, self-defense.

—In general.

—Voluntary participation in combat, self-defense.

Sentence and punishment.

Speedy trial rights.

Verdict.

Weight and sufficiency of evidence.

—Cause or time of death, weight and sufficiency of evidence.

—Commission of or attempt to commit other offense, weight and sufficiency of evidence.

- Commission of or participation in act by accused, weight and sufficiency of evidence.
- Degree of homicide generally, weight and sufficiency of evidence.
- Degree of murder, weight and sufficiency of evidence.
- In general.
- Insanity or other incapacity, weight and sufficiency of evidence.
- Malice, weight and sufficiency of evidence.
- Passion and provocation, weight and sufficiency of evidence.
- Principals and accessories, weight and sufficiency of evidence.
- Self-defense, weight and sufficiency of evidence.

Adequacy of representation.

Assistance of defense counsel was not inadequate because of refusal, on tactical and other grounds, to cross-examine the Government's principal witness who was 15 years old at time of offense and 16 at time of trial, where it was apparent that had such witness testified further, there was a strong likelihood she would have testified to additional facts that would have supplied factual elements from which jury might have found both defendants guilty of first-degree felony murder or premeditated murder as well as armed robbery and robbery instead of only second-degree murder. D.C. Code §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Assistance of defense counsel in prosecution for first-degree murder and robbery was not inadequate for failure to cross-examine the Government's principal witness who was 15 years old at time of offense and 16 at time of trial which failure was attributable to a failure to interview the witness or do adequate research, where record disclosed that counsel had adequate knowledge of the facts, counsel were skilled and experienced, and their tactics were highly successful in that they secured acquittals on two first-degree murder charges for each defendant and also acquittals on both robbery charges. D.C. Code §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Defendant was not denied his Sixth Amendment right to assistance of counsel because the court's refusal to admit defendant's statements at start of his testimony regarding what he had stated to police officer shortly after the murder made it impossible for the defendant to present his case "in the best light legally possible." D.C. Code §§ 22-2401, 22-2403; U.S. Const. Amend. 6. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

Decision by trial counsel, for defendant who was not identified by female eyewitness as one of the attackers, to not call witnesses who could allegedly impeach testimony of the eyewitness, did not prejudice defendant as required in order to establish ineffective assistance of counsel claim in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; defendant contended that impeaching eyewitness's account that she saw the attackers would also undermine the credibility of her testimony that the day after the assaults defendant threatened to kill her if she cooperated with police, but eyewitness was impeached for bias because her boyfriend cooperated with the prosecution and for her delay in reporting defendant's threat, jury believed eyewitness despite such impeachment, and it was unlikely that calling additional witnesses to impeach eyewitness would have swayed the jury otherwise. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Decision by trial counsel, for defendant who was not identified by female eyewitness as one of the attackers, to not call witnesses who could allegedly impeach the eyewitness, was a reasonable trial strategy and thus did not constitute deficient performance, as required in order to establish an ineffective assistance of counsel claim in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene; defendant contended that impeaching eyewitness's account that she saw the attackers would also undermine the credibility of eyewitness's testimony that the day after the assaults defendant threatened to kill her if she cooperated in police investigation, but defendant's counsel and the attorneys for the other defendants concluded after interviewing the witnesses that such witnesses would not be credible and would likely hurt the defendants more than help. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Even if counsel's performance was deficient in pressing codefendant on cross-examination on whether he had seen his client attack passerby, which resulted in testimony that client hit passerby in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene,

counsel's client was not prejudiced as required for an ineffective assistance claim, as counsel quickly recovered by impeaching codefendant with grand jury testimony in which codefendant did not identify client as one of the attackers, and two other government witnesses had identified client as participating in the attack on passerby. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Risk that defense counsel took during cross-examination of codefendant by pressing codefendant on whether counsel's client was present at scene of attack, which resulted in codefendant testifying that he saw client hit passerby who subsequently died from stab wounds, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, fell within the range of reasonable conduct and thus did not constitute deficient performance as required for an ineffective assistance claim; codefendant had not identified counsel's client as one of the attackers in codefendant's grand jury testimony, codefendant had not identified counsel's client as one of the attackers in his trial testimony until counsel's cross-examination, and it was not unreasonable for counsel to suspect that codefendant had not seen client attack passerby and take calculated risk in pressing codefendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Trial counsel's decision not to call witnesses who allegedly would have provided exculpatory testimony for his client was a reasonable strategic choice and thus did not constitute ineffective assistance, in trial of five defendants including counsel's client arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, where counsel interviewed the witnesses, proffered testimony of two witnesses who were interviewed more than once repeatedly changed with one witnesses parroting the other, proffered testimony of such two witnesses even if true would have placed defendant at the scene of the assaults, and two other witnesses, who would have allegedly impeached testimony of government witness, had provided inconsistent statements to the police, and calling such witness posed the risk of making government witness more credible. *Perez v. United States*, 968 A.2d

39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Counsel's allegedly deficient performance in failing to call expert on homicide investigations to testify at murder trial was not prejudicial, as element of ineffective assistance of counsel, though expert's testimony that passenger had not been seated in vehicle when defendant shot and killed him would have supported defendant's self-defense theory that passenger had been exiting vehicle, where expert's opinion could have been easily discredited on cross-examination; expert relied on photograph which expert believed was crime scene but which was actually arrest scene, which was photographed after vehicle had traveled four blocks from site of shooting and after paramedics had opened passenger door and forcibly removed passenger from passenger seat. *Lopez v. United States*, 863 A.2d 852, 2004 D.C. App. LEXIS 699 (2004).

Counsel's allegedly deficient performance in failing to call eyewitness to testify at murder trial was not prejudicial, as element of ineffective assistance of counsel, though eyewitness' affidavit stated that passenger door of vehicle had been open when defendant shot and killed passenger, and such fact would support defendant's self-defense theory that passenger had been exiting the vehicle; affidavit also stated that eyewitness had not seen passenger get out of vehicle, which contradicted defendant's testimony that passenger had been exiting the vehicle, and affidavit was contradicted by eyewitness' earlier statements to prior counsel and to defense investigator. *Lopez v. United States*, 863 A.2d 852, 2004 D.C. App. LEXIS 699 (2004).

Defendant received full benefit of counsel in connection with negotiated guilty plea to second-degree murder while armed, as factor weighing against allowing defendant to withdraw the plea before sentencing; even if counsel did not prepare defendant to testify, defendant had decided to plead guilty a few weeks before the case was to go to trial and had not communicated his intent to renege on plea deal, and while counsel advised defendant to accept the plea agreement, counsel told defendant he would try the case if defendant wanted him to. *Lopez v. United States*, 863 A.2d 852, 2004 D.C. App. LEXIS 699 (2004).

Trial court's disqualification of defense counsel due to counsel's representation of jailhouse informant who was going to testify in defendant's murder trial was not arbitrary; court held two hearings on the matter and allowed counsel and the prosecutor to articulate their

arguments, and the court listened to a lengthy proffer by the government on what the informant would testify about and how he obtained his information. *Pinkney v. United States*, 851 A.2d 479, 2004 D.C. App. LEXIS 316 (2004).

Trial court did not abuse its discretion in disqualifying defense counsel due to potential conflict of interest; counsel had previously represented a jailhouse informant who was going to testify at defendant's murder trial, and thus, the impeachment of informant would likely be accomplished by eliciting specific instances of misconduct involving matters of truthfulness that defense counsel gained through his previous attorney-client relationship so that his previous representation was relevant to the issues and determinations presented in defendant's case, even though his previous representation of informant was not substantially related to the subject matter of defendant's murder trial. *Pinkney v. United States*, 851 A.2d 479, 2004 D.C. App. LEXIS 316 (2004).

Any deficient performance by trial counsel, in second-degree murder prosecution arising from death of defendant's infant daughter from scalding bath, in failing to present promised evidence that defendant's wife suffered from mental illness and had committed the offense was not prejudicial and thus did not constitute ineffective assistance in view of overwhelming evidence of guilt. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Trial counsel's failure, in second-degree murder prosecution arising from death of defendant's infant daughter from scalding bath, to pursue defense of accident or mistake was reasonable tactical choice and did not constitute ineffective assistance; there was evidence that defendant asked neighbor to help him secrete babies after older daughter called police and that defendant failed for three days to seek medical attention for victim, and trial court ruled that an accident defense would "open the door" to evidence of defendant's prior physical abuse of his children. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Defendant was not prejudiced by defense counsel's erroneous advice regarding prosecutor's plea offer, as required to support ineffective assistance claim; defendant was convicted of same offense to which he claimed he would have pled guilty had he been correctly advised and was subject to same penalties. U.S. Const. Amend. 6; D.C. Code 1981, §§ 22-2403, 22-3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

In proceeding in which defendant was convicted of second-degree murder while armed and of carrying pistol without license and in

which defense counsel unsuccessfully sought to be permitted to elicit hearsay testimony from officer in regard to a declarant's alleged statement that specified individual other than defendant had shot victim, counsel's failure to secure attendance of declarant, who was absent from the jurisdiction, was not a denial of effective assistance of counsel. D.C. Code §§ 22-2403 to 22-3202, 22-3204; U.S. Const. Amend. 6. *Jackson v. United States*, 424 A.2d 40, 1980 D.C. App. LEXIS 416 (1980), writ of certiorari denied by 454 U.S. 1127, 102 S. Ct. 979, 71 L. Ed. 2d 116, 1981 U.S. LEXIS 3006, 50 U.S.L.W. 3487 (1981).

Admissibility of evidence.

— Admissions or declarations of accused, admissibility of evidence.

Where defendant, before being charged or arrested for any crime and without interrogation or coercion of any sort, stated, in reply to police officer's mere request that he identify himself, that he had killed person at given address, statement was voluntarily given and admissible in evidence despite fact that defendant was admittedly inebriated at time statement was made. D.C. Code §§ 22-2403, 22-2405; 18 U.S.C. § 3501; U.S. Const. Amendments. 5, 14. *United States v. Bennett*, 495 F.2d 943, 1974 U.S. App. LEXIS 10650 (C.A.D.C. 1974).

In murder prosecution, wherein defendant proposed to take the stand first and then introduce a written statement which he had made to police officer that defendant had killed victim in self-defense, for purpose of corroborating what defendant was going to state on the stand, such statement was properly excluded at that time as hearsay and as corroborating an exculpatory statement that was self-serving. D.C. Code §§ 22-2401, 22-2403. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

Statements made during a conversation between defendant and three other persons about the shooting of victim and preceding events, as related by witness during his grand jury testimony, were admissible at a murder trial as adoptive admissions of defendant; the grand jury testimony, if believed, placed defendant at the conversation, established that the conversation involved statements that were inconsistent with what was being argued by defendant at trial, and established that defendant did not contradict or rebut any of those statements even though they were made in front of a third-party non-accomplice and contained assertions of fact that, if untrue, defendant would naturally be expected to deny. *Blackson v. United States*, 979 A.2d 1, 2009 D.C. App. LEXIS 355 (2009).

Detective's testimony that defendant told him that when she was high on marijuana, she

sometimes felt paranoid or believed that men were about to do something to her was admissible in second-degree murder prosecution as admission of party-opponent, and relevant to reasonableness of any fear she harbored toward victim that would support self-defense claim. D.C. Code 1981, §§ 22-2403, 22-3202. *United States v. Williams*, 697 A.2d 1244, 1997 D.C. App. LEXIS 165 (1997).

Defendant's statement to police officer after he had asserted his rights to remain silent and to counsel that "I had to sacrifice him" expressed a desire to discuss the murder investigation and "initiated" a conversation within the meaning of the *United States Supreme Court's* *Edwards* and *Bradshaw* decisions regarding waiver of such rights. U.S. Const. Amends. 5, 6; D.C. Code 1981, §§ 22-2403, 22-3202. *Rogers v. United States*, 483 A.2d 277, 1984 D.C. App. LEXIS 523 (1984), writ of certiorari denied by 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 363, 1985 U.S. LEXIS 1102, 53 U.S.L.W. 3599 (1985).

Alibi statement made by defendant to undercover government agent, in response to statement by government informer to defendant that the agent knew a deputy marshal who could help him, and that if the agent asked about the murder for which defendant had been arrested, defendant could tell agent he had been with informer at a party at the time the murder occurred was not given to agent involuntarily, and therefore use of it at trial did not violate defendant's Fifth Amendment right against self-incrimination, as the agent was investigating the deputy marshal and not defendant, and as, defendant was not required to meet with agent, but did so voluntarily. U.S. Const. Amend. 5; D.C. Code 1973, §§ 22-2403 to 22-3202(a)(1), 22-3204. *Hill v. United States*, 434 A.2d 422, 1981 D.C. App. LEXIS 336 (1981), writ of certiorari denied by 454 U.S. 1151, 102 S. Ct. 1020, 71 L. Ed. 2d 307, 1982 U.S. LEXIS 432, 50 U.S.L.W. 3548 (1982).

Where defendant had not yet been indicted for murder at point when, in response to statement by government informer to defendant that undercover government agent knew a deputy marshal who could help him, and statement that if the agent asked about the murder, defendant could tell agent he had been with informer at a party at the time the murder occurred, defendant made a statement to that effect during his conversation with agent, rule providing that an accused's right to counsel is violated where there is used at trial evidence of his own incriminating words which federal agents have deliberately elicited from him after he has been indicted and in the absence of counsel did not apply; therefore, defendant was not entitled to prevent introduction into evidence of the alibi he gave agent. U.S. Const. Amend. 6; D.C. Code 1973, §§ 22-2403 to 22-

3202(a)(1), 22-3204. *Hill v. United States*, 434 A.2d 422, 1981 D.C. App. LEXIS 336 (1981), writ of certiorari denied by 454 U.S. 1151, 102 S. Ct. 1020, 71 L. Ed. 2d 307, 1982 U.S. LEXIS 432, 50 U.S.L.W. 3548 (1982).

— Character and habits of accused, admissibility of evidence.

Testimony of defendant's former wife that defendant became quarrelsome when drinking at the time that they were married more than 20 years prior to killing of defendant's girlfriend had little or no relevance to relationship between defendant and his girlfriend. *Clark v. United States*, 593 A.2d 186, 1991 D.C. App. LEXIS 188 (1991).

Ordinarily, in a homicide trial, character of deceased is irrelevant to question whether accused has committed crime charged; but, where evidence tends to show, even in slightest degree, that killing was in self-defense or leaves any doubt as to identity of first aggressor, peaceful or violent character of decedent becomes particularly significant and should be admitted. *Carter v. United States*, 475 A.2d 1118, 1984 D.C. App. LEXIS 363 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1097, 53 U.S.L.W. 3599 (1985).

Whether a defendant or some other defense witness in homicide prosecution testifies about deceased victim's violent character or its relevance to "reasonable fear" and/or "aggressor" aspects of self-defense claim, general rule of policy against admission of evidence about defendant's own character shall prevail, unless defendant first places her own good character in issue. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

In murder prosecution, testimony concerning defendant's homosexual relationship with victim was admissible, in that testimony was highly relevant to question of motive or intent, the central issue in the case, and was not presented in such way as to be unduly inflammatory. *Smith v. United States*, 381 A.2d 258, 1977 D.C. App. LEXIS 308 (1977).

— Character and habits of decedent, admissibility of evidence.

Where defendant in murder case has raised defense of accident, suicide, or self-defense, victim's state of mind is of particular concern to jury. *United States v. Williams*, 697 A.2d 1244, 1997 D.C. App. LEXIS 165 (1997).

— Circumstances preceding act, admissibility of evidence.

Testimony by the witness that, shortly before the decedent was shot, the decedent told the witness that he had had an argument with one of the defendants was inadmissible as, in addition to showing fear on the part of the decedent, it carried the plain inference that the defendant

had the state of mind and a reason to murder the decedent. Fed.Rules Evid. rule 803(3), 18 U.S.C. *United States v. Day*, 591 F.2d 861, 1978 U.S. App. LEXIS 7223 (C.A.D.C. 1978).

Although decedent's statement, made to witness shortly before the decedent was shot, that his leg was hurting him was a spontaneous statement describing a contemporary physical condition, and thus within exception to the hearsay rule, it would be admissible to show the intensity of a fight between the decedent and the defendant only if the Government could lay a proper foundation by showing, by other evidence, that such a fight had occurred. Fed.Rules Evid. rule 803(3), 18 U.S.C. *United States v. Day*, 591 F.2d 861, 1978 U.S. App. LEXIS 7223 (C.A.D.C. 1978).

Evidence of one defendant's activities prior to alleged homicide was admissible in prosecution of three defendants for such homicide, in view of close proximity, in time, place and persons between such activities and subsequent homicide. D.C. Code 1961, § 22-2401. *Turberville v. U.S.*, 303 F.2d 411, 1962 U.S. App. LEXIS 6036 (C.A.D.C. 1962).

In prosecution for murder in the second degree by shooting decedent with a gun, evidence that two weeks prior to the shooting, a gun had been seen lying in defendant's bed was admissible in evidence even though no connection was shown between the gun seen on defendant's bed and the murder gun. *Morton v. U.S.*, 183 F.2d 844, 1950 U.S. App. LEXIS 3018 (C.A.D.C. 1950).

In murder prosecution, evidence of uncommunicated complaint which victim of defendant had made about his work prior to the offense was properly excluded, where the complaint was not a threat, and there was no claim of self-defense. *Fisher v. U.S.*, 149 F.2d 28, 1945 U.S. App. LEXIS 2550 (1945).

Evidence as to defendant's conduct in his mother's home years before date of offense was irrelevant and immaterial in murder prosecution. *United States v. White*, 225 F. Supp. 514, 1963 U.S. Dist. LEXIS 6247 (D.D.C.1963), remanded by 349 F.2d 965, 121 U.S. App. D.C. 287, 1965 U.S. App. LEXIS 5055 (1965).

Trial court did not abuse its discretion in finding prosecution witness, who had been diagnosed with paranoid schizophrenia and recently hospitalized for psychiatric problems, competent to testify in prosecution for manslaughter while armed and related weapons offenses; witness did not display kinds of mental impairments that would suggest testimonial incapacity, witness demonstrated understanding of what it meant to testify truthfully and was oriented in time and place, and testimony of witness, although her memory was imperfect, was responsive and her account of events at issue was coherent and consistent with recollections of other witnesses. *Dorsey v.*

United States, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

Probative value of evidence focusing on presence of defendants and their access to guns prior to murder of victim, and at time of murder of another victim, and defendant's reaction to third party's arrest, was not substantially outweighed by danger of unfair prejudice in murder prosecution; evidence established at least a reasonable probability defendants either were seen with, or had reasonable access to, guns probably used in two murders, and helped to explain murder of victim, but did not show any armed robbery, or establish murder of other victim. *Hartridge v. United States*, 896 A.2d 198, 2006 D.C. App. LEXIS 142 (2006), writ of certiorari denied by 549 U.S. 1272, 127 S. Ct. 1503, 167 L. Ed. 2d 242, 2007 U.S. LEXIS 2963, 75 U.S.L.W. 3473 (2007).

Evidence in murder prosecution focusing on presence of defendants and their access to guns prior to murder of victim, and at time of murder of another victim, and defendant's reaction to third party's arrest, was not typically *Drew* evidence, and thus, did not require a *Drew* analysis, which determines admissibility of other wrongful acts evidence. *Hartridge v. United States*, 896 A.2d 198, 2006 D.C. App. LEXIS 142 (2006), writ of certiorari denied by 549 U.S. 1272, 127 S. Ct. 1503, 167 L. Ed. 2d 242, 2007 U.S. LEXIS 2963, 75 U.S.L.W. 3473 (2007).

Eyewitness's testimony that, two years before shooting in question, he had seen defendant carrying "same gun" that was used to shoot victim was admissible in murder trial as evidence of guilt, even though testimony established only reasonable probability, and not certainty, that defendant possessed murder weapon, and defendant argued that testimony referred to event too remote in time. *Adams v. United States*, 883 A.2d 76, 2005 D.C. App. LEXIS 469 (2005).

With respect to deaths that are unintentional, e.g., second-degree, depraved heart murder, evidence of prior bad acts can be admitted to prove malice element of a defendant's consciousness of the risk of death or serious bodily injury to third persons, so long as the probative value of such evidence is not substantially outweighed by its prejudicial effect. *Curry v. United States*, 793 A.2d 479, 2002 D.C. App. LEXIS 51 (2002).

In prosecution for second-degree murder arising from defendant's dump truck colliding with victim's vehicle, prior bad acts evidence that defendant had an earlier collision while driving the same truck that was caused in part by defective brakes was relevant to establish defendant's subjective awareness of the risks posed by his driving, which was necessary to establish element of malice based on theory that defendant acted with a depraved heart,

i.e., wanton and willful disregard of a known, unreasonable risk to human life. *Curry v. United States*, 793 A.2d 479, 2002 D.C. App. LEXIS 51 (2002).

In prosecution for second-degree murder arising from defendant's dump truck colliding with victim's vehicle, other crimes evidence of defendant's repeated driving violations during the previous 16 months was relevant to establish defendant's subjective awareness that driving over the speed limit and in disregard of posted signals was dangerous, which was necessary to establish element of malice based on theory that defendant acted with a depraved heart, i.e., wanton and willful disregard of a known, unreasonable risk to human life. *Curry v. United States*, 793 A.2d 479, 2002 D.C. App. LEXIS 51 (2002).

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Trial court did not abuse its discretion in limiting scope of manslaughter defendant's testimony regarding his previous encounters with victim; defendant presented evidence that victim was drug dealer who pressured him for money and that victim came to defendant's apartment unannounced, defendant testified that he was afraid of victim, had several arguments with victim, and there was evidence that victim bypassed secured entry system at defendant's apartment building. D.C. Code 1981, §§ 22-2403, 22-3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Evidence of defendant's prior threats and assaults against assault victim, his former girlfriend, was admissible in murder and assault prosecution to prove defendant's identity as victim's assailant, which defendant contested. *Parks v. United States*, 656 A.2d 1137, 1995 D.C. App. LEXIS 73 (1995), writ of certiorari denied by 516 U.S. 873, 116 S. Ct. 198, 133 L.

Ed. 2d 133, 1995 U.S. LEXIS 6237, 64 U.S.L.W. 3245 (1995).

Hearsay statements of decedent indicating fear of defendant are admissible in homicide case under state of mind exception; hearsay evidence of a prior specific act by the defendant is not. *Giles v. United States*, 432 A.2d 739, 1981 D.C. App. LEXIS 322 (1981).

Admissibility of extrajudicial declarations that a homicide victim feared the accused must be determined by a careful balancing of their probative value against their prejudicial effect. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

Direct evidence of a homicide victim's mental state, such as the declaration "I am afraid of D", are considered hearsay if offered to prove the truth of their contents; however, such declarations are generally admissible under the present state of mind exception to the hearsay rule. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

Extrajudicial declarations which are only circumstantially probative of a homicide victim's state of mind, such as a statement that "D threatened to kill me," are offered not to prove the truth of what was said but to circumstantially show the victim's state of mind toward the accused and, therefore, the hearsay rule is not applicable to such declarations; however, such declarations present an admissibility problem in that they involve extraneous factual elements which create risk that they will be considered by the jury not only as circumstantial evidence of the declarant's mental state but also for the truth of the matters asserted therein. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

In prosecution for assault or homicide accused may show prior acts of violence by alleged victim to support claim of self-defense. *King v. U.S.*, 177 A.2d 912, 1962 D.C. App. LEXIS 254 (Cr.App. 1962).

— Documentary evidence, admissibility of evidence.

In murder prosecution, trial court acted within its discretion in admitting two black and white photographs of inside of house showing where victim was standing when he was shot and where he fell, where photographs were probative of place where victim was shot, and were material on issues in the case. D.C. Code §§ 22-2401, 22-2403. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

Photograph of government witness holding a revolver was not inadmissible on ground that probative value of the photograph was substantially outweighed by danger of unfair prejudice in prosecution for second degree murder while armed, despite witness's "menacing" and "thug-like" pose and defendant's inability to date the

photograph or establish that the gun in the photograph was same one used to kill the victim; defendant contended that the witness committed the crime, there was no question that the witness was part of the group present before, during, and after the shooting, and the witness had testified that the same type of gun displayed in the photograph was owned by defendant, and that he had seen it many times, had access to it, had handled it in months preceding the crime, and that he and defendant brought their respective weapons on night of the murder. *Burgess v. United States*, 786 A.2d 561, 2001 D.C. App. LEXIS 251 (2001), writ of certiorari denied by 537 U.S. 854, 123 S. Ct. 210, 154 L. Ed. 2d 88, 2002 U.S. LEXIS 5668, 71 U.S.L.W. 3238 (2002).

Photographs of defendant's infant daughter undergoing hospital treatment two to three days after being placed in scalding bath, and of daughter's body taken in the medical examiner's office, were admissible to establish malice element of second degree murder and to establish elements of cruelty to children, despite defense offers to stipulate that victim was placed in sitting position in hot tub and as a result suffered burns resulting in her death. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Trial court did not abuse its discretion in prohibiting defendant from introducing into evidence photographs of a 1975 death scene involving his mother, nor did exclusion of said photographs violate his constitutional right to present a defense, notwithstanding his insanity defense to murder charge that his mental illness stemmed from his discovery of his mother's body in addition to the bodies of other neighbors. D.C. Code 1981, §§ 22-2403, 22-3202; U.S.C. Const. Amends. 6, 14. *Rogers v. United States*, 483 A.2d 277, 1984 D.C. App. LEXIS 523 (1984), writ of certiorari denied by 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 363, 1985 U.S. LEXIS 1102, 53 U.S.L.W. 3599 (1985).

— Dying declarations, admissibility of evidence.

For statement to be admissible under dying declaration exception to hearsay rule, declarant must have spoken without hope of recovery and in shadow of impending death. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

Victim's statement that defendant "told them to shoot me" was admissible under dying declaration exception to hearsay rule where victim made statement after being shot in chest and victim asked responding officer not to move him because he had been shot too many times. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

Finding that victim spoke with sense of impending death when he identified defendant as perpetrator of stabbing was supported by evidence that victim had been stabbed ten times with double-edged knife, penetrating his lungs, spleen, stomach, arms, and back, that he was bleeding profusely and staggering before he collapsed on pavement, and that he repeatedly emphasized to police officer who heard his statement that he was in pain. *Jenkins v. United States*, 617 A.2d 529, 1992 D.C. App. LEXIS 303 (1992).

In order to admit a statement as a dying declaration, there is no requirement that the declarant actually state that he knows he is going to die; such knowledge may be inferred from the nature and extent of the declarant's wounds. *Butler v. United States*, 614 A.2d 875, 1992 D.C. App. LEXIS 188 (1992), writ of certiorari denied by 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558, 1992 U.S. LEXIS 7611, 61 U.S.L.W. 3401 (1992).

— Evidence incriminating others, admissibility of evidence.

Murder defendant was properly precluded from presenting evidence in support of third-party perpetrator defense, as he failed to establish relevancy requirement that others had the practical opportunity to commit the crime; defendant's proffer was merely rooted in the allegedly widespread ill will against the victim, in that he alleged others with reason to seek revenge on victim may have been present in a nearby neighborhood or in a bordering state. *Resper v. United States*, 793 A.2d 450, 2002 D.C. App. LEXIS 50 (2002), writ of certiorari denied by 540 U.S. 890, 124 S. Ct. 274, 157 L. Ed. 2d 163, 2003 U.S. LEXIS 6422, 72 U.S.L.W. 3242 (2003).

Testimony concerning assault on victim by her boyfriend prior to fatal weekend was admissible in prosecution of defendant for second-degree murder to show that someone other than defendant caused fatal blow; evidence of boyfriend's relationship with victim and fact that he had assaulted her in past was relevant to ultimate issue of cause of death, Government's theory of causation was based on circumstantial proof, and defense proffered medical evidence from which jury could conclude that defendant's slap of victim's face had not caused her death. *Stack v. United States*, 519 A.2d 147, 1986 D.C. App. LEXIS 493 (1986).

— Excuse or justification generally, admissibility of evidence.

In proceeding in which a defendant was convicted of second-degree murder, attempted armed robbery, conspiracy and two counts of assault with deadly weapon, refusal to admit evidence which assertedly would have established that he suffered severe mental limita-

tions when facing panic situation and that, he could not have formed intent necessary for second-degree murder was proper, in that defense of diminished responsibility was not a recognized defense. *Jones v. United States*, 386 A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

— **Expert testimony, admissibility of evidence.**

Any error in trial court's exclusion of expert opinion testimony that victim likely died from injuries caused by one defendant punching victim and by victim's subsequent fall to the ground was harmless as to two other defendants at a joint trial for second-degree murder under a theory of aiding and abetting, even though the punch and victim's fall to the ground occurred before the other defendants kicked victim; probative value of the expert's testimony was minimal at best given certain admissions and concessions made by him, and, *inter alia*, even if the first defendant had inflicted the lethal blow, his having done so would not negate the other defendants' *actus reus* of assisting or participating in second-degree murder. *Johnson v. United States*, 980 A.2d 1174, 2009 D.C. App. LEXIS 454 (2009), writ of certiorari denied by 131 S. Ct. 367, 178 L. Ed. 2d 237, 2010 U.S. LEXIS 7200, 79 U.S.L.W. 3205 (U.S. 2010), writ of certiorari denied by 131 S. Ct. 263, 178 L. Ed. 2d 174, 2010 U.S. LEXIS 6845, 79 U.S.L.W. 3202 (U.S. 2010).

Prosecutor's cross-examination of three defense witnesses, namely, a psychiatrist, psychologist, and defendant's sister about their knowledge of defendant's arrest record was proper to impeach their credibility, where defendant proffered a defense of insanity at the time he committed a murder. D.C. Code 1981, §§ 22-2403, 22-3202. *Rogers v. United States*, 483 A.2d 277, 1984 D.C. App. LEXIS 523 (1984), writ of certiorari denied by 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 363, 1985 U.S. LEXIS 1102, 53 U.S.L.W. 3599 (1985).

— **Harmless or reversible error, admissibility of evidence.**

Given trial context and lack of objection, no prejudicial error was established in trial court's refusal to admit arrest record of deceased, in homicide prosecution, there being no crime of violence on such record. D.C. Code § 22-2403. *United States v. Perkins*, 498 F.2d 1054, 1974 U.S. App. LEXIS 8461 (C.A.D.C. 1974).

Given trial context and lack of objection, no prejudicial error was established in admission of testimony, in homicide prosecution, as to defendant's postarrest statement, no question having been raised at trial that statement should be paraphrased by detective rather than

read. D.C. Code § 22-2403. *United States v. Perkins*, 498 F.2d 1054, 1974 U.S. App. LEXIS 8461 (C.A.D.C. 1974).

In view of trial context and lack of objection, no prejudicial error was established when trial court permitted prosecutor, in homicide prosecution, to ask as to character of deceased, after defense counsel had initiated this line of inquiry. D.C. Code § 22-2403. *United States v. Perkins*, 498 F.2d 1054, 1974 U.S. App. LEXIS 8461 (C.A.D.C. 1974).

Conviction would not be reversed because trial judge failed to exercise his discretion in admitting or refusing to admit as impeaching evidence three prior assault convictions of defendant charged with second-degree murder. D.C. Code 1961, § 22-2403. *Lewis v. United States*, 381 F.2d 894, 1967 U.S. App. LEXIS 5799 (C.A.D.C. 1967).

Error in admitting reports of DNA and serology tests through testimony of forensics experts who were not involved in testing or preparing reports, in violation of defendant's right of confrontation, was not harmless beyond reasonable doubt, in trial for murder; without reports, circumstantial evidence was not sufficient, in that there were no witnesses to crime, defendant's fingerprints were not found on murder weapon, and alleged confession to government informant was highly suspect after informant was impeached with ample reward he received in exchange for his testimony. *Gardner v. United States*, 999 A.2d 55, 2010 D.C. App. LEXIS 351 (2010).

Probative value of evidence, consisting of defendant's handwritten rap lyrics, was not outweighed by its prejudicial effect in prosecution for voluntary manslaughter while armed and related weapons offenses; lyrics were probative of defendant's identity as shooter, and lyrics were not only evidence that defendant was a drug dealer, since witness testified that defendant had sold marijuana to her and her friends on night of shooting, and one of those friends testified that defendant had been his supplier of marijuana for over a year. *Dorsey v. United States*, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

Any error in trial judge's precluding defendant from eliciting evidence of disposal of gun, which evidence was allegedly critical to third-party perpetrator defense, was harmless, given strength of evidence against defendant, in prosecution for second-degree murder while armed and weapons offenses; three eyewitnesses identified defendant as the shooter, all witnesses specifically denied seeing alleged gunman with gun on evening in question, and alleged gunman did not have motive to kill victim. D.C. Code 1981, §§ 22-2403, 22-3202, 22-3204(a, b). *Boykin v. United States*, 738 A.2d 768, 1999 D.C. App. LEXIS 219 (1999).

Any error in trial court's limiting scope of manslaughter defendant's testimony regarding his previous encounters with victim was harmless, considering strength of government's case as to excessiveness of force used against victim. D.C. Code 1981, §§ 22-2403, 22-3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

In prosecution for assault with intent to murder while armed, trial court's exclusion of proffered testimony on provocation/mitigation by defendant and defense witness was harmless beyond reasonable doubt as to defendant, given centrality of testimony to defense, as well as its relative strength bearing on provocation issue, and further given potential importance of provocation evidence on ultimate outcome, despite strength of government's case. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Any error in excluding evidence of other crimes committed by third party alleged by homicide defendant to have been actual shooter did not prejudice defense sufficiently to render defendant's conviction constitutionally infirm; much of proffered evidence was brought before jury through defense witness and, moreover, alleged shooter's culpability was not inconsistent with defendant's guilt as aider and abettor. *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Keeping evidence of victim's boyfriend's prior assault on victim from jury was not harmless error in murder prosecution in which boyfriend testified for prosecution, where evidence of parties' phlegmatic relationship was relevant to explain how new injury might have occurred, nature of that relationship was admitted by victim's boyfriend, prior incidents were not so remote in time as to be irrelevant to parties' relationship on date defendant slapped victim, and Government's evidence of causation was circumstantial. *Stack v. United States*, 519 A.2d 147, 1986 D.C. App. LEXIS 493 (1986).

Error in excluding testimony of acquaintance of homicide victim, who was also a friend of defendant, as to victim's purported threat against defendant, which fell within state-of-mind exception to hearsay rule and was more probative than prejudicial, was harmless in view of fact that record was replete with references to victim's sometimes acrimonious behavior toward defendant and that there was considerable testimony concerning victim's violent nature. *Hairston v. United States*, 500 A.2d 994, 1985 D.C. App. LEXIS 532 (1985).

Reversal of second-degree murder while armed conviction was required where the Court of Appeals could not say with sufficient certainty that evidence which was properly admitted was so overwhelming that defendant was not impermissibly and unduly prejudiced by introduction of witness' highly damaging hearsay statement as to defendant previously holding a gun to victim's head. D.C. Code §§ 22-2403, 22-3202. *Campbell v. United States*, 391 A.2d 283, 1978 D.C. App. LEXIS 566 (1978).

Defendant in prosecution for second-degree murder was not prejudiced by exclusion of testimony regarding prior consistent statements by defendant to show her state of mind at time of killing where other evidence was presented by defendant on such issue. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

Even assuming that jury erroneously considered testimony of homicide victim's sister concerning extrajudicial statements by victim and by defendant's sister as substantive evidence that defendant had threatened the victim rather than merely as reflecting on victim's mental state, any resulting prejudice was minimal in light of fact that Government had already proved defendant's confession and his two inculpatory statements to his neighbor on the day of the homicide; therefore, admission of testimony was not error. D.C. Code § 22-2403. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

— Hearsay, admissibility of evidence.

Hearsay evidence is generally inadmissible because it is less reliable than nonhearsay testimony; it may not have been offered under oath, there may have been no opportunity for cross-examination, and the jury is given no opportunity to observe the demeanor of the witness. *United States v. Lynch*, 499 F.2d 1011, 1974 U.S. App. LEXIS 8774 (C.A.D.C. 1974).

Under certain circumstances, exigencies permit the use of hearsay even in criminal trials, despite its dangers. *United States v. Lynch*, 499 F.2d 1011, 1974 U.S. App. LEXIS 8774 (C.A.D.C. 1974).

Out-of-court statement to witness about an attack on victim was admissible at a murder trial under the exception to the hearsay rule for excited utterances, even though defendants argued that declarant was responding to witness's questions; witness testified that declarant's voice sounded shocked, loud, and high-pitched, the statement was made approximately 10 to 15 minutes after the attack, and the witness questioned declarant about who had attacked victim, not for the details of the attack. *Johnson v. United States*, 980 A.2d 1174, 2009 D.C. App. LEXIS 454 (2009), writ of certiorari denied by 131 S. Ct. 367, 178 L. Ed.

2d 237, 2010 U.S. LEXIS 7200, 79 U.S.L.W. 3205 (U.S. 2010), writ of certiorari denied by 131 S. Ct. 263, 178 L. Ed. 2d 174, 2010 U.S. LEXIS 6845, 79 U.S.L.W. 3202 (U.S. 2010).

Alleged statement by a vehicle passenger that no one said "follow that car" was inadmissible at a murder trial under an exception to the hearsay rule to show the passenger's or the driver's states of mind; there was no hearsay because the trial testimony was that no out-of-court statement was made, and neither the passenger's nor the driver's states of mind were at issue in the case. *Blackson v. United States*, 979 A.2d 1, 2009 D.C. App. LEXIS 355 (2009).

Admission of unredacted portion of out-of-court statement made by driver/defendant who drove two of the other defendants and two additional passengers who were not defendants in the trial to location where passerby was stabbed to death and another passerby assaulted, during prosecution's cross-examination of driver/defendant in order to impeach driver/defendant's trial testimony that he did not know that passengers in his car had knives, did not violate the Sixth Amendment confrontation right of passenger/defendant who claimed he was not carrying a knife, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, as the unredacted portion of the statement was used only after driver/defendant had taken the stand to testify in his own defense, and driver/defendant was available for cross-examination by passenger/defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Admission of redacted videotaped hearsay statement made by defendant who drove two of the other defendants and two additional passengers to location where passerby was stabbed to death and another passerby assaulted, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, in order to establish that the driver/defendant was a willing participant in the assaults because he knew that some his passengers, two of whom were not defendants at the trial, were armed with knives when they entered his car, did not violate the Sixth Amendment confrontation right of passenger/defendant who claimed he was not carrying a knife, as the statement as redacted did not implicate passenger/defendant, and trial court instructed jury that the statement could only constitute evidence against driver/defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certio-

rari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Statements by a government witness to police about events on night of victim's murder, and what he said to his friends about what he told the police, were not offered to prove the truth of the matter asserted, but to show reason for the friends to collude, and thus, the statements were not hearsay. *Burgess v. United States*, 786 A.2d 561, 2001 D.C. App. LEXIS 251 (2001), writ of certiorari denied by 537 U.S. 854, 123 S. Ct. 210, 154 L. Ed. 2d 88, 2002 U.S. LEXIS 5668, 71 U.S.L.W. 3238 (2002).

In proceeding in which defendant was convicted of second-degree murder while armed and of carrying pistol without a license, declarant's alleged hearsay statement to officer that specified individual other than defendant shot victim did not have sufficient equivalent circumstantial guarantees of trustworthiness to warrant its admission into evidence as exception to hearsay rule, in that statement was not made under oath, was not made in presence of trier of fact and that declarant was not subject to cross-examination and in view of fact that it was not demonstrated that probability of trustworthiness in statement outweighed normal risks associated with inherent dangers of hearsay statements. D.C. Code §§ 22-2403 to 22-3202, 22-3204; Fed.Rules Evid. Rule 804(b)(5), 18 U.S.C. *Jackson v. United States*, 424 A.2d 40, 1980 D.C. App. LEXIS 416 (1980), writ of certiorari denied by 454 U.S. 1127, 102 S. Ct. 979, 71 L. Ed. 2d 116, 1981 U.S. LEXIS 3006, 50 U.S.L.W. 3487 (1981).

It was not error, in prosecution for second-degree murder, to admit hearsay testimony recounting earlier statements by decedent that she intended to leave defendant, with whom she had been living, as he fought with her and abused her, where issue was what caused fatal fall down steps as it was either an accident or was caused by defendant, who was standing at head of the steps, instruction limiting such evidence to state of mind exception was given and Government's evidence included three admissions by defendant that he caused the fall; in any event, any prejudice was minimal in view of voluntary manslaughter conviction. D.C. Code §§ 22-2403, 22-2405. *Jones v. United States*, 398 A.2d 11, 1979 D.C. App. LEXIS 331 (1979).

Statements made by murder victim indicating that she was afraid of defendant were admissible under state of mind exception at second-degree murder while armed trial, even though certain hearsay evidence of specific prior acts by defendant should have been excluded. D.C. Code §§ 22-2403, 22-3202. *Camp-*

bell v. United States, 391 A.2d 283, 1978 D.C. App. LEXIS 566 (1978).

In homicide prosecution, trial court properly admitted into evidence extrajudicial statements which tended to show state of mind of the defendant and the victim, the defendant's wife. D.C. Code §§ 22-2403, 22-2405, 22-3202. *Gezmu v. United States*, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

— In general.

Government's negligent destruction of .38 Rossi revolver used by defendant's intended victim in shootout did not warrant exclusion of ballistics evidence, in trial for murder and other crimes; Government had preserved bullet core recovered from decedent's body and bullet fragments, defendant represented at pretrial that his own ballistics expert had determined that bullet core could have been fired from any weapon, and therefore, revolver was not necessary to prove defendant's theory that bullet core recovered from decedent's body came from revolver rather than his own gun. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

In view of remoteness in time of proffered evidence of homicide victim's violent character and fact that proffered evidence concerned instances of victim's violent behavior in special context of marital relationship, trial court did not abuse its discretion in refusing to admit proffered character testimony into evidence in homicide prosecution for killing of victim following a traffic dispute, despite defendant's assertion that he was entitled to introduce such evidence in connection with his claim of self-defense due to Government's presentation of evidence at trial that defendant had initially provoked attack upon him by victim. *Hawkins v. United States*, 461 A.2d 1025, 1983 D.C. App. LEXIS 385 (1983), writ of certiorari denied by 464 U.S. 1052, 104 S. Ct. 734, 79 L. Ed. 2d 193, 1984 U.S. LEXIS 707, 52 U.S.L.W. 3510 (1984).

— Intent, malice, deliberation, and premeditation, admissibility of evidence.

In prosecution for second-degree murder arising from shooting incident, jury could consider defendant's prior aggressive behavior toward deceased during altercation which had occurred an hour prior to the shooting incident and could infer that defendant had harbored malice toward the deceased or that defendant had been more likely to have been the aggressor in the subsequent encounter and could consider such evidence in weighing defendant's testimony that deceased had instigated the fatal confrontation. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

Where there was other evidence that there had been "bad blood" between defendant and the deceased, his former common-law wife, continuing over period of years, trial court did not abuse its discretion in prosecution for second-degree murder by admitting evidence that defendant had threatened decedent with a shotgun 12 years prior to the homicide. *United States v. Bobbitt*, 450 F.2d 685, 1971 U.S. App. LEXIS 7916 (C.A.D.C. 1971).

In prosecution for drowning wife, evidence concerning prior procurement of accident policy on wife's life held admissible as indicating intent. *Dickerson v. U.S.*, 65 F.2d 824, 1933 U.S. App. LEXIS 3176 (1933).

In a homicide case, remark of defendant at the time of the killing that deceased was not the first white man he had killed, following defendant's statement that, if witness would say she was sorry he had killed defendant, he would shoot her, indicated the state of defendant's mind at the time of the killing; that is, that the killing was done deliberately and maliciously. *Bowman v. U.S.*, 267 F. 648, 1920 U.S. App. LEXIS 2220 (1920).

Evidence that defendant had been in possession of .45 caliber pistol and had access to pistol was properly admitted in prosecution for murder of victim shot with .45 caliber pistol; evidence of defendant's access to and possession of weapon just weeks before murder constituted probative temporal connection to murder and was admissible to show intent, and constituted evidence of crime charged. *Thomas v. United States*, 685 A.2d 745, 1996 D.C. App. LEXIS 241 (1996).

Murder defendant's prior assault upon decedent would have been admissible in his second-degree murder prosecution. D.C. Code 1981, §§ 22-2403, 22-3202. *Bowler v. United States*, 480 A.2d 678, 1984 D.C. App. LEXIS 571 (1984).

Hearsay testimony of prior violence by defendant against victim was inadmissible to show defendant's motive, malice, and intent where victim, and not defendant, was the declarant of the hearsay statement that defendant had stabbed him in the right arm and evidence of the prior specific act by the defendant was not admissible. *Giles v. United States*, 432 A.2d 739, 1981 D.C. App. LEXIS 322 (1981).

Evidence concerning prior incidents of hostility, prior assault, and the like is particularly relevant in marital homicide cases. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

Testimony of two witnesses concerning defendant's threats and other expressions of hostility toward victim was relevant to determine her state of mind and was admissible for that purpose in prosecution for second-degree murder. D.C. Code §§ 22-2403, 22-3202. *Rink v.*

United States, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

Defendant's conduct in pointing pistol at victim in connection with threats and other expressions of hostility was evidence of prior aggressive conduct of defendant toward the victim and was relevant to defendant's claim of self-defense to charge for second-degree murder. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

Evidence in prosecution for second-degree murder of prior aggressive conduct by defendant toward victim was probative of the existence of defendant's malice toward victim, whether defendant was likely to be the aggressor in the encounter at issue and whether defendant reasonably apprehended danger of imminent serious bodily harm. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

There is no particular limit as to the time anterior to a homicide when evidence of threats made by defendant against deceased will be excluded, the admissibility of such evidence depending on the circumstances of the case. *U.S. v. Neverson*, 12 D.C. 152 (D.C.Sup. 1880).

On a trial for homicide, evidence of threats made by defendant against deceased the summer before the murder is not inadmissible merely because the time of making them was too remote. *U.S. v. Neverson*, 12 D.C. 152 (D.C.Sup. 1880).

— Intoxication, admissibility of evidence.

While intoxication was no defense at common law to crime of murder, when murder in first degree is defined by statute in such terms as to require deliberate premeditation for its commission, evidence of intoxication may be shown for purpose of proving lack of capacity to deliberate or premeditate. D.C. Code 1929, T. 6, § 21. *McAffee v. U.S.*, 111 F.2d 199, 1940 U.S. App. LEXIS 3609 (1940).

Voluntary immediate drunkenness, in particular, is not admissible to disprove the element of malice integral to the crime of murder. *Wheeler v. United States*, 832 A.2d 1271, 2003 D.C. App. LEXIS 569 (2003).

In proceeding in which accused was convicted of second-degree murder and arson, trial judge did not err in refusing to admit proffered evidence that accused's voluntary ingestion of drugs induced a toxic psychosis on date of offense or err in instructing jury that voluntary taking of drugs was not a defense to the charges. D.C. Code §§ 22-401, 22-2403. *Barrett v. United States*, 377 A.2d 62, 1977 D.C. App. LEXIS 374 (1977).

— Motive, admissibility of evidence.

In a prosecution for the killing of defendant's wife, evidence of previous quarrels between

defendant and his wife was admissible on the question of motive. *Murray v. U.S.*, 288 F. 1008, 1923 U.S. App. LEXIS 2254 (1923).

The question of the remoteness of evidence of previous quarrels between defendant and his wife goes to the weight to be given the evidence by the jury as evidence of motive for the subsequent killing of the wife. *Murray v. U.S.*, 288 F. 1008, 1923 U.S. App. LEXIS 2254 (1923).

Evidence of defendants' friendly relationship with person who had shot victim in the past, as buttressed by other evidence tending to show that defendants may have assaulted victim in retaliation for victim's earlier testimony against their friend which led to his conviction, was relevant in defendants' prosecution for assault of victim to show motive for the assault; evidence of prior shooting explained the reason why there might be "bad blood" between defendants and victim, defendants' association with person who had shot victim was not the only evidence of defendants' participation in the assault, and trial court instructed jury that there was no evidence of defendants' involvement in prior shooting. *Freeman v. United States*, 689 A.2d 575, 1997 D.C. App. LEXIS 21 (1997).

Evidence that defendant had given handgun to victim which victim had failed to return was properly admitted in murder prosecution; evidence was relevant to charged crime and demonstrated circumstances surrounding crime and was also relevant to show motive for crime, and probative value of evidence outweighed its prejudicial effect. *Thomas v. United States*, 685 A.2d 745, 1996 D.C. App. LEXIS 241 (1996).

Evidence of prior violent altercation between murder victim and defendant had probative value to both defendant's motive and issue of identification of defendant which outweighed any prejudice; testimony of murder victim's son concerning previous attack by defendant was relevant to alleged announced course of revenge and perceived necessity for silencing victim. *Green v. United States*, 580 A.2d 1325, 1990 D.C. App. LEXIS 254 (1990).

Evidence of prior altercation between homicide victim and defendant was admissible to demonstrate motive. *Mathis v. United States*, 513 A.2d 1344, 1986 D.C. App. LEXIS 403 (1986).

— Opinion evidence, admissibility of evidence.

Where defendant's brother and sister, through contacts with defendant over period of years prior to shooting of defendant's wife, had a proper foundation for expressing an opinion as to defendant's sanity, and from time defendant was indicted he had been continuously confined in hospital and had been diagnosed as suffering from paranoid schizophrenia, it could not be said that failure to permit brother and

sister to give their lay opinions as to defendant's sanity did not seriously prejudice defendant. D.C. Code § 22-2403. *United States v. Pickett*, 470 F.2d 1255, 1972 U.S. App. LEXIS 6908 (C.A.D.C. 1972).

Trial court did not err in disallowing testimony in response to defense counsel's questions to defendant's girl friend on question of whether PCP caused defendant to be violent, and whether defendant's behavior on date of victim's murder was of the sort she had seen after he smoked PCP, since the trial court fully permitted questioning as to defendant's conduct and behavior both at times after he had taken PCP and on the date of the murder and beyond this point, the trial court could properly rule that it was incumbent upon the jury to draw its own conclusions. D.C. Code 1981, §§ 22-2403, 22-3202. *Rogers v. United States*, 483 A.2d 277, 1984 D.C. App. LEXIS 523 (1984), writ of certiorari denied by 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 363, 1985 U.S. LEXIS 1102, 53 U.S.L.W. 3599 (1985).

In view of overwhelming evidence of malice aforethought, premeditation and deliberation, error in allowing defendant's daughter to testify that she had stated to defendant, immediately following the killing, that defendant had threatened deceased before and he had meant to do it was harmless beyond a reasonable doubt. D.C. Code §§ 22-2401, 22-2403. *Butler v. United States*, 322 A.2d 279, 1974 D.C. App. LEXIS 248 (1974).

— Other offenses, admissibility of evidence.

In prosecution for second-degree murder, committed as result of violation of speed law while attempting to escape from police, evidence that defendant was engaged in illegal transportation of liquor was admissible though relating to a separate and different offense, in view of statute defining murder in terms of attempt to perpetrate a crime punishable by imprisonment in penitentiary. D.C. Code 1929, T. 6, §§ 21-23, 401. *Lee v. U.S.*, 112 F.2d 46, 1940 U.S. App. LEXIS 4220 (1940).

Trial court acted within its discretion in concluding that the probative value of a witness's testimony that someone threatened to kill him for snitching was not substantially outweighed by the danger of unfair prejudice at a murder trial; the testimony was meant to explain specific behavior of the witness while testifying, trial court instructed the jury on the proper use of the testimony by giving a limiting instruction, and the testimony did not link defendant to the threats. *Blackson v. United States*, 979 A.2d 1, 2009 D.C. App. LEXIS 355 (2009).

Defendant was not entitled to mistrial due to co-defendant's counsel's elicitation of testimony on cross-examination to effect that defendant had provided marijuana to witness, as defen-

dant opened the door to this cross-examination when he cross-examined witness about drug-related reason witness had defendant's gun in his apartment. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

A trial judge is permitted, in the exercise of discretion, to admit other crimes evidence within one of the Drew exceptions unless the danger of unfair prejudice substantially outweighs the probative value of the proffered evidence. *Curry v. United States*, 793 A.2d 479, 2002 D.C. App. LEXIS 51 (2002).

Trial court's exclusion of Drew evidence that victim had financial problems, that he had complained of defendant taking advantage of him, and that defendant had been seen acting "disrespectful" toward victim, was not error in second-degree murder prosecution. D.C. Code 1981, §§ 22-2403, 22-3202. *United States v. Williams*, 697 A.2d 1244, 1997 D.C. App. LEXIS 165 (1997).

Evidence that defendant sold drugs to victim for years, that defendant supplied crack cocaine to victim and roommate two days before fire, and had threatened to burn down apartment building if victim did not pay him for recent drug sale was admissible in prosecution for arson and murder to put arson in context, and as direct and substantial proof of crimes charged. D.C. Code 1981, §§ 22-401, 22-403, 22-2401, 22-2403. *Bonhart v. United States*, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Evidence of prior instances of hostility, assaults, and the like is particularly relevant in marital homicide cases. *Hill v. United States*, 600 A.2d 58, 1991 D.C. App. LEXIS 171 (1991).

In prosecution for felony-murder, second-degree murder, assault with intent to commit rape, and first-degree burglary, trial judge did not abuse his discretion in admitting evidence of defendant's prior conviction for assault and robbery where there were significant similarities in modus operandi which were probative of defendant's identity as attacker of victim, where the testimony was probative of defendant's motive and intent, and where eight-year gap between the two incidents did not so reduce probity of the evidence that it should have been excluded. D.C. Code §§ 22-501, 22-1801(a), 22-2401, 22-2403. *Calaway v. United States*, 408 A.2d 1220, 1979 D.C. App. LEXIS 492 (1979).

— Res gestae, admissibility of evidence.

Where officers apparently came upon defendant shortly after he had been stabbed and he was extremely excited and repeatedly asked officers to let him go kill his assailant, his statements fell within spontaneous utterance exception to hearsay rule and were properly admitted in homicide prosecution. D.C. Code

§ 22-2403. *Young v. United States*, 391 A.2d 248, 1978 D.C. App. LEXIS 558 (1978).

— **Self-defense, admissibility of evidence.**

In prosecution for murder, evidence of the deceased's violent character, including evidence of specific violent acts, is admissible where a claim of self-defense is raised and such evidence is relevant on the issue of who was the aggressor and, where there is evidence that defendant knew of deceased's character, on the issue of whether or not defendant reasonably feared he was in danger of imminent great bodily injury. *U.S. v. Burks*, 470 F.2d 432, 1972 U.S. App. LEXIS 7117 (C.A.D.C. 1972).

To determine whether defendant was aggressor and whether he could establish claim of self-defense to charges of assault with a dangerous weapon and murder, jury was required to consider all of circumstances leading up to fatal affray at victim's home, and it was not error to admit evidence that defendant had shortly before entered house of a former girl friend and attacked her and homicide victim. D.C. Code 1961, §§ 22-502, 22-2403. *Harris v. United States*, 364 F.2d 701, 1966 U.S. App. LEXIS 5634 (C.A.D.C. 1966).

In prosecution for homicide resulting in conviction of second degree murder where defendant claimed killing was necessary in order to repel sexual assault by deceased who was drunk at the time of killing, it was reversible error to refuse to admit testimony to the effect that deceased was aggressive when drunk. *Evans v. U.S.*, 277 F.2d 354, 1960 U.S. App. LEXIS 4997 (C.A.D.C. 1960).

Where one accused of homicide claimed self-defense and testified that his victim jumped up, started around a table with his hand in his pocket and stated that he would kick accused's teeth out of his head, evidence that morgue attendant found open pen knife in victim's pocket, although playing cards were in his hand, was admissible to show what victim's apparent conduct was, notwithstanding several eyewitnesses testified that accused was the aggressor and that victim made no move. *Griffin v. U.S.*, 183 F.2d 990, 1950 U.S. App. LEXIS 3032 (C.A.D.C. 1950).

In murder prosecution, where defendant pleaded self-defense, deceased's police record showing arrests but no convictions held inadmissible. *Preston v. U.S.*, 80 F.2d 702, 1935 U.S. App. LEXIS 3399 (1935).

In murder prosecution, under plea of self-defense, evidence that deceased had violent or dangerous character or habitually carried deadly weapons is admissible, but not proof of general character or proof of crimes other than crimes of violence. *Preston v. U.S.*, 80 F.2d 702, 1935 U.S. App. LEXIS 3399 (1935).

In prosecution for murdering wife and mother-in-law, excluding, as irrelevant, testimony

that seven months before shooting, altercation had taken place between wife, defendant, and mother-in-law, held not error as against contention that purpose was to show accused was put in fear. *Bolden v. U.S.*, 69 F.2d 121, 1934 U.S. App. LEXIS 3459 (1934).

Probative value of evidence that defendant had previously threatened victim's friend with gun after friend had gotten into fight with defendant's cousin, and that defendant had expressed intent to rob friend was not substantially outweighed by danger of unfair prejudice, in trial for murder and related offenses; evidence was probative to negate claim of self-defense and to place shooting in context, and it gave jury perspective of defendant's involvement with victim's friend. *Muschette v. United States*, 936 A.2d 791, 2007 D.C. App. LEXIS 571 (2007).

In making claim of self-defense, accused may introduce evidence of prior violent acts committed by decedent which were known to accused. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Past acts of victim's violence of which accused was unaware may be introduced as evidence supporting the objective question of who was the first aggressor. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Manslaughter victim's prior armed robbery conviction was inadmissible in support of self-defense claim, absent claim that defendant knew of that conviction when he killed victim. D.C. Code 1981, §§ 22-2403, 22-3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Only in homicide cases may prior violent acts of victim be introduced as evidence to prove that victim was first aggressor. *Harris v. United States*, 618 A.2d 140, 1992 D.C. App. LEXIS 316 (1992).

In homicide trial where accused raises claim of self-defense, Government may properly introduce evidence of victim's past behavior toward defendant to show who was the initial aggressor and whether defendant was in reasonable fear of imminent great bodily harm. D.C. Code 1981, §§ 22-2403, 22-3202. *Rawls v. United States*, 539 A.2d 1087, 1988 D.C. App. LEXIS 22 (1988).

When defense of self-defense is raised in homicide prosecution, it is generally recognized that hearsay evidence of prior threats is probative of whether defendant was likely to be

aggressor in altercation and whether defendant reasonably apprehended imminent, serious bodily harm from decedent. *Hairston v. United States*, 500 A.2d 994, 1985 D.C. App. LEXIS 532 (1985).

By raising self-defense in homicide trial, defendant was asserting that decedent had been the initial aggressor in the fatal conflict; therefore, evidence of decedent's peaceable or violent character was admissible as relative on issue of who was initial aggressor. *Carter v. United States*, 475 A.2d 1118, 1984 D.C. App. LEXIS 363 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1097, 53 U.S.L.W. 3599 (1985).

Once defendant opens door to reputation of deceased for peace or violence by claiming self-defense, prosecutor has corresponding right to rebut with evidence of noncombative nature of decedent. *Carter v. United States*, 475 A.2d 1118, 1984 D.C. App. LEXIS 363 (1984), writ of certiorari denied by 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362, 1985 U.S. LEXIS 1097, 53 U.S.L.W. 3599 (1985).

Accused claiming self-defense in homicide prosecution may attempt to show that decedent was the aggressor by showing that he was a bellicose and violent individual. *Johnson v. United States*, 452 A.2d 959, 1982 D.C. App. LEXIS 482 (1982).

At least when a defendant is charged with homicide, she has right to present evidence of victim's violent character to support claim of self-defense and evidence of violent character may be testimony of specific acts, including acts of violence unrelated to crime at issue, or it may be evidence of general reputation for violence. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

Prior acts of violence are admissible in homicide cases where defendant raises claim of self-defense against decedent as the alleged first aggressor. *Ibn-Tamas v. United States*, 407 A.2d 626, 1979 D.C. App. LEXIS 457 (1979).

As a general rule, antecedent declarations that a homicide victim feared the accused are considered relevant to an accused's claim that he acted in self-defense, that is, that the victim was the aggressor in the first instance. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

Trial judge, at prosecution of defendant for second-degree murder, properly denied admission of certified copy of decedent's conviction for carrying pistol without license, as bare fact of proof of conviction for carrying pistol without license did not in and of itself prove a specific violent act which could be used to support defendant's claim of self-defense. *Carmichael v.*

United States, 363 A.2d 302, 1976 D.C. App. LEXIS 356 (1976).

— **Subsequent incriminating or exculpatory circumstances, admissibility of evidence.**

Testimony of circumstances surrounding defendant's arrest by officers pursuant to a warrant for his arrest, not for the robberies and murder for which he was being tried, but for armed assault on police officer, offered as indicating consciousness of guilt or resistance to arrest, was admissible in context in which case was tried. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

Agreement among shooters to conform to the version of events one of them told police on the night of the shooting, and deny knowledge of the murder, showed consciousness of guilt and, thus, was directly admissible evidence of the charged crime separate from its potential status as evidence of other, uncharged crimes, despite government's failure to provide advance notice of intent to use the agreement in prosecution for second degree murder while armed. *Burgess v. United States*, 786 A.2d 561, 2001 D.C. App. LEXIS 251 (2001), writ of certiorari denied by 537 U.S. 854, 123 S. Ct. 210, 154 L. Ed. 2d 88, 2002 U.S. LEXIS 5668, 71 U.S.L.W. 3238 (2002).

Arguments and conduct of counsel.

Where only evidence linking defendant with homicides was testimony of confessed accessory who was granted immunity, defendant's theory that accessory committed the killings and lied about defendant to cover up his own guilt was supported by testimony of eyewitnesses who described a man fitting accessory's description as being near scene of crimes, and defense counsel's closing argument seeking to present such theory did not supplement or misstate the record but merely suggested that jury draw certain inferences, restriction of closing argument so as to prevent defense counsel from suggesting that accessory committed the murders impaired defendant's constitutional right to a closing argument in his behalf and was not harmless beyond reasonable doubt. D.C. Code §§ 22-2401, 22-2403; 18 U.S.C. § 6002; 18 U.S.C. § 2111; Fed.Rules Crim.Proc. rule 52(a), 18 U.S.C. *United States v. De Loach*, 504 F.2d 185, 1974 U.S. App. LEXIS 9849 (C.A.D.C. 1974).

Prosecutor's closing and rebuttal arguments seeking to draw an analogy between crime charged against defendant and those involving defendants in other cases involving heinous

crimes were so highly prejudicial as to require reversal. D.C. Code §§ 22-2403, 22-3204. *United States v. Phillips*, 476 F.2d 538, 1973 U.S. App. LEXIS 9930 (C.A.D.C. 1973).

Prosecutor's gang references were not excessive, and did not violate court order limiting references only to show identity and membership in a conspiracy, in trial of five defendants arising out of beating of homeless man following their eviction from nightclub and murder and assaults of passersby who tried to intervene; prosecutor in opening statement referred to government witness as a gang member and stated that one of the defendants flashed a sign at another group that resulted in a fight in nightclub and defendants' eviction, investigator testified that he was assigned to a gang unit and concentrated on Hispanic gang activities, court sustained objection when prosecutor asked investigator about the informal nature of East coast gangs, and there was evidence that defendants' association with each in a gang was an integral factor in their instant conspiracy to assault homeless man and passersby after they were evicted from nightclub. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Remarks by prosecutor, in opening statement describing stabbed passerby who intervened in beating of homeless man as a bloody corpse with his guts spilling out who died a premature and tragic death and stating that one of the kicks inflicted on passerby was so hard that second passerby did not believe anyone could survive it, and in closing argument describing the government witnesses' testimony as screaming that defendants were guilty and accusing defendants of intimidating witnesses, to which defendants did not object at trial arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, did not constitute plain error; description of passerby's injuries were supported by the evidence, remarks on witness intimidation was supported by the evidence, prosecutor was not prohibited from expressing reasonable indignation, and prosecution did not improperly vouch for government witnesses. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Defendant failed to establish that he suffered substantial prejudice due to prosecutor's improper comment, remarking that a particular

witness would be "honest," in prosecution for second-degree murder; defense counsel's objection to comment was sustained, court told jurors to "disregard any statements by counsel as to whether people can be believed or not," and government's case against defendant was strong. *Crawford v. United States*, 932 A.2d 1147, 2007 D.C. App. LEXIS 577 (2007).

Prosecutor's comments during his opening and closing statements to jury, referring to murder of victim in vivid terms, were not improper in prosecution for second-degree murder; victim in was shot in the abdomen and, according to medical examiner, bled to death as a result of his wounds, reference to grim details of victim's death was within permissible bounds of comment, prosecutor was under no obligation to remove evidence from jury's consideration or to lessen its impact merely because it was potentially dramatic, and it was not likely that brief comments "substantially swayed" verdict. *Crawford v. United States*, 932 A.2d 1147, 2007 D.C. App. LEXIS 577 (2007).

Prosecutor's argument in prosecution for second degree murder while armed, that, among the five friends, "which ones were willing to admit that they did things wrong and which ones tried to wipe their hands completely" was not manifestly intended to improperly comment on defendant's election not to testify, as argument could be viewed as comment on inconsistencies and untrustworthiness of defendants' out-of-court statements. *Burgess v. United States*, 786 A.2d 561, 2001 D.C. App. LEXIS 251 (2001), writ of certiorari denied by 537 U.S. 854, 123 S. Ct. 210, 154 L. Ed. 2d 88, 2002 U.S. LEXIS 5668, 71 U.S.L.W. 3238 (2002).

Prosecutor's mention of murder victim's seventy-nine year old blind mother was not improperly designed to elicit empathy, but served to explain why she had not testified and helped to establish the events leading up to and following her son's death. *Burgess v. United States*, 786 A.2d 561, 2001 D.C. App. LEXIS 251 (2001), writ of certiorari denied by 537 U.S. 854, 123 S. Ct. 210, 154 L. Ed. 2d 88, 2002 U.S. LEXIS 5668, 71 U.S.L.W. 3238 (2002).

Any impropriety in prosecutor's unobjected-to rebuttal argument that allegedly misled jury as to its importance as finder of fact, by alluding to possibility of new trial after appeal if jury made a mistake and to several pretrial stages including grand jury proceeding, did not clearly prejudice defendant's substantial rights in second-degree murder prosecution, in view of overwhelming evidence of guilt. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Although cumulative impact of prosecutor's continual references to murder defendant's failure to testify was sufficiently prejudicial as to have denied him a fair trial, this misconduct

contaminated only the jury's deliberations and the finding of malice requisite for the verdict of murder in the second degree; accordingly, case had to be remanded with instructions either to permit Government to elect to retry defendant on charge of second-degree murder or to enter a judgment on the charge of manslaughter with appropriate resentencing to follow. D.C. Code 1981, §§ 22-2403, 22-3202; U.S. Const. Amend. 6. *Bowler v. United States*, 480 A.2d 678, 1984 D.C. App. LEXIS 571 (1984).

Error in suggesting in closing argument that particular pistol which caused victim's death belonged to defendant solely because he had owned other guns was not prejudicial where standard instruction that case was to be decided on the evidence and not on counsel argument was given and defendant, tried for second-degree murder, was convicted of involuntary manslaughter. D.C. Code 1981, §§ 11-707(a), 22-2403, 22-3202. *Fornah v. United States*, 460 A.2d 556, 1983 D.C. App. LEXIS 353 (1983).

Statement by prosecutor at trial of defendant for second-degree murder while armed, and carrying a pistol without a license, that testimony of the Government's witness was especially credible since witness chose to testify against defendant even though he was convinced that by doing so he faced "certain death" did not constitute reversible error, especially in light of trial court's careful instructions which mitigated the potential for prejudice which the prosecutor's remarks might have caused. D.C. Code 1973, §§ 22-2403 to 22-3202(a)(1), 22-3204. *Hill v. United States*, 434 A.2d 422, 1981 D.C. App. LEXIS 336 (1981), writ of certiorari denied by 454 U.S. 1151, 102 S. Ct. 1020, 71 L. Ed. 2d 307, 1982 U.S. LEXIS 432, 50 U.S.L.W. 3548 (1982).

Arrest.

That defendant apparently was arrested for unauthorized use of vehicle and not for homicide because no body had yet been found did not affect the determination of probable cause for arrest. D.C. Code 1981, §§ 22-2403, 22-3202. *Rogers v. United States*, 483 A.2d 277, 1984 D.C. App. LEXIS 523 (1984), writ of certiorari denied by 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 363, 1985 U.S. LEXIS 1102, 53 U.S.L.W. 3599 (1985).

Collateral estoppel.

In view of instructions to jury, in murder prosecution, that malice was essential element of second-degree murder, verdict that defendant was guilty of second-degree murder collaterally estopped defendant from contesting insurer's subsequent action for declaratory judgment that insurer was not obligated, under homeowner's policy covering liability for accident neither expected or intended from stand-

point of insured, to defend civil court action for causing death. 18 U.S.C. § 2201 et seq.; D.C. Code § 22-2403. *Travelers Indem. Co. v. Walburn*, 378 F. Supp. 860, 1974 U.S. Dist. LEXIS 7811 (1974).

Under principle of collateral estoppel, defendant's acquittal of second-degree murder as lesser included offense of felony-murder barred second prosecution for second-degree murder as lesser included offense of premeditated murder, at least where second trial would involve same issues, and no more, that were presented to jury in first trial, that is, that acts of defendant caused death of victim and that defendant acted with malice and not in heat of passion. D.C. Code 1973, §§ 22-103, 22-2401, 22-2403, 22-3202; U.S. Const. Amend. 5. *Turner v. United States*, 459 A.2d 1054, 1983 D.C. App. LEXIS 355 (1983).

Constitutional rights of defendant.

Reindictment of defendants for first-degree murder, after their first trial on charge of second-degree murder had ended with a declaration of mistrial granted on motion of defense counsel, denied defendants due process of law, absent any showing of justification for the increase in the degree of the crime charged. D.C. Code §§ 22-2401, 22-2403. *United States v. Jamison*, 505 F.2d 407, 1974 U.S. App. LEXIS 6511 (C.A.D.C. 1974).

After invoking his right to counsel by saying to first police officer, "I'm done talking to you. Go get my lawyer," defendant's immediately following statement to a second police officer, "Can I talk to you, please?" evinced a willingness and a desire for a generalized discussion about the investigation, thus permitting the resuming of custodial interrogation; defendant voluntarily waived his Miranda rights when he initially agreed to speak with the police, there was no suggestion that defendant did not still understand those rights when he reinitiated contact, defendant had previous experience with the criminal justice system, and defendant demonstrated knowledge of his rights by invoking his right to counsel in a strategic manner to manipulate the situation and exclude first officer from the interview room. *Jennings v. United States*, 989 A.2d 1106, 2010 D.C. App. LEXIS 83 (2010).

Out-of-court statement of co-defendant, "[t]here that nigger go right there," admitted as present sense impression exception to rule against hearsay, did not violate defendant's right of confrontation, in prosecution for murder and other offenses, as statement was not "testimonial" in nature, given that it was not made to police for purposes of accusation or prosecution, but was simply a present sense impression statement that co-defendant had made to his fellow passengers. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS

150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Trial court's preclusion of murder defendant's cross-examination of government witness regarding dismissal of charge of assault with intent to kill against witness' brother, did not violate defendant's right of confrontation; defense counsel failed to proffer facts which supported genuine belief that witness was biased in manner asserted, and not only was defense counsel mistaken about witness' familial relationships, in that it was witness' cousin, not his brother, against whom assault charge had been dismissed, but he could not name brother of witness who allegedly had been involved in assault, and government made clear that witness had not been implicated in incident cited by defense counsel. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Trial court's preclusion of murder defendant's cross-examination of eyewitness regarding grand jury testimony she had given in earlier, unrelated homicide, did not violate defendant's right of confrontation; value of grand jury transcript would not have been significant in undermining eyewitness' credibility, particularly given that defense counsel had other opportunities to show bias and lack of credibility on eyewitness' part, defendant failed to make adequate showing that eyewitness' grand jury testimony had been fabricated, and there was another eyewitness to murder at issue whose testimony and character were not impeached to any significant extent. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Suppression of defendant's videotaped confession to murder was not required, even though defendant had not been properly advised of his rights when he waived extradition; although defendant did not have required probable cause hearing in Maryland, he did have a probable cause hearing one day later in district. *Outlaw v. United States*, 806 A.2d 1192, 2002 D.C. App. LEXIS 516 (2002).

Murder defendant was not subjected to custodial interrogation when he was interviewed at police detective's office after Terry stop, and thus, the administration of Miranda warnings was not required; defendant knew that he was stopped because his car was reportedly involved in incident, he was not formally arrested and he voluntarily went to detective's office without bodily restraints, and he left detective's office after the interview. *Resper v. United States*, 793 A.2d 450, 2002 D.C. App. LEXIS 50 (2002), writ of certiorari denied by 540 U.S.

890, 124 S. Ct. 274, 157 L. Ed. 2d 163, 2003 U.S. LEXIS 6422, 72 U.S.L.W. 3242 (2003).

Trial court's limitation of scope of manslaughter defendant's testimony regarding his previous encounters with victim, and refusal to reinstruct jury on "castle doctrine" did not deny defendant's due process right to present defense; defendant was able to mount defense which convinced jury that he was not guilty of second-degree murder while armed, as charged in indictment, in spite of strength of government's evidence. *U.S. Const. Amend. 14*; D.C. Code 1981, §§ 22-2403, 22-3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Prosecution, following abrogation of year and a day rule, for murder of victim who died more than year and a day after date of attack was barred by ex post facto clause. D.C. Code 1981, §§ 22-2403, 22-3202; *U.S. Const. Art. 1, § 9, cl. 3*. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

In proceeding in which defendant was convicted of second-degree murder while armed and of carrying pistol without license, Government, which had furnished defendant with a copy of a declarant's statement that specified individual other than defendant had shot victim and had furnished the address and telephone number of declarant, did not deny defendant due process by failing to remain apprised of whereabouts of declarant and to maintain his availability. D.C. Code §§ 22-2403 to 22-3202, 22-3204; *U.S. Const. Amends. 6, 14*. *Jackson v. United States*, 424 A.2d 40, 1980 D.C. App. LEXIS 416 (1980), writ of certiorari denied by 454 U.S. 1127, 102 S. Ct. 979, 71 L. Ed. 2d 116, 1981 U.S. LEXIS 3006, 50 U.S.L.W. 3487 (1981).

Defenses generally.

Deadly force cannot be employed to arrest or prevent the escape of a misdemeanor. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Only defense to charge of causing another's death—aside from self-defense, insanity, duress and so forth—is that the homicide was inadvertent and that defendant's negligence, if any, was not sufficient to convict him of involuntary manslaughter. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Degree of offense.

— Common law, degree of offense.

The District of Columbia statute providing

that homicide committed purposely and with deliberate and premeditated malice is first degree murder, and that homicide committed with malice aforethought without deliberation and premeditation is second degree murder, embodies the substance of murder as it was known to the common law, although distinction was made in severity of punishment for degrees of murder. D.C. Code 1929, T. 6, § 21. *Bishop v. U.S.*, 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

While implied malice at common law was sufficient to make an offense murder, under sections 799 and 800, Code of Law 1901, D.C. Code 1929, T. 6, §§ 22, 23, which require proof of actual malice, implied malice constitutes murder in the second degree. *Sabens v. U.S.*, 40 App.D.C. 440, 1913 U.S. App. LEXIS 2099 (1913).

Although first and second-degree murders are defined by statute, those statutes embody common-law definition of murder. D.C. Code 1981, §§ 22-2401 to 22-2403. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

— Distinction between first and second degree offense.

Sole difference between first- and second-degree murder is premeditation and deliberation. *Howard v. United States*, 389 F.2d 287, 1967 U.S. App. LEXIS 4276 (C.A.D.C. 1967).

Intentional murder is in the first degree if committed in cold blood and is murder in the second degree if committed on impulse or in the sudden heat of passion. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

First-degree murder requires premeditation and deliberation and covers calculated and planned killings while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second degree. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

The distinguishing characteristic of first degree murder is that it is a deliberate, premeditated, intentional killing, while killing in second degree murder may be intentional or unintentional, but it must, in either event, result from a willful and malicious act. D.C. Code 1961, §§ 22-2401 to 22-2403. *Hansborough v. U.S.*, 308 F.2d 645, 1962 U.S. App. LEXIS 4033 (C.A.D.C. 1962).

First-degree murder is distinguished from second-degree murder in that it requires premeditation and deliberation. D.C. Code 1981, § 22-2401. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Premeditation and deliberation distinguish first-degree murder from second-degree murder. D.C. Code 1981, § 22-2401. *Mills v. United States*, 599 A.2d 775, 1991 D.C. App. LEXIS 216 (1991).

First-degree murder, with its requirement of premeditation and deliberation, covers calculated and planned killings, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in second degree; premeditation and deliberation may be inferred from sufficiently probative facts and circumstances. D.C. Code 1981, §§ 22-2401, 22-3202. *Hall v. United States*, 454 A.2d 314, 1982 D.C. App. LEXIS 507 (1982).

Malice aforethought is an element common to first and second-degree murder; the distinguishing feature between the crimes being that first-degree murder includes the elements of premeditation and deliberation while second-degree murder does not. D.C. Code §§ 22-2401, 22-2403. *Butler v. United States*, 322 A.2d 279, 1974 D.C. App. LEXIS 248 (1974).

— First degree murder, degree of offense.

No particular length of time is necessary for deliberation, and it is not the lapse of time which constitutes deliberation necessary to convict for first-degree murder but the reflection and turning over in mind of accused concerning his design and purpose to kill. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

Murder in the first degree is intentional homicide done deliberately and with premeditation, and homicide that is intentional but "impulsive," not done after "reflection and meditation", is murder in the second degree. *U.S. v. Brawner*, 471 F.2d 969, 1972 U.S. App. LEXIS 8824 (C.A.D.C. 1972).

Though deliberate intent to take life, together with malice, are essential elements of "murder in the first degree", an accidental or unintentional killing will constitute "murder in the second degree" if accompanied by malice. D.C. Code 1929, T. 6, §§ 21-23. *Lee v. U.S.*, 112 F.2d 46, 1940 U.S. App. LEXIS 4220 (1940).

Murder in first degree, in addition to intent to kill, requires premeditation and deliberation, but murder in second degree does not require any premeditation or deliberation and not even an intent to kill, if killing is accompanied with malice. *U.S. v. Wilson*, 178 F.Supp. 881, 1959 U.S. Dist. LEXIS 2601 (D.D.C.1959).

"Deliberation" element of first-degree murder requires evidence that defendant acted with consideration and reflection upon preconceived decision to kill. D.C. Code 1981, § 22-2401. *Daniels v. United States*, 738 A.2d 240, 1999 D.C. App. LEXIS 198 (1999).

To prove first-degree premeditated murder, Government must show beyond a reasonable doubt that defendant acted with premeditation and deliberation. D.C. Code 1981, §§ 22-2401, 22-3202. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

"Premeditation" required for first-degree premeditated murder requires proof that defendant gave thought before acting to idea of taking human life and reached definite decision to kill. D.C. Code 1981, §§ 22-2401, 22-3202. *Thacker v. United States*, 599 A.2d 52, 1991 D.C. App. LEXIS 306 (1991).

First-degree murder is a calculated and planned killing while second-degree murder is unplanned or impulsive. D.C. Code 1981, § 22-2401. *Watson v. United States*, 501 A.2d 791, 1985 D.C. App. LEXIS 549 (1985).

No fixed time is required for a finding of deliberation and evidence that defendant threatened to kill decedent only seconds before shooting her was not dispositive of that issue in first-degree murder prosecution. D.C. Code 1981, § 22-2401. *Jones v. United States*, 477 A.2d 231, 1984 D.C. App. LEXIS 407 (1984).

First-degree murder, with its requirement of premeditation and deliberation, covers calculated and planned killings, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second degree. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

— In general.

Second-degree murder statute does not define substantive offense of second-degree murder so as to exclude therefrom all crimes that also come within first-degree murder statutes. D.C. Code §§ 22-2403, 22-2404. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Malice aforethought is an element of both first and second degrees of murder. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Single offense cannot be both first and second degree murder. D.C. Code 1961, §§ 22-2401 to 22-2403; 18 U.S.C. § 1111. *Naples v. U.S.*, 344 F.2d 508, 1964 U.S. App. LEXIS 3943 (C.A.D.C. 1964).

Any reasonable doubt as to nature and degree of homicide should inure to defendant's benefit. *U.S. v. Hamilton*, 182 F.Supp. 548, 1960 U.S. Dist. LEXIS 3027 (D.D.C.1960).

Defendant cannot be convicted of both first-degree felony murder and second-degree murder of the same victim. *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434

(2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Unlike circumstances of justification or excuse, legally recognized mitigating factors do not constitute total defense to murder charge but they may serve to reduce the degree of criminality of a homicide which was otherwise committed with an intent to kill, an intent to injure, or in conscious and wanton disregard of life. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

— Manslaughter, degree of offense.

Reckless conduct resulting in death may constitute manslaughter; the difference between that recklessness which displays depravity and such extreme and wanton disregard for human life as to constitute "malice" (justifying second-degree murder conviction) and that recklessness which amounts only to manslaughter lies in the quality of awareness of the risk. D.C. Code §§ 22-2403, 22-2405. *United States v. Dixon*, 419 F.2d 288, 1969 U.S. App. LEXIS 13086 (C.A.D.C. 1969).

Unlawful killing in sudden heat of passion, whether produced by rage, resentment, anger, terror or fear is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in passion of the moment to lose some self-control and commit act on impulse and without reflection. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

Where defendant struck a person who fell to the sidewalk and whose head hit the concrete and where several days later such person died as a result of the head injuries, the defendant was guilty of manslaughter. D.C. Code 1951, § 22-2403. *Williams v. U.S.*, 267 F.2d 625, 1959 U.S. App. LEXIS 3995 (C.A.D.C. 1959).

Provocation sufficient to produce a heat of passion and a resulting absence of malice may give such character to a homicide as to make it manslaughter, but the same provocation may, under slightly varied circumstances, justify a person in killing in self-defense. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

Where there is malice aforethought in regard to a homicide, crime is second-degree murder, but, if malice aforethought is lacking, crime is manslaughter. *U.S. v. Hamilton*, 182 F.Supp. 548, 1960 U.S. Dist. LEXIS 3027 (D.D.C.1960).

In this jurisdiction, a homicide may constitute manslaughter where a killing is not committed with a specific intent to kill or to do serious bodily injury, or not in conscious disregard of an extreme risk of death or serious bodily injury; thus, the burden of establishing malice as an element of the offense is based on

a subjective standard applicable to the individual defendant on trial. *United States v. Lindsay*, 124 WLR 2021 (Super. Ct. 1996).

— Second degree murder, degree of offense.

The term “malice” in second-degree murder includes recklessness where defendant had awareness of serious danger to life and displayed wanton disregard for human life. *U.S. v. Brawner*, 471 F.2d 969, 1972 U.S. App. LEXIS 8824 (C.A.D.C. 1972).

Evidence demonstrating that an act was done so recklessly or wantonly as to manifest a depravity of mind and disregard of human life satisfies malice requirement for second-degree murder. D.C. Code § 22-2403. *United States v. Lucas*, 447 F.2d 338, 1971 U.S. App. LEXIS 9284 (C.A.D.C. 1971).

“Malice”, as element of second-degree murder, refers to the state of mind with which defendant must be found to have acted. *United States v. Comer*, 421 F.2d 1149, 1970 U.S. App. LEXIS 11385 (C.A.D.C. 1970).

An accidental killing may be second-degree murder, manslaughter, or no crime at all, depending on degree of recklessness involved. *Thomas v. United States*, 419 F.2d 1203, 1969 U.S. App. LEXIS 10029 (C.A.D.C. 1969).

Second-degree murder may consist of an unintentional killing where act which imports danger to another is one so reckless or so wrongful as to manifest depravity or a depraved mind and disregard of human life. *Thomas v. United States*, 419 F.2d 1203, 1969 U.S. App. LEXIS 10029 (C.A.D.C. 1969).

Accidental or unintentional killing will constitute second-degree murder if accompanied by malice. D.C. Code § 22-2403. *Logan v. United States*, 411 F.2d 679, 1968 U.S. App. LEXIS 4548 (C.A.D.C. 1968).

With certain statutory exceptions, when there is unjustified intentional killing, not premeditated but with malice, the offense is murder in the second degree and the same is true when there is unintentional killing which results from a willful and malicious act other than those specified in the first degree murder statute. D.C. Code 1961, §§ 22-2401 to 22-2403. *Hansborough v. U.S.*, 308 F.2d 645, 1962 U.S. App. LEXIS 4033 (C.A.D.C. 1962).

“Murder in the second degree” is the unlawful killing of another, where there is not a premeditated design and plan to effect death, but where there is malice aforethought. *Fryer v. U.S.*, 207 F.2d 134, 1953 U.S. App. LEXIS 2841 (C.A.D.C. 1953).

An intentional killing that is not premeditated and not connected with another crime is “murder in the second degree”. D.C. Code 1951, § 22-2403. *Kitchen v. U.S.*, 205 F.2d 720, 1953 U.S. App. LEXIS 2666 (C.A.D.C. 1953).

A killing under the influence of passion, induced by insufficient provocation, may be “murder in the second degree”, and an accidental or unintentional killing constitutes murder in the second degree if it is accompanied by malice. *U.S. v. Edmonds*, 63 F.Supp. 968, 1946 U.S. Dist. LEXIS 2946 (D.D.C.1946).

To convict individual of second-degree murder, government must prove beyond a reasonable doubt that defendant caused the death of decedent and that defendant had the specific intent to kill or seriously injure decedent, or acted in conscious disregard of extreme risk of death or serious bodily injury to decedent. *Herbin v. United States*, 683 A.2d 437, 1996 D.C. App. LEXIS 188 (1996).

“Malice” required for second-degree murder conviction may be proved by showing of: specific intent to kill, specific intent to inflict serious bodily injuries, or wanton disregard of unreasonable risk of death or serious bodily harm; malice may also be implied where homicide occurs during commission of felony. D.C. Code 1981, §§ 22-2403, 22-3202. *Price v. United States*, 602 A.2d 641, 1992 D.C. App. LEXIS 22 (1992).

Second-degree murder, which requires that killing be done with “malice” connotes intention to kill or wanton disregard for human life. D.C. Code 1981, § 22-2403. *Towles v. United States*, 496 A.2d 560, 1985 D.C. App. LEXIS 436 (1985), vacated by 497 A.2d 793, 1985 D.C. App. LEXIS 513 (D.C. 1985), affirmed by 521 A.2d 651, 1987 D.C. App. LEXIS 311 (D.C. 1987).

Essential elements of second-degree murder which government must prove beyond reasonable doubt are that defendant inflicted injury or injuries upon victim from which victim died, and that defendant, at time he injured victim, acted with malice. D.C. Code 1981, § 22-2403. *McClurkin v. United States*, 472 A.2d 1348, 1984 D.C. App. LEXIS 317 (1984), writ of certiorari denied by 469 U.S. 838, 105 S. Ct. 136, 83 L. Ed. 2d 76, 1984 U.S. LEXIS 3334, 53 U.S.L.W. 3237 (1984).

Elements of second-degree murder are: that defendant inflicted injuries on victim from which he died; at time defendant so injured victim, he acted with malice; and defendant did not injure victim in heat of passion caused by adequate provocation. D.C. Code 1973, § 22-2403. *Turner v. United States*, 459 A.2d 1054, 1983 D.C. App. LEXIS 355 (1983).

Discovery.

Any Brady violation resulting from prosecution’s failure to disclose to defendant prior to trial, in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, that there was a pending neglect proceeding against government eyewitness, did not prejudice defendant, as required in order for such

defendant to obtain a new trial, as witness's testimony did not incriminate such defendant. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Evidence was sufficient to establish, at Brady violation hearing, that even if the government violated Brady, in prosecution of defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by not disclosing that eyewitness made false statements regarding her illegal immigration status when she was being considered for a witness protection program prior to trial, such violation did not prejudice defendants, as required in order for defendants to obtain a new trial; witness had been living in the country since she was nine, there was evidence that witness's status only became an issue after she had provided a statement to the police and testified before grand jury and that witness did not seek to use her statement or grand jury testimony to secure her immigration status, and other witnesses corroborated almost all of such witness's trial testimony. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Any Brady violation by the prosecution in failing to disclose to defense counsel witnesses who could allegedly impeach testimony of government eyewitness by testifying that eyewitness had drunk a large amount of alcohol and left nightclub before incident occurred, in prosecution of defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, did not prejudice defendants, as required in order for defendants to obtain a new trial, as one of such witnesses nonetheless testified during the trial, such witnesses had provided inconsistent statements to police, and testimony of the eyewitness was almost completely corroborated by other government witnesses, with the exception of eyewitness's testimony that one of the defendants threatened and assaulted her following the incident. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Prosecution's violation of Brady, in trial of defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by disclosing just before eyewitness testified the grand jury transcript of witness's testimony and information indicating that witness met with prosecution multiple times before acknowledging he had a memory of the incident, did not prejudice defendants, as required in order for defendants to obtain a new trial, as defense counsel were still able to conduct an effective cross-examination, counsel exploited many other available grounds to attack witness's credibility, prosecution on redirect brought out witness's prior statements that he had no memory, it was obvious that witness had resisted prosecution's persistent questions regarding his knowledge of the incident, and the jury was made aware through other witnesses that the government's investigation of the incident had been heavy-handed. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Government did not commit Brady violation on retrial for murder and other crimes by failing to disclose identity of two witnesses who would have testified that they were not present in nightclub at time former girlfriend testified that she saw defendant enter nightclub near closing time and hand another friend gun, and heard defendant confess to friend that he had "wasted a boy"; witnesses had initially told prosecutor that they could not remember whether they had been in nightclub on night in question, girlfriend had testified that she could not remember if one of two witnesses was present in nightclub, and proffered testimony was not material to issue of guilt or punishment, even though other witness's testimony would have directly impeached girlfriend's testimony that she was certain witness was in nightclub, especially in view of defendant's failure to request continuance to investigate issue and in light of defendant's more effective impeachment of girlfriend by cross-examining her regarding her admission that she lied in original trial when she testified that defendant had been nightclub with her at time of shooting. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

Eyewitness's grand jury testimony provided in case involving prior, unrelated homicide was not material to defense in case at issue, as necessary to establish Brady violation, as there was no reasonable probability that, had transcript of this testimony been disclosed to de-

fense, result of proceedings would have been different; testimony took place ten years prior to murder at issue, and transcript of testimony supported contention that eyewitness had been mistaken as to identity of shooter in prior case, and that she had not identified shooter in that case with any degree of certainty or specificity, not that she had lied with respect to earlier identification. *Tucker v. United States*, 871 A.2d 453, 2005 D.C. App. LEXIS 140 (2005).

Double jeopardy.

Concurrent sentences for arson, felony murder, and second-degree murder violated double jeopardy, in action in which one victim died in burning building; underlying felony was lesser offense included within offense of felony murder, and concurrent sentences for second-degree murder and felony murder constituted dual punishment for just one offense. *U.S. Const.Amend. 5*; D.C. Code 1981, §§ 22-401, 22-2401, 22-2403. *Bonhart v. United States*, 691 A.2d 160, 1997 D.C. App. LEXIS 49 (1997).

Double jeopardy did not bar subsequent prosecution for second-degree murder of defendant who had been acquitted of assault with intent to kill while armed arising from same incident and involving same victim, where victim had not died at time defendant was prosecuted for assault, and jury at first trial was not presented with question of malice. D.C. Code 1981, §§ 22-501, 22-502, 22-2403, 22-3202; *U.S. Const.Amend. 5*. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Defendant, who had been acquitted of second-degree murder in first trial, but who registered unexplained objection to second-degree murder instruction in third trial, waived double jeopardy rights, where defendant failed to pinpoint double jeopardy as basis for objection, where Government had made identical request at second trial, where same lawyer had represented defendant at second trial, and where lawyer's decision not to object specifically on double jeopardy grounds could be viewed as tactical decision to avoid instructions only on issue of first-degree murder. D.C. Code 1981, § 22-2403; *U.S. Const.Amend. 5*. *Towles v. United States*, 521 A.2d 651, 1987 D.C. App. LEXIS 311 (1987), writ of certiorari denied by 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741, 1987 U.S. LEXIS 2800 (1987).

Although defendant did not affirmatively consent to Government's oral motion to dismiss original second-degree murder indictment, which motion was made after first trial was aborted and indictment for first-degree murder filed, such dismissal did not act as an acquittal barring retrial on subsequent second-degree murder indictment, on ground that double jeopardy attached in the first trial before mistrial was declared due to defense error in opening remarks; dismissal of first indictment was not

an acquittal since effect of request for a mistrial nullified any attachment of jeopardy and Government was free to proceed as though no trial had ever begun. D.C. Code §§ 22-2401, 22-2403, 22-3204. *Jamison v. United States*, 373 A.2d 594, 1977 D.C. App. LEXIS 477 (1977).

Examination of witnesses-Capacity and qualification of witnesses.

Trial court, which denied a defense motion during trial to have key prosecution witness, who was a chronic alcoholic, subjected to a psychiatric examination with respect to his competency, did not abuse its discretion in refusing to treat the witness as a person of actual or potential incompetency, notwithstanding the claims of defendants, in support of their motion, that the testimony given by the witness was highly confusing and that hospital records indicated he had a clinical history which rendered him wholly unreliable. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Where witness in prosecution for murder and possession of prohibited weapon was long time drug addict who had used drugs on day of trial and who had been hospitalized for drug addiction, trial court abused its discretion by refusing defendant's request that trial judge subpoena and examine locally available hospital records pertaining to witness' competency. D.C. Code §§ 22-2403, 22-3214(b); 18 U.S.C. § 292(c). *United States v. Crosby*, 462 F.2d 1201, 1972 U.S. App. LEXIS 9656 (C.A.D.C. 1972).

Trial court acted within its discretion at a joint murder trial in concluding that a witness's testimony that he could not remember his grand jury testimony and was not sure whether one defendant was present during that testimony was not substantially more prejudicial than probative and that a mistrial was not warranted after the witness had an anxiety attack after leaving the witness stand before resuming his testimony three days later, even though the prosecution's questioning could have been more circumspect with an obviously frightened witness; the witness's general reluctance to testify was probative of his credibility as a witness at trial, and defendants refused a curative instruction. *Johnson v. United States*, 980 A.2d 1174, 2009 D.C. App. LEXIS 454 (2009), writ of certiorari denied by 131 S. Ct. 367, 178 L. Ed. 2d 237, 2010 U.S. LEXIS 7200, 79 U.S.L.W. 3205 (U.S. 2010), writ of certiorari denied by 131 S. Ct. 263, 178 L. Ed. 2d 174, 2010 U.S. LEXIS 6845, 79 U.S.L.W. 3202 (U.S. 2010).

Trial court's preclusion of defendant's cross-examination of government witness regarding her prior history of mental illness was not abuse of discretion, in prosecution for second-

degree murder and other offenses; last record of a mental health disturbance suffered by witness had occurred a decade and a half prior to her testimony, trial court had opportunity to observe witness testify and concluded that her testimony was "completely competent," and defendant proffered no evidence to rebut witness's competency. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

In criminal prosecution, trial court applied proper legal standard for ascertaining competency of child to testify regarding murder, although voir dire focused almost exclusively on child's capacity to understand difference between truth and falsehood and to appreciation of duty to tell truth, where trial court's own question at voir dire as to child's ability to remember back to date of murder followed by court's observations and findings immediately after child's testimony at trial and again in posttrial order clearly covered determination of child's ability to recollect events about which she testified. D.C. Code §§ 22-2403, 22-3202, 22-3203. *Smith v. United States*, 414 A.2d 1189, 1980 D.C. App. LEXIS 290 (1980).

— Compelling calling of witness, examination of witnesses.

Accused in murder prosecution was required to plead and prove his own case and was responsible for the production in court of witnesses necessary to do so, and failure of the government to produce certain witnesses could not be regarded as prejudicial. D.C. Code 1940, §§ 22-2401, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

— Cross-examination of witnesses.

Trial judge, in allowing prosecutor to question defense witness about arrests or convictions of his family members for unrelated matters in an attempt to show his bias against government, did not commit plain error in murder prosecution; witness testified only that he saw third party and victim at murder scene an hour or so before it occurred, prosecutor's summation focused not on witness's credibility, but on fact that defendant could have been inside building when witness was outside, and witness was impeached with his own pending indictment, and thus, any error did not affect defendant's substantial rights. *Jones v. United States*, 946 A.2d 970, 2008 D.C. App. LEXIS 213 (2008).

Any error in trial court's limiting of defendant's cross examination of two eyewitnesses regarding drug use of others was harmless, in murder trial; defendant was able to ask each eyewitness whether eyewitness was under influence of any drugs at time of incident, and

whether eyewitnesses were under influence of drugs would not have furthered defendant's theory at trial that eyewitnesses, all four of whom disliked him, identified him as the shooter to "set him up." *Adams v. United States*, 883 A.2d 76, 2005 D.C. App. LEXIS 469 (2005).

Admission of witness's testimony from original trial for murder and other crimes in second trial, based on witness's unavailability due to deportation, was not abuse of discretion, where there was no showing that government had not made good faith effort to secure witness's presence before learning of deportation, defendant had opportunity to cross-examine witness at first trial and at hearing on motion for new trial, and witness's partial recantation was admitted at second trial. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

Trial court did not abuse its discretion in murder trial by not allowing defendant to cross-examine government witness concerning witness's motive to fabricate her testimony that defendant confessed to shooting victim in self-defense, where while defense counsel asserted that she had a good faith basis to believe that witness's trial testimony was fabricated to cover up fact that she was spreading lie in neighborhood that defendant killed victim in self-defense, defense counsel proffered no facts in support of such claim. *Fuller v. United States*, 873 A.2d 1108, 2005 D.C. App. LEXIS 253 (2005).

— Cross-examination of accused, examination of witnesses.

Refusal of court to make any advance ruling that under no circumstances would it permit photograph of defendant found in his wallet, which depicted defendant holding a knife in a menacing manner, to be used in cross-examining defendant if he took the stand in his own defense, was not error where court asked for some indication of the nature of defendant's proposed testimony but none was supplied, in prosecution for murder arising out of stabbing death of fellow employees of defendant. D.C. Code § 22-2403. *United States v. Cobb*, 449 F.2d 1145, 1971 U.S. App. LEXIS 7917 (C.A.D.C. 1971).

No improper impeachment of defendant in second-degree murder prosecution took place when prosecutor inquired as to previous terms of imprisonment served by defendant only after prisoner had already testified to such confinements in his direct testimony. D.C. Code §§ 14-305(b), 22-2403. *Curry v. United States*, 322 A.2d 268, 1974 D.C. App. LEXIS 246 (1974).

— Cumulative evidence, examination of witnesses.

Trial court did not abuse its discretion in murder trial by cutting short defense counsel's

questioning of government witness regarding inconsistencies between her trial and grand jury testimony concerning number of fights that had occurred between defendant and victim; witness had already been thoroughly impeached on such point, as every other witness had testified, contrary to witness, that there was only one fight between defendant and victim. *Fuller v. United States*, 873 A.2d 1108, 2005 D.C. App. LEXIS 253 (2005).

Even if court in prosecution for second-degree murder erred in ruling that prior consistent statements of defendant were inadmissible under present state of mind exception to hearsay rule, it would not have been abuse of discretion to exclude such statements on account of delay or confusion in that such statements were merely cumulative of other evidence and were only admissible for a limited purpose. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

In prosecution against juvenile who killed his father, wherein several witnesses had testified to juvenile's fear of his father, exclusion of testimony of juvenile's probation officer that the juvenile had come to officer several days before the shooting in order to seek his advice concerning the violent outbreaks of the father and that at that time officer had told juvenile to contact police whenever such outbreaks occurred was not an abuse of discretion and was not prejudicial since proffered evidence was cumulative and more remote than the evidence already admitted which dealt with juvenile's state of mind on the day in question. D.C. Code §§ 22-502, 22-2403. *In re Bumphus*, 254 A.2d 400, 1969 D.C. App. LEXIS 267 (App. 1969).

— Scope of evidence in rebuttal, examination of witnesses.

Where defendant in second-degree murder prosecution himself contended in his direct testimony that he had only recently begun carrying gun, trial court did not err in allowing prosecution thereafter to introduce rebuttal testimony indicating that defendant had been carrying gun for at least three weeks prior to shooting of victim. D.C. Code § 22-2403. *Curry v. United States*, 322 A.2d 268, 1974 D.C. App. LEXIS 246 (1974).

— Separation and exclusion of witnesses, examination of witnesses, generally.

Trial court did not abuse its discretion in murder trial by excluding testimony of defendant's brother, whom defense counsel proffered would have testified that he told witness that if defendant had shot victim, it was in self-defense, and thus would have shown that theory that defendant committed shooting from self-defense, as alleged by witness in her testimony, came from defendant's brother, who planted

such idea in witness's mind; defendant's brother had no way of knowing what the source of witness's testimony was, and it was pure speculation to imply that it was his statement to her that caused her to testify at trial that defendant had confessed to victim's shooting. *Fuller v. United States*, 873 A.2d 1108, 2005 D.C. App. LEXIS 253 (2005).

Trial court, which had before it allegation of a single comment on discrepancy in testimony on matter that was not central to any of issues in second-degree murder prosecution and firm denial of any inappropriate discussion, did not err, after extensively questioning defense witness who allegedly observed alleged impropriety and spectator, in refusing to call additional witnesses to explore defendant's allegations that witnesses had been discussing trial with spectator. D.C. Code § 22-2403. *Parker v. United States*, 363 A.2d 975, 1976 D.C. App. LEXIS 377 (1976).

Harmless or reversible error, generally.

Trial judge's questioning of defendant at trial, regarding his inconsistent explanations for why he confessed to a crime that he did not commit, was not plain error, notwithstanding defendant's claim that judge's questions indicated a skepticism of defendant's testimony; defendant's responses could have helped his defense by explaining why he gave a false confession, and trial counsel perceived the court's questioning as innocuous enough not to object or even pose follow-up questions. *Jennings v. United States*, 989 A.2d 1106, 2010 D.C. App. LEXIS 83 (2010).

Improper failure to suppress statement obtained in violation of Fifth Amendment right to counsel was not harmless beyond a reasonable doubt in prosecution for second-degree murder while armed in which defendant argued self-defense and jury returned conviction for lesser included offense of voluntary manslaughter while armed; defendant's assertions in statement that he stepped up, cut victim, and took off running and did not know whether victim had any weapons on him undoubtedly carried great weight with reasonable jurors, as other evidence presented by government was not overwhelming. *Tindle v. United States*, 778 A.2d 1077, 2001 D.C. App. LEXIS 172 (2001).

Defendant was not prejudiced in presenting his theory of self-defense that homicide victim was first aggressor based on trial court's decision precluding defendant from presenting additional evidence of violent character of assault victim who was also present in room when defendant and friend attempted to sell victims soap rather than cocaine; there could be no legal imputation of assault victim's intent to homicide victim because, although victims may have been cohorts, they were victims, not parties charged as aiders and abettors. D.C. Code

1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Indictment or information.

— Act or omission causing death, indictment or information.

In prosecution for negligent homicide, that part of the indictment charging negligence and alleging that such negligence caused decedent's death held to state an offense, and the allegation that defendant was under the influence of intoxicating liquor merely constitutes an element of aggravation and may be treated as surplusage. *Clifton v. U.S.*, 295 F. 925, 1923 U.S. App. LEXIS 3124 (1923).

An indictment charging the persons constructing a theater with involuntary manslaughter for a death resulting from the collapse of the theater held not to sufficiently allege criminal negligence. *U.S. v. Geare*, 293 F. 997, 1923 U.S. App. LEXIS 1708 (1923).

Where an indictment is found against several defendants for neglect in the work of paving and removing the earth from around the pier of a public building, whereby it fell, killing many of the persons in the building, it is insufficient if it fails to state explicitly the definite duty of each of the defendants, and to give notice to them of the specific acts of negligence with which they are charged. *Ainsworth v. U.S.*, 1 App.D.C. 518, 1893 U.S. App. LEXIS 3064 (1893).

— In general.

Statutory definition of crimes of first and second-degree murder do not impel requirement that they be charged in the alternative, as their substantive elements do not conflict. D.C. Code §§ 22-2403, 22-2404. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

— Lesser included offenses, indictment or information.

Second degree murder is an included defense under an indictment for felony-murder. D.C. Code 1961, §§ 22-2401, 22-2403. *Jackson v. U.S.*, 313 F.2d 572, 1962 U.S. App. LEXIS 3288 (C.A.D.C. 1962).

Voluntary manslaughter while armed was lesser included offense of second-degree murder while armed, so that defendants could be convicted of manslaughter offense after being charged only with murder offense, though at time of trial, maximum penalty for manslaughter offense exceeded maximum penalty for murder offense by \$1,000 fine; two offenses had identical elements except that murder offense also required malice, and court could avoid misapplication of statute by refraining from

imposing fine. D.C. Code 1981, §§ 22-2403, 22-2404, 22-2405, 22-3202; Fed.R.Cr.Proc. Rule 31(c), 18 U.S.C.; Criminal Rule 31(c). *Lee v. United States*, 668 A.2d 822, 1995 D.C. App. LEXIS 252 (1995).

Manslaughter is lesser included offense of second-degree murder. D.C. Code 1981, §§ 22-2403, 22-3202. *Price v. United States*, 602 A.2d 641, 1992 D.C. App. LEXIS 22 (1992).

Second-degree murder while armed and attempted robbery while armed were lesser included offenses of felony-murder, requiring vacation of either the felony-murder conviction or the convictions for the lesser offenses. U.S. Const.Amend. 5; D.C. Code 1981, §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *Price v. United States*, 531 A.2d 984, 1987 D.C. App. LEXIS 448 (1987).

Manslaughter is a lesser included offense of second-degree murder. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

Manslaughter is a lesser included offense of second-degree murder. D.C. Code§ 22-2403. *Pendergrast v. United States*, 332 A.2d 919, 1975 D.C. App. LEXIS 326 (1975).

— Malice, indictment or information.

Indictment charging defendant with second-degree murder was not defective because it merely mentioned "malice aforethought" without specifying recklessness, notwithstanding claim that it left defendant without notice that case would be tried on a theory of recklessness, since, given long-standing precedent in jurisdiction that malice can be inferred from excessive recklessness, it could not be said that defendant was unfairly foreclosed from any awareness that government would assert that theory of criminality. D.C. Code § 22-2403. *United States v. Lucas*, 447 F.2d 338, 1971 U.S. App. LEXIS 9284 (C.A.D.C. 1971).

Defendant could be convicted of second degree murder under felony-murder indictment even though indictment failed to allege "malice aforethought", where indictment contained the fully equivalent language that defendant "unlawfully and feloniously did murder" named person "by means of shooting him with a pistol". D.C. Code 1961, §§ 22-2401, 22-2403; Fed.Rules Crim.Proc. rules 7(c), 31(c), 18 U.S.C. *Jackson v. U.S.*, 313 F.2d 572, 1962 U.S. App. LEXIS 3288 (C.A.D.C. 1962).

— Specification of grade or degree of homicide, indictment or information.

Fact that indictment's first-degree murder counts, which alleged that defendant purposely beat, stabbed, shot or strangled various victims, thereby causing injuries resulting in their death, did not allege that defendant had a purpose of intent to kill was not a defect requiring dismissal of counts or that the counts be

construed as charging murder in second degree, in view of fact that counts sufficiently notified defendant of charges against him and that his counsel was aware throughout the proceedings that defendant was charged with first-degree murder. D.C. Code § 22-2401; D.C. Code SCR, Criminal Rule 7(c). *Hackney v. United States*, 389 A.2d 1336, 1978 D.C. App. LEXIS 479 (1978), writ of certiorari denied by 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95, 1979 U.S. LEXIS 645 (1979).

Instructions.

— Accident or misfortune, instructions.

Where question of accidental death was only contested issue in homicide case and jury received no guidance on this issue from trial court, second-degree murder conviction was reversed for new trial under proper instructions. *Thomas v. United States*, 419 F.2d 1203, 1969 U.S. App. LEXIS 10029 (C.A.D.C. 1969).

Defendant was not entitled to jury instructions on self-defense and defense of a third person in prosecution for voluntary manslaughter while armed and related weapons offenses; victim was not armed, had uttered no threats, did not obtain control of weapon of defendant's brother or point it at defendant or brother, and had not inflicted any serious injury on brother, and thus, evidence did not show that defendant or his brother were in imminent peril of death or serious bodily harm, such that defendant reasonably could think lethal response necessary, even though victim was initial aggressor and he was struggling to disarm defendant's brother. *Dorsey v. United States*, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

— Commission of or attempt to commit other offense, instructions.

In prosecution for second-degree murder, committed as result of violation of speed law by one engaged in illegal transportation of liquor while attempting to escape from police officers, court properly charged that one who intentionally and wrongfully does an act, so dangerous and serious that it reasonably might be expected to cause death and does cause death, may be convicted of second-degree murder, because wanton and reckless disregard of the rights of another is involved. D.C. Code 1929, T. 6, §§ 21-23, 401. *Lee v. U.S.*, 112 F.2d 46, 1940 U.S. App. LEXIS 4220 (1940).

— Defense of another, instructions.

Instruction on defense of third party was not warranted by evidence, in trial for murder and related offenses; individual with defendant had walked away from defendant when defendant approached victim and victim's friend to purchase marijuana and began shooting, and there was no evidence indicating that person with defendant was in danger sufficient to warrant

self-defense when defendant began firing. *Muschette v. United States*, 936 A.2d 791, 2007 D.C. App. LEXIS 571 (2007).

Instruction on defense of third persons was required where defendant could reasonably have believed his pregnant wife was in imminent danger of bodily harm when participant in altercation with defendant lunged at wife. *Graves v. United States*, 554 A.2d 1145, 1989 D.C. App. LEXIS 37 (1989).

In order to justify instruction on defense of a third person, defendant must point to evidence fairly tending to show that he reasonably believed the force used was necessary to avert serious bodily harm to the third person. *Graves v. United States*, 554 A.2d 1145, 1989 D.C. App. LEXIS 37 (1989).

Fact that defendant's own testimony supported only self-defense instruction because he stated that he struck victim with hatchet only when victim confronted him with knife did not preclude defendant's request for instruction on defense of third person. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Proper instruction regarding defense of a third person includes instruction on use of deadly force and caution concerning use of excessive force. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

In order to provide basis for instruction on defense of third person, defendant must point to evidence fairly tending to show that he reasonably believed particular deadly force used to avert serious bodily harm to victim was necessary, not excessive, under circumstances. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Even if defendant was entitled to use deadly force in defense of another, i.e., force likely to cause death or serious bodily harm, there are degrees of deadly force; on some occasions it may be reasonable only to cause serious bodily harm not threatening life itself. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

— Defense of habitation, instructions.

In a prosecution for homicide, which occurred in defendant's own home, where defendant's right to have a pistol in the house was not in any way questioned, and the issue was whether the killing was justifiable, requests for charges that defendant had a right to have the pistol in his house, and, if necessary, to use it, were properly denied. *Price v. U.S.*, 276 F. 628, 1921 U.S. App. LEXIS 2127 (1921).

— Deliberation and premeditation, instructions.

Charge in homicide prosecution should focus primarily on defendant's actual thought processes in terms of meditation and conscious

weighing of alternatives and the appreciable time element is subordinate, necessary for but not sufficient to establish deliberation. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

"Appreciable time" charge in homicide prosecution is a meaningful way to convey to jury the core meaning of premeditation and deliberation and for that reason should be given at least where specifically requested by defense. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

— Discharge of jury before verdict, instructions.

Question by prosecutor to defendant as to whether defendant relived moment of killing when she drew up document stating she was common-law wife of victim had potential for prejudice which outweighed whatever relevance it had for impeachment purposes; however, such question alone was not so prejudicial to fairness of defendant's trial that refusal to grant a mistrial in prosecution for second-degree murder was abuse of discretion. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

— Grade or degree of murder, instructions.

Under District of Columbia law, an accused in a criminal trial is not entitled to an instruction based on evidence of mental weakness short of legal insanity, which would reduce his crime from first to second-degree murder. D.C. Code 1940, §§ 22-2401, 22-2403, 22-2404. *Fisher v. U.S.*, 66 S.Ct. 1318, 1946 U.S. LEXIS 2178 (U.S. Dist. Col. 1946).

Court's instruction on second degree murder as lesser included offense of felony-murder was properly given where evidence so warranted and where defendants made timely request therefor. D.C. Code §§ 22-2401, 22-2403. *United States v. Robinson*, 475 F.2d 376, 1973 U.S. App. LEXIS 11290 (C.A.D.C. 1973).

In prosecution for second-degree murder and manslaughter where there was evidence of provocation, instruction repeating that provocation must be adequate before defendant could be acquitted of second-degree murder and convicted instead of manslaughter and manslaughter instruction containing detailed statement of several issues which were clearly important for jury to consider when deciding whether to convict defendant of second-degree murder were confusing, but did not require reversal of conviction, where confusion might have prejudiced government as well as defendant. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S.

Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

If defendant presses no objection, judge may instruct jury to render verdicts on both first-degree felony murder count and second-degree murder count, assuming judge concludes the instruction will not confuse jury; however, if defendant insists that charge of second-degree murder be submitted to jury solely as lesser offense included within first-degree murder charge, and if he makes a timely motion or objection, he is entitled to an instruction directing jury (a) to first consider issue of guilt as to first-degree murder; (b) in the event of acquittal, to consider guilt of second-degree murder as lesser included offense; and (c) in the event of verdict of guilty of first-degree murder, to enter no verdict concerning second-degree murder. *United States v. Butler*, 455 F.2d 1338, 1971 U.S. App. LEXIS 7080 (C.A.D.C. 1971).

Instruction that if prosecution had proved beyond reasonable doubt that defendant had committed acts disclosed by evidence as result of which victim died but that prosecution had failed to prove element of malice necessary to second-degree murder jury must consider whether defendant was guilty of lesser included offense of manslaughter, did not improperly permit jury to infer requisite malice if they accepted defendant's version that his assault was only of minor dimensions and not by itself sufficient to disclose intent to cause great or serious bodily harm. D.C. Code § 22-2403. *Logan v. United States*, 411 F.2d 679, 1968 U.S. App. LEXIS 4548 (C.A.D.C. 1968).

Jury may be instructed on second-degree murder as a lesser included offense even though indictment is solely for felony-murder. D.C. Code §§ 22-2401, 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Where indictment charges felony-murder, verdict of second-degree murder is appropriate if there is proof from which the jury might reasonably find defendant did not commit one of the enumerated felonies but was guilty of an intentional killing on impulse, and on this state of proof a charge of second-degree murder as a lesser included offense may be requested by prosecution or defense. D.C. Code §§ 22-2401, 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

If prosecutor files in two counts of first-degree murder, once charge of premeditated murder is struck as supported by insufficient evidence and that count is reduced to second-degree murder, defendant is entitled, on motion, to have entire count struck and to have

issue of guilt as to second-degree murder submitted only as lesser included offense and only in the event of reasonable doubt of guilt of greater offense. D.C. Code §§ 22-2401 to 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

On request, an accused is entitled to instructions in a murder prosecution that make clear the distinction between first and second degrees of murder by reference to distinction between killings in cold blood and impulsive killings. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

While instructions calculated to lead jury to conclude that impulsive killings are murder in first degree are erroneous, instructions given in murder prosecution, while skimpy, did set forth the difference between the degrees of murder sufficiently so that reversal was not required on ground of plain error, notwithstanding the absence of objection. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Analysis of jury would be illuminated if it is first advised that a typical case of first-degree murder is the murder in cold blood while murder committed on impulse or in sudden passion is murder in the second degree, and then instructed that a homicide conceived in passion constitutes murder in the first degree only if jury is convinced beyond a reasonable doubt that there was an appreciable time after design was conceived and that in this interval there was further thought and a turning over in the mind and not mere persistence of an initial impulse of passion. D.C. Code 1961, §§ 22-2401, 22-2403. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Submitting question of first-degree murder to jury was not erroneous on theory that evidence was insufficient to support verdict of that crime and that its submission tended to lead to compromise verdict of manslaughter whereas, except for such submission claim of self-defense might have been sustained, where under evidence manslaughter conviction could not be attributed to submission to jury of issue of more serious offense, court cautioned jury in a manner which indicated doubt that verdict of first-degree murder would be warranted, and defendant's counsel raised no objection to the instruction. *Gaines v. United States*, 349 F.2d 190, 1965 U.S. App. LEXIS 5239 (C.A.D.C. 1965).

Trial judge in instructing jury as to difference between first degree murder and second degree murder, should endeavor to make it absolutely clear to jury that intentional killing may be second degree murder if premeditation and

deliberation do not exist. D.C. Code 1961, §§ 22-2401, 22-2403. *Tucker v. United States*, 318 F.2d 221, 1963 U.S. App. LEXIS 5946 (C.A.D.C. 1963), writ of certiorari denied by 381 U.S. 952, 85 S. Ct. 1812, 14 L. Ed. 2d 726, 1965 U.S. LEXIS 1004 (1965).

Where it could not be determined from evidence whether defendant intended to kill or merely wound his victim and it could not be said from record with legal certainty that interval between fight and the killing which followed was or was not of sufficient duration to provide time for premeditation required for first degree murder, court properly submitted lesser included offense of second degree murder in prosecution under indictment on charge of first degree murder. D.C. Code 1961, §§ 22-2401 to 22-2403. *Hansborough v. U.S.*, 308 F.2d 645, 1962 U.S. App. LEXIS 4033 (C.A.D.C. 1962).

Failing to instruct that jury might return a second degree murder verdict was not error in a felony-murder prosecution, where accused and his brother robbed a store proprietor, accused took some money and fled, and in immediate close and continuous pursuit, police officers followed accused up to instant of killing of one of the officers by accused. D.C. Code 1951, § 22-2401. *Coleman v. U.S.*, 295 F.2d 555, 1961 U.S. App. LEXIS 3632 (C.A.D.C. 1961).

In homicide prosecution, wherein there was sufficient evidence of possible intoxication to justify second degree charge, it was a question of fact for jury to resolve whether accused had possessed "purpose" to kill, irrespective of his drinking, and second degree murder charge was not incorrect for failure to spell out degree of intoxication which must have overcome accused. D.C. Code 1929, § 6-21. *Askins v. U.S.*, 231 F.2d 741, 1956 U.S. App. LEXIS 3461 (C.A.D.C. 1956).

In homicide prosecution, there was sufficient evidence of a possible intoxication of defendant to justify second degree murder charge. *Askins v. U.S.*, 231 F.2d 741, 1956 U.S. App. LEXIS 3461 (C.A.D.C. 1956).

Where, in arson and murder prosecution, all testimony as to what occurred in burning house pointed to first degree murder only, giving of second degree murder instruction was error. D.C. Code 1951, §§ 22-401, 22-2401. *Green v. U.S.*, 218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

In prosecution for first degree murder, instruction to jury that second degree murder is killing with malice aforethought, but without intent to kill, was erroneous as to such limitation. D.C. Code 1951, § 22-2403. *Kitchen v. U.S.*, 205 F.2d 720, 1953 U.S. App. LEXIS 2666 (C.A.D.C. 1953).

In homicide prosecution instruction that murder in second degree is an unlawful killing with malice, but without a purpose or intent to kill and without premeditation and delibera-

tion, was reversibly erroneous. *Weakley v. U.S.*, 198 F.2d 940, 1952 U.S. App. LEXIS 3260 (C.A.D.C. 1952).

An instruction that if jury believe defendant guilty of killing but have reasonable doubt as to whether offense is murder in the first degree or murder in the second degree, doubt should be resolved in defendant's favor and he should be found guilty of lesser crime, is necessary only where from evidence as a whole jury might reasonably find defendant guilty of either first or second degree murder. D.C. Code 1940, §§ 22-2401, 2402. *Goodall v. U.S.*, 180 F.2d 397, 1950 U.S. App. LEXIS 2434 (C.A.D.C. 1950).

In prosecution for second degree murder for killing two persons with an automobile, "instruction" that "second degree murder" is the unlawful killing of another without premeditated design and plan to effect death, but with malice aforethought, and defining "malice aforethought" as comprehending an act done regardless of social duty and a mind bent upon mischief, or an act done with a depraved mind and attended with circumstances which indicate a wilful disregard of the rights or the safety of others, was proper. *Nestlerode v. U.S.*, 122 F.2d 56, 1941 U.S. App. LEXIS 2905 (1941).

Permitting of jury to find defendant, charged with murder in first degree and defending solely on ground of insanity, guilty of murder in second degree, held not error if defendant were not as matter of law guilty of first degree murder if sane, since, if defendant were found sane at time of homicide, case remained for consideration as if no plea of insanity had been interposed. *Owens v. U.S.*, 85 F.2d 270, 1936 U.S. App. LEXIS 4088 (1936).

Plain error of trial court by including in aiding and abetting instruction "natural and probable consequences" language that allowed jury to convict defendants of first-degree murder while armed without finding the necessary mens rea for first-degree murder, in trial of five defendants arising out of beating of homeless man and murder of passerby who tried to intervene, resulted in a miscarriage of justice such that the plain error rule required convictions of defendants for first-degree murder while armed be reversed and convictions instead be entered for second-degree murder while armed; defendants were tried as aiders and abettors, the principals who committed the murder were not codefendants, there was no compelling evidence that the defendants personally had the intent to kill and acted with premeditation and deliberation in doing so, but there was evidence that defendants acted with malice, as required to support conviction for second-degree murder. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari

denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Plain error of trial court, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by including in aiding and abetting instruction "natural and probable consequences" language which allowed jury to convict defendants of first-degree murder while armed without finding the necessary mens rea, affected the substantial rights of the defendants, for purposes of determining whether the first-degree murder convictions should be reversed on plain error review, as the government's sole theory of defendants' liability for murder was as aiders and abettors, aiding and abetting liability for murder required a principal, the principals who committed the murder were not codefendants, and the prosecution argued that defendants were guilty of first-degree murder if the principals had acted with premeditation and deliberation. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Error of trial court, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, by including in aiding and abetting instruction "natural and probable consequences" language which allowed jury to convict defendants of first-degree murder while armed without finding the necessary mens rea for first-degree murder, was plain error, for purposes of plain error review, as the instruction imposed liability on an accomplice for a crime committed by a principal based on the accomplice's negligence. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Evidence was sufficient to support giving of charges on first and second-degree murder while armed; there was testimony that defendant pushed victim first and escalated confrontation by pulling and firing his weapon, defendant approached victim, who had already been wounded by bullet and was laying on ground, stood over him, and defendant shot him several times in chest, while saying to him that he was going to die. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125

S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Jury instruction on second-degree murder as lesser-included offense of first-degree murder was not improper because reasonable jury could have concluded that government failed to establish premeditation, the only element distinguishing first from second-degree murder. *Woodard v. United States*, 738 A.2d 254, 1999 D.C. App. LEXIS 199 (1999).

Evidence of defendant's longstanding jealousy of murder victim's associations with other men, and of defendant's volatile temperament, was sufficient to support instruction on second-degree murder as lesser-included offense of charged first-degree murder. *Wilson v. United States*, 711 A.2d 75, 1998 D.C. App. LEXIS 91 (1998).

Even if there is no disputed factual element distinguishing greater offense from lesser, court should still give requested instruction on second-degree murder as lesser included offense of felony-murder and should appraise all testimony to see if it is capable of more than one reasonable inference. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

Trial court should give instruction on second-degree murder as lesser included offense of felony-murder where Government, even if it failed to prove underlying burglary, could have obtained second-degree murder conviction. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

Second-degree murder was lesser included offense of first-degree felony-murder committed by defendant engaged in robbery with loaded pistol and, therefore, did not need to be charged in first-degree felony-murder indictment in order to justify trial court's instruction on second-degree murder. D.C. Code 1981, §§ 22-2401, 22-2403; U.S. Const. Amend. 5. *Towles v. United States*, 521 A.2d 651, 1987 D.C. App. LEXIS 311 (1987), writ of certiorari denied by 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741, 1987 U.S. LEXIS 2800 (1987).

Instruction on second-degree murder as lesser included offense of first-degree murder was proper, given that reasonable jury could have concluded that government had failed to establish beyond reasonable doubt elements of premeditation and deliberation. *Young v. United States*, 515 A.2d 1090, 1986 D.C. App. LEXIS 453 (1986).

In prosecution for felony-murder, trial court properly denied defendant's request for instruction as to lesser included charge of second-degree murder, since evidence, including testimony that defendant had declared his intention to commit robbery immediately prior to the shooting, provided no rational basis for requested instruction. D.C. Code 1981, §§ 22-2401, 22-2403, 22-3202. *Wood v. United States*,

472 A.2d 408, 1984 D.C. App. LEXIS 329 (1984).

Even though defendant was charged with both first-degree murder and felony-murder, second-degree murder constituted appropriate lesser included offense of both charged offenses and trial court could properly give instruction on such lesser included offense relative to each of the charged offenses. D.C. Code 1973, §§ 22-103, 22-2401, 22-3202. *Turner v. United States*, 459 A.2d 1054, 1983 D.C. App. LEXIS 355 (1983).

— Grade or degree of manslaughter, instructions.

Defendant accused of voluntary manslaughter was not entitled to instruction on lesser included offense of involuntary manslaughter; defendant acknowledged he intended to hurt victim and defendant inflicted well over 70 wounds upon victim. D.C. Code 1981, §§ 22-2403, 22-3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Denial of requested manslaughter instruction in second-degree murder prosecution was not error given that evidence did not support inference of provocation; evidence indicated that defendant provoked victim to defend victim's friend, chased victim to victim's car, and shot victim through window of car as victim was leaving. D.C. Code 1981, §§ 22-2403, 22-3202. *Price v. United States*, 602 A.2d 641, 1992 D.C. App. LEXIS 22 (1992).

Provocation needed to justify lesser included offense instruction for manslaughter was not established by evidence that murder defendant's assault on victim's friend caused victim to go to friend's defense where defendant chased victim back to victim's car where defendant shot victim as victim tried to drive off. D.C. Code 1981, §§ 22-2403, 22-3202. *Price v. United States*, 602 A.2d 641, 1992 D.C. App. LEXIS 22 (1992).

Trial court properly refused to give lesser included instruction on manslaughter in second-degree murder prosecution where there was no evidence to support a jury finding of no malice. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

Requested instruction on manslaughter as lesser included offense of second-degree murder was properly refused absent an evidentiary predicate for finding of adequate legal provocation on which to base such a charge. D.C. Code § 22-2403. *Jamison v. United States*, 373 A.2d 594, 1977 D.C. App. LEXIS 477 (1977).

In prosecution for murder of defendant's estranged wife, instruction on lesser included offense of manslaughter was not warranted, where only testimony as to defendant's version

of shooting incident came from a defense psychiatrist and was hearsay and could provide no factual predicate for proper consideration of manslaughter by jury. D.C. Code §§ 22-2403 to 22-2405. *Bethea v. U.S.*, 365 A.2d 64, 1976 D.C. App. LEXIS 374 (1976).

Evidence in prosecution of apartment manager for second-degree murder of tenant, which showed that killing occurred during argument over noise and that manager shot tenant in back, was insufficient to support defendant's request for instruction on lesser included offense of involuntary manslaughter. *Robinson v. United States*, 361 A.2d 199, 1976 D.C. App. LEXIS 337 (1976).

Evidence, including defendant's testimony that he had seen victim wave his gun earlier on date of incident at issue and that he knew that victim had previously shot someone else in the neighborhood, as well as testimony that heated words were exchanged at fateful meeting of defendant and victim and that victim was moving his hand toward his pocket when defendant struck him with baseball bat, constituted some evidence that defendant lacked requisite malice for second degree murder; hence, failure to give requested instruction on lesser included offense of manslaughter was reversible error. *Pendergrast v. United States*, 332 A.2d 919, 1975 D.C. App. LEXIS 326 (1975).

— Grade or degree of offense generally, instructions.

Court erred in refusing to instruct that jury could not find defendant guilty of both first-degree and second-degree murder. D.C. Code 1961, §§ 22-2401 to 22-2403; 18 U.S.C. § 1111. *Naples v. U.S.*, 344 F.2d 508, 1964 U.S. App. LEXIS 3943 (C.A.D.C. 1964).

In prosecution for manslaughter, instructions which defined murder in the first degree and murder in the second degree as well as manslaughter and which were accompanied by admonition to jury that the defendant could not be convicted of any greater offense than the one for which he had been indicted, namely manslaughter, was not error. *McGuire v. U.S.*, 171 F.2d 136, 1948 U.S. App. LEXIS 2798 (C.A.D.C. 1948).

Where instructions were largely devoted to discussion of the elements of three crimes of murder in first degree, murder in second degree and manslaughter and to possible effect of intoxication on existence of specific intent and deliberation and premeditation, and did not expressly inform jury that unless they found beyond reasonable doubt that all elements of some crime existed, they must acquit the defendant, the instructions were insufficient. *McAffee v. U.S.*, 105 F.2d 21, 1939 U.S. App. LEXIS 3249 (1939).

Failure to give requested instruction that if jury believed beyond reasonable doubt that

defendant was guilty of some grade of culpable homicide but had a reasonable doubt regarding whether he was guilty of first or second degree murder, jury could not find him guilty of a higher offense than second degree murder was error, notwithstanding instruction was incomplete because of failure to cover manslaughter. *McAffee v. U.S.*, 105 F.2d 21, 1939 U.S. App. LEXIS 3249 (1939).

Trial court should not be criticized for stating in instruction with considerable detail law regarding different degrees of murder. *Goodman v. U.S.*, 70 F.2d 741, 1934 U.S. App. LEXIS 4290 (1934).

Murder prosecution instruction to effect that jury should first consider highest degree of offense, and pass on to next degree if they were not unanimously convinced that government had proven guilt beyond a reasonable doubt, was proper and preferable to defendant's requested instruction that if jury was convinced beyond reasonable doubt that defendant was guilty of some degree of culpable homicide but was reasonably doubtful as to degree, it must proceed to lesser degree. *United States v. White*, 225 F. Supp. 514, 1963 U.S. Dist. LEXIS 6247 (D.D.C.1963), remanded by 349 F.2d 965, 121 U.S. App. D.C. 287, 1965 U.S. App. LEXIS 5055 (1965).

There was no evidence of unplanned or impulsive murders, and thus, trial judge was not obligated to give instruction on second degree murder as lesser included offense, despite speed with which events unfolded and alleged lack of evidence of motive and premeditation; speed was not controlling factor as to premeditation and deliberation, and there was sufficient circumstantial evidence to demonstrate premeditation and deliberation, including defendant's bringing gun to scene, intercepting first victim from behind, and chasing second victim, and evidence that defendant had threatened to "mess [second victim] up." *Bright v. United States*, 698 A.2d 450, 1997 D.C. App. LEXIS 174 (1997).

A defendant is entitled to a manslaughter instruction where there is evidence of mitigating factors which would undermine the government's evidence as to the defendant's awareness of the risk or intent to kill or commit serious bodily injury that thereby reduces the level of homicide from murder in the second degree to manslaughter. *United States v. Lindsay*, 124 WLR 2021 (Super. Ct. 1996).

— Harmless or reversible error, instructions.

Trial court's instruction in second degree murder prosecution that "malice is a state of mind showing a heart regardless of social duty," was harmless error where death was caused by knife wound. *United States v. Hinkle*, 487 F.2d

1205, 1973 U.S. App. LEXIS 7168 (C.A.D.C. 1973).

In prosecution for second-degree murder, failure of trial court to clarify instruction that defense of self-defense is not available to one who provokes difficulty by informing jury that, in determining whether defendant had been aggressor, they were not to consider his conduct at time of earlier altercation which had taken place an hour prior to shooting was not prejudicial where earlier altercation had not loomed large at trial and possible ambiguity of instruction as given was offset by its context. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

Instructions providing, inter alia, that high degree of recklessness requisite to prove malice as an element of murder is distinguished from lesser recklessness constituting manslaughter by reason of quality of defendant's awareness of risk either actually or from showing of such danger that any reasonable person must have been aware of it were not prejudicially erroneous. *United States v. Dent*, 477 F.2d 447, 1973 U.S. App. LEXIS 10804 (C.A.D.C. 1973).

Instruction that malice may also be defined as a condition of mind that prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse did not warrant reversal of conviction of second-degree murder on ground that instruction erroneously informed jury that an injurious wrongful act is done with malice if done only willfully, that is, on purpose. D.C. Code § 22-2403. *Carter v. United States*, 437 F.2d 692, 1970 U.S. App. LEXIS 6078 (C.A.D.C. 1970), writ of certiorari denied by 402 U.S. 912, 91 S. Ct. 1393, 28 L. Ed. 2d 655, 1971 U.S. LEXIS 2430 (1971).

Fact that when instructing on elements of lesser included offense of manslaughter judge defined only voluntary and not involuntary manslaughter was not prejudicial as improperly precluding jury from rendering verdict of involuntary manslaughter where defendant did not request involuntary manslaughter instruction, elements of voluntary manslaughter were properly defined, and trial judge properly emphasized essential distinction between murder and manslaughter and presence or absence of malice. D.C. Code § 22-2403; Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. *Logan v. United States*, 411 F.2d 679, 1968 U.S. App. LEXIS 4548 (C.A.D.C. 1968).

Where, had not erroneous second degree murder instruction been given in arson and murder prosecution defendant, who was found guilty by jury of second degree murder, might have been found not guilty under the murder count, giving of such second degree murder instruction constituted reversible error. D.C. Code 1951, §§ 22-401, 22-2401. *Green v. U.S.*,

218 F.2d 856, 1955 U.S. App. LEXIS 2853 (C.A.D.C. 1955).

A conviction of first degree murder after erroneous instruction to jury that second degree murder is killing with malice aforethought, but without intent to kill, must be reversed, as Court of Appeals cannot assume that jury would not have returned verdict of guilty of second degree murder had it known that it could convict intentional killer of such offense. D.C. Code 1951, §§ 22-2401, 22-2403. *Kitchen v. U.S.*, 205 F.2d 720, 1953 U.S. App. LEXIS 2666 (C.A.D.C. 1953).

Where instruction regarding second-degree murder and manslaughter was given at request of defendant's counsel, if the instruction was subject to criticism on ground that it was confusing because it opened up a matter not properly for jury's consideration, it was favorable to defendant, and he could not complain. D.C. Code 1940, § 22-2401. *Mumfords v. U.S.*, 130 F.2d 411, 1942 U.S. App. LEXIS 3113 (1942).

Error in trial court's giving of a jury instruction on natural and probable consequences in the context of aiding and abetting was harmless at a joint trial for second-degree murder while armed with a shod foot; three witnesses testified that defendants kicked victim multiple times, there was thus strong evidence from which to infer that defendants had the requisite mens rea for the offense because they intended to kill victim, intended to seriously injure victim, or acted in conscious disregard of an extreme risk of death or serious bodily injury to victim when they were kicking him, and, moreover, the instructions given specified that an accomplice had to know that another participant had the intent necessary for second-degree murder. *Johnson v. United States*, 980 A.2d 1174, 2009 D.C. App. LEXIS 454 (2009), writ of certiorari denied by 131 S. Ct. 367, 178 L. Ed. 2d 237, 2010 U.S. LEXIS 7200, 79 U.S.L.W. 3205 (U.S. 2010), writ of certiorari denied by 131 S. Ct. 263, 178 L. Ed. 2d 174, 2010 U.S. LEXIS 6845, 79 U.S.L.W. 3202 (U.S. 2010).

Error in giving predeliberation charge given to jury concerning "attitude and conduct of jurors" was not plain error in prosecution for murder; although instruction tilted toward desirability of verdict, jury deliberated for some nine hours before signaling that it could not reach agreement, presence of charge did not seriously affect fairness, integrity or public reputation of judicial proceedings, and charge did not create impermissible risk of jury coercion. *Jones v. United States*, 946 A.2d 970, 2008 D.C. App. LEXIS 213 (2008).

Even if trial court erred in submitting transcript of murder defendant's testimony from first trial that resulted in mistrial during deliberations of second trial, such error was harmless; defendant's testimony from the first trial

was not inculpatory, but consistent with his defense in the second trial that he had been misidentified as the shooter and that his claim that his companion shot victim, while trial judge did not specifically instruct jury with respect to the transcript of defendant's prior testimony, he did instruct jurors that they must not draw any inference of guilt from defendant's decision not to testify at the second trial, and access to the transcript did not sway guilty verdict, as evidence in support of defendant's guilt was strong. *Fuller v. United States*, 873 A.2d 1108, 2005 D.C. App. LEXIS 253 (2005).

Error, if any, in submitting first-degree and second-degree murder charges to jury was harmless; there was no basis to conclude that mere submission of greater charges resulted in confusion, unduly influenced jury, or led them to decide case on anything other than evidence and law, and defendant was acquitted of both first-degree and second-degree murder. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Trial court's error in second degree murder prosecution in failing to give instruction on lesser included offense of criminally negligent involuntary manslaughter did not constitute grounds for new trial; rather than an all-or-nothing choice of second-degree murder or acquittal, jury had before it the intermediate options of both voluntary and misdemeanor involuntary manslaughter, and absence of instruction did not deny jury opportunity to consider offense most consistent with defendant's theory of evidence. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

Even if trial court erred in refusing to give a self-defense instruction in defendant's trial for murder, any error was harmless, because court instructed jury on mitigation of malice or intent, and the defense of imperfect self-defense, and despite these instructions, the jury returned a second-degree murder verdict, which was inconsistent with imperfect self-defense. *Outlaw v. United States*, 806 A.2d 1192, 2002 D.C. App. LEXIS 516 (2002).

In prosecution of juvenile as adult, any error in trial court's failure to instruct jury to consider juvenile's age as factor in determining his criminal culpability for involuntary manslaughter was harmless, where issue was not central to case, there was no evidence showing that juvenile's age caused him to be unaware of risk of pointing gun at someone and pulling trigger, defense did not argue that juvenile could not appreciate danger because of age, government's evidence against juvenile was strong, and juvenile was over age of 16. D.C. Code 1981, §§ 16-2301(3), 22-2403 et seq.

White v. United States, 692 A.2d 1365, 1997 D.C. App. LEXIS 74 (1997).

Although defendant was improperly denied "imperfect self-defense" instruction, error was harmless where jury was instructed on first and second-degree murder, and jury found defendant guilty of first-degree murder; jury's finding of premeditation could not coexist with defendant's mitigation claim, and if jury believed defendant acted in self defense, even if unreasonably, it would have convicted appellant of second-degree murder. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Trial court's error in refusing to give requested instruction on second-degree murder as lesser included offense of felony-murder was harmless where finding that defendant had intent to steal was inherent in jury's finding of guilt of first-degree burglary; jury could not rationally have found defendant guilty of lesser included offense of second-degree murder where only disputed elements separating greater offense from lesser included offense was whether defendant had specific intent to steal. *Nelson v. United States*, 601 A.2d 582, 1991 D.C. App. LEXIS 355 (1991).

That defense counsel argued independent cause of death of victim theory to jury in closing did not cure trial court's error in failing to adequately instruct on defense theory of independent cause. *Stack v. United States*, 519 A.2d 147, 1986 D.C. App. LEXIS 493 (1986).

Trial judge did not err in refusing to give manslaughter instruction where jury, which was given instruction on second-degree murder as a lesser included offense, found defendant guilty of first-degree murder. *Dean v. United States*, 377 A.2d 423, 1977 D.C. App. LEXIS 375 (1977).

In homicide prosecution, trial court did not commit reversible error in failing to give limiting instruction concerning extrajudicial statements admitted to show state of mind of the defendant and the victim, the defendant's wife. D.C. Code §§ 22-2403, 22-2405, 22-3202. *Gezmu v. United States*, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

— In general.

Predeliberation charge given to jury concerning "attitude and conduct of jurors," which stated that final test of quality of jury's service would lie in verdict returned to courtroom, not in opinions jury held as it retired, was error in prosecution for murder; in course of stressing distinction between "opinions" jurors could hold and verdict they reached, charge conveyed evident bias favoring latter, and instruction did not include language balanced against desirability of agreement that reminded jurors not to surrender their honestly held convictions, even if that prevented agreement. *Jones v.*

United States, 946 A.2d 970, 2008 D.C. App. LEXIS 213 (2008).

Causation instruction on second-degree murder, which charge arose out of gun battle on city street between defendant and co-defendant, was appropriate; proximate causation theory of second-degree murder liability was well-recognized in the law, increased risk to bystanders justified application of proximate cause liability to those participants who willfully chose to engage in street battle, and instruction given was functional equivalent of asking jury to decide whether there was concurrent or mutual expectation that street battle would ensue. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Trial court did not abuse its discretion and did not commit plain error when instructing on malice in murder prosecution, where instructions described three states of mind which could constitute malice, clearly indicated that malice implied state of mind which could include specific intent to kill, intent to commit serious bodily harm, or intent to act in a manner regardless of life and safety of others; moreover, judge had no sua sponte duty to adopt form of instructions of listing three mental states, rather than providing standard instruction. *Swanson v. United States*, 602 A.2d 1102, 1992 D.C. App. LEXIS 29 (1992).

— Instructions after submission of cause.

Trial judge's instruction to jury in second-degree murder prosecution that jury had to decide case "without other extraneous, irrelevant issues coming into play," did not constitute functional equivalent of antideadlock instruction, even though defendant claimed that minority of jurors who were deadlocked, believed judge knew how jury was numerically divided and felt singled out by judge's instructions that they could return verdict on lesser charge of manslaughter if, after reasonable efforts, they could not reach unanimous verdict on murder charge; at time judge gave instruction telling jury to decide case without extraneous issues, latest information he had was that the jury was no longer deadlocked. *Ford v. United States*, 856 A.2d 591, 2004 D.C. App. LEXIS 423 (2004).

Trial court did not abuse its discretion in refusing to reinstruct jury, in response to jury's question regarding finding defendant guilty of first or second degree murder while armed if jury believed defendant aided and abetted another person without knowing other person had intent to kill; trial court had already provided instructions regarding relevant terms and was concerned that jury's question was so specific that supplemental instruction would dictate

outcome of case. D.C. Code 1981, §§ 22-2403, 22-3202. *Graham v. United States*, 703 A.2d 825, 1997 D.C. App. LEXIS 268 (1997).

Trial court did not abuse its discretion by denying defendant's request, made during jury deliberations and after question from jury, for instruction on lesser included assault offense; trial court did not believe such instruction was responsive to jury's question regarding finding defendant guilty of first or second degree murder while armed if jury believed defendant aided and abetted another person without knowing other person had intent to kill. D.C. Code 1981, §§ 22-2403, 22-3202. *Graham v. United States*, 703 A.2d 825, 1997 D.C. App. LEXIS 268 (1997).

— Intoxication, instructions.

Defendant was not entitled to instruction on intoxication as a defense to second-degree murder; although voluntary intoxication might negate the ability of the defendant to form the specific intent to kill, or the deliberation and premeditation necessary to constitute first degree murder, it could not reduce murder to voluntary manslaughter, nor permit an acquittal of murder. *Wheeler v. United States*, 832 A.2d 1271, 2003 D.C. App. LEXIS 569 (2003).

— Lesser-included offenses, instructions.

Trial court's erroneous jury instruction on aiding and abetting did not affect defendants' substantial rights and therefore was not plain error requiring reversal of convictions for unarmed second-degree murder as lesser-included offenses of first-degree murder, even though defendants were convicted as aiders and abettors and prosecutor emphasized that theory of liability in closing argument, where government produced evidence from eyewitnesses that defendants actively and personally participated throughout the vicious beating and kicking that led to victim's death, and from this, the jury could have inferred that defendants acted, if not with a specific intent to kill, at the very least with malice. *Ingram v. United States*, 40 A.3d 887, 2012 D.C. App. LEXIS 137 (2012), writ of certiorari denied by 133 S. Ct. 1483, 185 L. Ed. 2d 383, 2013 U.S. LEXIS 1748, 81 U.S.L.W. 3471 (U.S. 2013).

Causation instruction on second-degree murder, which charge arose out of gun battle on city street between defendant and co-defendant, did not constitute constructive amendment or of variance from indictment; defendant was charged by indictment with first-degree murder, and thus he was placed on notice that government might request and that jury might consider charge of lesser-included offense, and indictment stated that defendant had killed victim by shooting at co-defendant and others. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari de-

nied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Evidence supported instruction on second-degree murder as lesser-included offense of first-degree murder; while jury could conclude reasonably that testimony from all three eye-witnesses showed malice on defendant's part, testimony of two of these witnesses presented some evidence which might have led jurors to conclude that there had been no premeditation, including testimony that defendant had left crap game without picking up his money, and testimony that witness could not hear words that defendant said to victim before any shots were fired. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Trial court's instructing jury in second degree murder prosecution that it could consider verdict of involuntary manslaughter only after making reasonable efforts to reach verdict on voluntary manslaughter was proper, even though defendant claimed such direction intimated that involuntary manslaughter was a lesser-included offense of, rather than alternative offense to, voluntary manslaughter; trial court identified both voluntary and involuntary manslaughter as lesser-included offenses. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

Defendant, in second degree murder prosecution, was entitled to instruction on lesser-included offense of criminally negligent involuntary manslaughter; evidence was presented that altercation between defendant and victim occurred once the parties were outside defendant's home, photograph showed concrete stairs leading to defendant's door, several doctors testified that victim's injuries could have been sustained in a fall down such stairs, defendant told police he punched victim, that he may have pushed victim, and that victim might have sustained his non-facial injuries, "when he fell." *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

— Malice, instructions.

In homicide prosecution, malice instruction was incorrect insofar as instructing that wrongful act if intentionally done is done with malice aforethought, and was also erroneous in defining malice as state of mind showing a heart regardless of social duty. D.C. Code § 22-2403. *United States v. Perkins*, 498 F.2d 1054, 1974 U.S. App. LEXIS 8461 (C.A.D.C. 1974).

Evidence in prosecution for second-degree murder established a sufficient degree of recklessness to merit an instruction to jury regarding inference of malice. D.C. Code § 22-2403.

United States v. Lucas, 447 F.2d 338, 1971 U.S. App. LEXIS 9284 (C.A.D.C. 1971).

Instruction that malice to support second degree murder conviction may be implied from wantonly reckless conduct was proper. D.C. Code § 22-2403. *Mitchell v. United States*, 434 F.2d 483, 1970 U.S. App. LEXIS 9263 (C.A.D.C. 1970), writ of certiorari denied by 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106, 1970 U.S. LEXIS 775 (1970).

Instruction that in absence of explanatory circumstances the law infers or presumes malice from use of deadly weapon was error. D.C. Code §§ 22-2401, 22-2403. *Green v. United States*, 405 F.2d 1368, 1968 U.S. App. LEXIS 5040 (C.A.D.C. 1968), US Supreme Court certiorari denied by 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447, 1971 U.S. LEXIS 3531 (1971).

In homicide prosecution, instructions which submitted first-degree murder, second-degree murder, and manslaughter and which contained statement that wrongful act intentionally done was done with malice was prejudicial error. D.C. Code §§ 22-2401, 22-2403; Fed. Rules Civ. Proc. rule 52(b), 18 U.S.C. *Green v. United States*, 405 F.2d 1368, 1968 U.S. App. LEXIS 5040 (C.A.D.C. 1968), US Supreme Court certiorari denied by 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447, 1971 U.S. LEXIS 3531 (1971).

In prosecution for murder resulting in conviction of second-degree murder, the court's charge covering premeditation, malice, and self-defense was not erroneous. D.C. Code 1940, §§ 22-2404, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

In prosecution for second-degree murder while armed and assault with a dangerous weapon, jury instructions defining express malice and implied malice did not necessarily cause jury to view defendant's flight from police as a wrongful act, and jury did not convict on that thesis alone. D.C. Code 1981, §§ 22-502, 22-2403, 22-3202. *Powell v. United States*, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

— Motive, instructions.

Defendant was not entitled to instruction in prosecution for second-degree murder to effect that jury could not consider threat which defendant made to decedent 12 years prior to homicide as evidence of defendant's motive or absence of mistake unless it first determined that defendant had done the shooting. *United States v. Bobbitt*, 450 F.2d 685, 1971 U.S. App. LEXIS 7916 (C.A.D.C. 1971).

— Necessity and sufficiency, instructions.

If defendant charged with second-degree murder is entitled to charge on lesser included

offense of manslaughter, instructions must take a form which distinguish clearly between those factors which constitute defenses to second-degree murder and those which constitute the elements of manslaughter, and which clearly instruct jury that when defense to second-degree murder—adequate provocation, for example—is put in issue, government must prove its absence beyond a reasonable doubt. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1974).

Trial court's aiding and abetting instruction correctly and unambiguously stated applicable law in prosecution for murder, assault with dangerous weapon (ADW), conspiracy to distribute cocaine, and carrying pistol without license, despite fact that alleged act of aiding and abetting by furnishing murder weapon to murderer, was itself a crime. D.C. Code 1981, §§ 22-502, 22-2403, 22-3202, 22-3204. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

Explanation of penalty for offense is required only for charge of first-degree murder; in every other instance, sentencing is solely the province of the court, and not of jury. D.C. Code §§ 22-502, 22-2401, 22-2403, 22-2901, 22-3202, 22-3204. *United States v. Caldwell*, 543 F.2d 1333, 1974 U.S. App. LEXIS 5417 (C.A.D.C. 1974), writ of certiorari denied by 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97, 1976 U.S. LEXIS 1234 (1976).

Where evidence introduced at trial on charges of first-degree burglary while armed, murder, and assault with intent to commit rape while armed supported a multiple-offense charge, trial court did not err in requiring jury to make a separate determination of defendant's sanity on each count for which he had been found guilty. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202. *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

Giving of instruction that second degree murder differs from first degree murder in that it may be committed either without purpose or intent to kill, or without premeditation and deliberation was not prejudicial error, in view of instructions in their entirety, in view of fact that court was careful to distinguish two degrees of murder in important respect that premeditation and deliberation are essential elements of first degree murder, in view of absence of objection or request for additional instruction, and in view of evidence and sentence of life imprisonment. D.C. Code 1961, § 22-2401, 22-

2403. *Tucker v. United States*, 318 F.2d 221, 1963 U.S. App. LEXIS 5946 (C.A.D.C. 1963), writ of certiorari denied by 381 U.S. 952, 85 S. Ct. 1812, 14 L. Ed. 2d 726, 1965 U.S. LEXIS 1004 (1965).

Jury instruction on statutory definition of pistol was not required in trial for second-degree murder while armed and possession of firearms during crime of violence, where neither offense required proof that weapon used was pistol. D.C. Code 1981, §§ 22-2403, 22-3202, 22-3204(b). *Curington v. United States*, 621 A.2d 819, 1993 D.C. App. LEXIS 52 (1993).

Although language of standardized self-defense instruction is preferable, trial court's instruction to jury, that jury must be satisfied that evidence of self-defense was present, when read in light of other instructions, was not improper, especially where there was little if any evidence of self-defense. D.C. Code § 22-2403. *Myles v. United States*, 364 A.2d 1195, 1976 D.C. App. LEXIS 383 (1976).

Charge, in prosecution for second-degree murder, considered as a whole, properly conveyed to jury correct rules on murder and manslaughter. D.C. Code 1961, §§ 22-2403, 22-2405. *Falls v. United States*, 321 F.2d 762, 1963 U.S. App. LEXIS 4665 (C.A.D.C. 1963).

Trial court's instruction, that if jury found no evidence of self-defense present such finding would end jury's consideration, when read in light of instruction that prosecution had burden to disprove self-defense beyond reasonable doubt, clearly did not direct jury to render guilty verdict if jury found no evidence of self-defense to charge of second-degree murder, and was not improper. D.C. Code § 22-2403. *Myles v. United States*, 364 A.2d 1195, 1976 D.C. App. LEXIS 383 (1976).

— Passion and provocation, instructions.

Court of Appeals stated sample instruction on provocation to be given in cases in which accused is charged with second-degree murder and manslaughter and adequate provocation is put in issue. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Trial court committed reversible error in refusing to include instruction on provocation as part of charge to jury on count of second-degree murder arising from shooting of bystander at scene of violent encounter; sufficient evidence of provocation was presented to support requested defense instruction on mitigation of malice; there was evidence that provocative conduct of third party which caused defendant to fire weapon included physical battery on defendant and assaulting him with a deadly

weapon. D.C. Code 1981, §§ 22-2403, 22-3202, 22-3204. *Bostick v. United States*, 605 A.2d 916, 1992 D.C. App. LEXIS 90 (1992).

— Principals and accessories, instructions.

Error in trial court instruction on aiding and abetting, in trial of defendant and co-defendant arising from shooting deaths of two victims that resulted in conviction of co-defendant on two counts of second-degree murder and possession of a firearm during a crime of violence (PFCV), stating that co-defendant's guilt for second-degree murder could be predicated on the natural and probable consequences of his actions, was not harmless; a conviction of second-degree murder could not be based on mere negligence, trial court's "natural and probable consequences" instruction imposed liability on an accomplice based on negligence, evidence was such that there was a reasonable possibility the jury convicted co-defendant merely because he gave to defendant the machine gun used to shoot the victims, and, without a conviction for second-degree murder, the "crime of violence" element for the PFCV conviction was not met as a matter of law. *Coleman v. United States*, 948 A.2d 534, 2008 D.C. App. LEXIS 246 (2008), writ of certiorari denied by 558 U.S. 931, 130 S. Ct. 349, 175 L. Ed. 2d 231, 2009 U.S. LEXIS 6443, 78 U.S.L.W. 3180 (2009).

Evidence was sufficient to support theory that defendant aided and abetted the impulsive killing of victim, making second-degree murder instruction appropriate; although government's primary theory was that defendant helped plan and execute the murders, it also presented evidence that killers had not planned to murder particular victim, but did so impulsively when they arrived on the scene, and there was other evidence that defendant obtained the guns used in the attack and handed the weapons to the shooters before they went into market where shootings took place. *McCrimmon v. United States*, 853 A.2d 154, 2004 D.C. App. LEXIS 371 (2004).

Instruction on aiding and abetting was supported, in second-degree murder prosecution arising from death of defendant's infant daughter from scalding bath, by evidence that defendant's wife or older daughter may have placed victim and her twin sister in tub and that defendant hit infants on head with empty plastic soft-drink bottle in order to keep them in tub, as well as by defense arguments that continually attempted to shift blame for victim's scalding from defendant to his wife. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Evidence that defendant traveled to scene of shooting with two men and victim, was present when victim was fatally shot, and fled scene with the two men, and that defendant over-

heard those two men planning victim's death prior to murder was sufficient to support instruction on aiding and abetting in second-degree murder prosecution. D.C. Code 1981, §§ 22-2403, 22-3202. *Gayden v. United States*, 584 A.2d 578, 1990 D.C. App. LEXIS 325 (1990), writ of certiorari denied by 502 U.S. 843, 112 S. Ct. 137, 116 L. Ed. 2d 104, 1991 U.S. LEXIS 5565, 60 U.S.L.W. 3260 (1991).

— Self-defense, instructions.

Although "actual belief" would have been preferable to "honest belief" in charge upon self-defense in murder prosecution, the charge did not impose higher standard of belief but only required finding that the defendant really believed that he was in immediate danger. *United States v. Hardin*, 443 F.2d 735, 1970 U.S. App. LEXIS 5866 (C.A.D.C. 1970).

Defendant was not entitled to a self-defense jury instruction in his trial for murder, where defendant walked away from a confrontation with victim, went to a truck, retrieved a gun, and returned to shoot victim multiple times, fatally wounding him. *Outlaw v. United States*, 806 A.2d 1192, 2002 D.C. App. LEXIS 516 (2002).

It is error to charge that accused must have been in imminent peril of his life or of some great bodily harm in order to support defense of justifiable homicide. *U.S. v. Hamilton*, 15 D.C. 446 (D.C.Supp. 1886).

A charge that, if defendant's situation was such that he honestly believed, and had reasonable grounds to believe, that he could save himself from serious bodily harm only by killing deceased, he had the right to kill him, is a correct and sufficient charge on the right of self-defense, since an honest belief implies reasonable grounds for the existence of such relief. *Price v. U.S.*, 276 F. 628, 1921 U.S. App. LEXIS 2127 (1921).

A requested instruction of self-defense, stating that if defendant, when he shot the deceased, was under reasonable belief of imminent danger, the jury should find him not guilty of murder, is defective for failure to state what the defendant was in imminent danger of, since one cannot avail himself of the principle of self-defense unless he is able to show that he was in imminent peril of his life or of great bodily harm at the time he did the act resulting in the homicide. *Jackson v. U.S.*, 48 App.D.C. 272, 1919 U.S. App. LEXIS 2311 (1919).

In a prosecution for homicide, an instruction that if the jury believe that the accused invited the deceased to speak with him, for the purpose of provoking a difficulty with him, in order that he might slay him, the accused cannot avail himself of the defense of self-defense, though he delivered the fatal stroke while in danger of death or serious bodily harm at the hands of the deceased, does not permit the drawing of an

inference from an inference, and is not erroneous. *Wallace v. U.S.*, 18 App.D.C. 152, 1901 U.S. App. LEXIS 5049 (1901).

Jury instruction that before a person can avail himself of plea of self-defense against charge of homicide, he must do everything in his power, consistent with his own safety, to avoid danger and avoid necessity of taking life did not improperly encourage jury to draw adverse inference from defendant's failure to retreat. *Cooper v. United States*, 512 A.2d 1002, 1986 D.C. App. LEXIS 378 (1986).

In murder prosecution self-defense instruction containing statement that assault with bare fists only does not of itself justify one, in repelling such assault, to resort to use of dangerous or deadly weapon in manner calculated to produce death or serious bodily harm, held reversible error, since it singled out particular aspect of facts bearing on question of self-defense. *Meadows v. U.S.*, 82 F.2d 881, 1936 U.S. App. LEXIS 3141 (1936).

In a prosecution for homicide, in which the defense is that accused acted in self-defense an instruction is properly rejected which states that if, on the whole evidence, the jury have a reasonable doubt as to whether the deceased at the time of the killing had in his possession the ax in evidence, the accused is entitled to the benefit of that doubt, as it segregates a single part of the evidence. *Wallace v. U.S.*, 18 App.D.C. 152, 1901 U.S. App. LEXIS 5049 (1901).

Trial court properly refused tendered instruction on self-defense in murder prosecution where defendant's own testimony, if believed, indicated that he did not shoot victim at all but that victim was shot by third person. *United States v. Crowder*, 543 F.2d 312, 1976 U.S. App. LEXIS 8090 (C.A.D.C. 1976), writ of certiorari denied by 429 U.S. 1062, 97 S. Ct. 788, 50 L. Ed. 2d 779, 1977 U.S. LEXIS 433 (1977).

Defendant was not entitled to jury instruction with respect to homicide victim's general reputation for past violence, where defendant requested the instruction in relation to impressions defendant himself held of victim, not of victim's general reputation. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Defendant was not entitled to have issue of self-defense submitted to jury in homicide prosecution, despite circumstances surrounding victim's yelling to passenger in defendant's car and his pursuit of defendant's car and discovery of pistol in victim's front pocket after his death, where victim made no threat, actual or apparent, prior to being shot to death by codefendant and there were many options available to defendant short of shooting victim. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Trial court did not err in refusing to grant requested instruction on self-defense or defense of third person, where alleged initiator of scuffle in van had fled scene well before fatal shot was fired and no weapons were subsequently recovered from van. *Jones v. United States*, 516 A.2d 929, 1986 D.C. App. LEXIS 519 (1987), writ of certiorari denied by 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848, 1987 U.S. LEXIS 2179, 55 U.S.L.W. 3776 (1987).

Evidence that defendant was attacked in his home by a cooccupant did not entitle him to instruction that he had no duty to retreat. *Cooper v. United States*, 512 A.2d 1002, 1986 D.C. App. LEXIS 378 (1986).

In a prosecution for homicide, evidence that the accused and deceased were rival lovers of the same woman, and that the accused, shortly before the killing, and after the deceased and the woman had been car-riding together, sought an explanation of the woman, and said to the deceased that he would see him presently, is sufficient to support an instruction by the prosecution that if the jury believed that the accused provoked the difficulty with the deceased, and in the progress thereof it became necessary to kill the latter to save himself from death or serious bodily harm, the defendant cannot justify the killing of the deceased on the ground of self-defense. *Wallace v. U.S.*, 18 App.D.C. 152, 1901 U.S. App. LEXIS 5049 (1901).

Defendant was entitled to imperfect self-defense instruction in homicide trial, where reasonable jury could have found that defendant had subjective actual belief that his life was in danger and a like belief that he had to react with the force that he did, even though such beliefs of defendant were objectively unreasonable. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Trial court properly refused to instruct jury on self-defense where evidence showed that defendants had put themselves in position where violence was likely to result by confronting victims while armed. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

In homicide prosecution, wherein defendant claimed self-defense, instruction which did not impose duty to retreat but did allow failure to retreat, together with all of the circumstances, to be considered by jury in determining if there was case of true self-defense correctly stated law of jurisdiction. D.C. Code §§ 22-2403, 22-3202, 22-3204. *Gillis v. United States*, 400 A.2d 311, 1979 D.C. App. LEXIS 320 (1979).

A charge in a murder case, where self-defense was relied on, which states that if defendant, without attempting to retreat or get out of the way of deceased, used a deadly weapon, intending to take the life of deceased or to inflict great bodily harm, then he is guilty of murder, is

erroneous as giving undue emphasis to the use of a dangerous weapon, and ignoring the question of heat of blood. *U.S. v. Green*, 17 D.C. 562 (D.C.Supp. 1888).

Joint or separate trial of charges.

Inclusion of assault count against one individual may have resulted in some confusion and prejudice to defendant's case involving the murder of another individual on a different date; however, given the interest in judicial efficiency, and it could not be said that the trial court abused its discretion in refusing to sever the assault count. D.C. Code 1981, §§ 22-504, 22-2403, 22-3202. *Bowler v. United States*, 480 A.2d 678, 1984 D.C. App. LEXIS 571 (1984).

Charges against defendant, including two counts of assault with a dangerous weapon, one count of second-degree murder while armed, and two counts of carrying a pistol without a license, were properly joined based on the similar character of the offenses, which arose out of two incidents, one occurring at about 5:30 p.m. and the other, an unrelated incident, at about 1:00 a.m. the following morning, in that the evidence of each offense tended to negate the possibility that defendant had acted in self-defense, as he asserted, and tended to establish rather that he had pursued a deliberate course of action in each incident, and the evidence regarding the two incidents was separate and distinct so that it was not likely to be amalgamated in the jury's mind into a single inculpatory mass. D.C. Code 1981, §§ 22-502, 22-2403, 22-3204; Criminal Rule 8. *Bruce v. United States*, 471 A.2d 1005, 1984 D.C. App. LEXIS 311 (1984).

In prosecutions for murder, kidnapping, etc., arising out of the so-called "Hanafi" take-overs of three buildings, the trial court did not abuse its discretion in refusing to sever that count of the indictment charging assault with a deadly weapon. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Joint or separate trials of codefendants.

In prosecution of defendants on murder and rape charges, trial court did not abuse its discretion in denying motion of defendant brothers for a severance from codefendant, who had fatally stabbed the victim, notwithstanding defendants' claim that the evidence against the codefendant was much stronger than the evidence against them. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Although defendant relied on alibi defense and codefendant maintained that defendant

and he had been drinking at lounge and that defendant and victim had gone into parking lot by themselves before stabbing occurred, defendants were not prejudiced by joint trials on theory of irreconcilable defenses, where such defenses were subject to scrutiny on cross-examination, alibi defense was contradicted by witness' testimony and evidence that victim's type of blood had been found on defendant's shoe and jury was instructed to consider evidence individually against defendant and codefendant. D.C. Code §§ 22-2401, 22-2403; Fed.Rules Crim.Proc. rule 14, 18 U.S.C. *United States v. Hurt*, 476 F.2d 1164, 1973 U.S. App. LEXIS 10998 (C.A.D.C. 1973).

Refusal to grant a severance for trial purposes as to defendant tried for several crimes including first-degree murder arising out of two separate robberies was prejudicial to defendant because there was not only the danger that evidence with respect to two robberies would cumulate in jurors' minds and tend to prove defendant guilty of each, but also because the evidence as to one of the robberies was so weak that its primary usefulness was to support government's case as to robbery which resulted in the murder. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901; Fed.Rules Crim.Proc. rules 8(a), 14, 16, 18 U.S.C. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

Defendant failed to show that manifest prejudice resulted due to denial of his motion to sever, in prosecution for second-degree murder and other offenses; defenses asserted by defendants at trial were not irreconcilable, and out-of-court statement made by co-defendant that was admitted at trial did not prejudice defendant, as it likely would have been admissible in a separate trial. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Defendant failed to show that manifest prejudice resulted due to denial of his motion to sever, in prosecution for second-degree murder and other offenses; defendant was able to put on case of self defense, refusal to admit witness' testimony that she had seen co-defendant with guns on two prior occasions did not prejudice defendant, as witness provided unchallenged testimony that she had seen co-defendant shortly after hearing gunshots on morning of offenses at issue, and that she had seen co-defendant almost daily for a couple of years, thus leaving little room for question regarding her identification, and discussion about whether co-defendant could cross-examine witness about his drug dealing activities, which included defendant, took place outside presence of jury. *Roy v. United States*, 871 A.2d 498, 2005 D.C. App. LEXIS 150 (2005), writ of certiorari

denied by 547 U.S. 1162, 126 S. Ct. 2346, 164 L. Ed. 2d 839, 2006 U.S. LEXIS 4167, 74 U.S.L.W. 3668 (2006).

Joint trial of defendant for second-degree murder while armed and assault with a deadly weapon with codefendant charged with second-degree murder while armed did not cause jury to be inflamed against defendant by evidence of murder; it was undisputed that defendant cut victim on the wrist prior to his being stabbed by codefendant in the chest, and jury acquitted each of defendants for murder, convicting defendant instead of assault with deadly weapon and codefendant of assault with intent to kill while armed. D.C. Code 1981, §§ 22-501, 22-502, 22-2403, 22-3202, 23-311. *Jackson v. United States*, 650 A.2d 659, 1994 D.C. App. LEXIS 218 (1994).

Denying motion to sever trial of murder codefendants was not abuse of discretion, despite contention that prejudice from joint trial resulted from threats allegedly made by codefendant to government witness, given that threats or nature of that conversation were never revealed. D.C. Code 1981, §§ 22-2403, 22-3202. *Price v. United States*, 602 A.2d 641, 1992 D.C. App. LEXIS 22 (1992).

Juvenile adjudications, generally.

Although 17-year-old defendant was initially petitioned as a juvenile in Family Division on a charge of assault with intent to kill, a transfer hearing was not required before defendant, following death of victim some two months after the assault, could be charged by the United States Attorney as an adult with second-degree murder. D.C. Code §§ 16-2301(3)(A), 16-2307, 22-2403. *Pendergrast v. United States*, 332 A.2d 919, 1975 D.C. App. LEXIS 326 (1975).

Merger of offenses.

Charge of cruelty to child did not merge into manslaughter conviction, in that count charging cruelty had societal purposes as well as essential elements differing from those in count which charged second-degree murder and under which defendant was convicted of manslaughter. D.C. Code §§ 22-901, 22-2403, 22-2405. *United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Convictions for second-degree murder while armed and armed robbery merged with conviction for felony murder while armed. D.C. Code 1981, §§ 22-2401, 22-2403, 22-2901, 22-3202. *Gresham v. United States*, 654 A.2d 871, 1995 D.C. App. LEXIS 32 (1995), writ of certiorari denied by 516 U.S. 854, 116 S. Ct. 155, 133 L. Ed. 2d 99, 1995 U.S. LEXIS 5969, 64 U.S.L.W. 3243 (1995).

In prosecution for murder, kidnapping, and assault arising out of the "Hanafi" take-overs of three buildings, the kidnapping convictions of

defendants did not merge with the other offenses. D.C. Code §§ 22-105a, 22-501, 22-502, 22-2101, 22-2401, 22-2403, 22-3202. *Khaalis v. United States*, 408 A.2d 313, 1979 D.C. App. LEXIS 461 (1979), writ of certiorari denied by 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781, 1980 U.S. LEXIS 912 (1980).

Mistrial.

Trial court did not abuse its discretion by denying defendants' motion for mistrial when defense counsel reported that two jurors had discussed the case outside of the jury room and agreed that Spanish people loved stabbing each other, in trial of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, where trial court conducted a voir dire of the two jurors, the jurors denied talking about stabbing or groups of people in general, and the jurors affirmed they could be fair and impartial. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Defendant was not entitled to mistrial after jury was told, through reading of indictment and prosecutor's opening statement, that defendant previously had been convicted of a felony crime of violence or a dangerous crime, in prosecution for manslaughter while armed and related weapons offenses; no actual evidence of defendant's prior convictions was presented, references to convictions were brief, non-specific, and not linked to central issue at trial, which was defendant's identification as perpetrator, government's proof of defendant's identification was strong and unrefuted, and court gave curative instructions at close of trial. *Dorsey v. United States*, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

Nature and elements of homicide offenses—In general.

The essential elements of the offense of murder in the second degree are: (1) That the defendant inflicted an injury or injuries upon the deceased from which the deceased died; (2) that the defendant, at the time he so injured the deceased, acted with malice; and (3) that the defendant did not injure the deceased in the heat of passion caused by adequate provocation. *United States v. McClurkin*, 110 WLR 1657 (Super. Ct.).

Elements of second-degree murder are (1) that the defendant inflicted an injury or injuries upon the deceased from which the deceased died; (2) that the defendant, at the time he so injured the deceased, acted with malice; and (3) that the defendant did not injure the deceased

in the heat of passion caused by adequate provocation. *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434 (2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Difference between risk-creating activity sufficient to sustain murder conviction and criminal manslaughter conviction lies in whether actor is aware of risk or should have been. *Boykins v. United States*, 702 A.2d 1242, 1997 D.C. App. LEXIS 172 (1997).

Where accused was aware of risk of harm, but acted in conscious disregard of it, killing is murder or "voluntary manslaughter," and where accused is not aware of risk of harm, but should have been, killing will be "involuntary manslaughter." *Boykins v. United States*, 702 A.2d 1242, 1997 D.C. App. LEXIS 172 (1997).

Mitigation principle is predicated on legal system's recognition of the weaknesses or infirmity of human nature, as well as a belief that those who kill under extreme mental or emotional disturbance for which there is reasonable explanation or excuse are less morally blameworthy than those who kill in the absence of such influences. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Legally recognized mitigating factors serve to extenuate or dampen the otherwise malicious nature of the perpetrator's mental state, and thus serve as a bar to a conviction for murder. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

If actor is aware of risk to life in his conduct which results in death, the crime is murder and not involuntary manslaughter, but if he is not aware, implied malice is not a factor, and he should have been aware, crime is involuntary manslaughter and if he was not aware of risk and he should not have been aware of it, there is no criminal liability and only pure accident. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

— Different offenses in same transaction, nature and elements of homicide offenses.

Defendant could not be convicted of both second-degree murder as aider and abettor and second-degree murder under conspiracy theory where there was only one victim. D.C. Code 1981, §§ 22-2403, 22-3202. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

— Express malice, nature and elements of homicide offenses.

However sudden a killing may be, if the means used or the manner of doing it, or other external circumstances attending it, indicate a sedate and deliberate mind and former design

to kill, it will be upon express malice. *Travers v. U.S.*, 6 App.D.C. 450, 1895 U.S. App. LEXIS 3603 (1895).

"Express malice" exists where one unlawfully kills another in pursuance of wrongful act or unlawful purpose, without legal excuse. *McClurkin v. United States*, 472 A.2d 1348, 1984 D.C. App. LEXIS 317 (1984), writ of certiorari denied by 469 U.S. 838, 105 S. Ct. 136, 83 L. Ed. 2d 76, 1984 U.S. LEXIS 3334, 53 U.S.L.W. 3237 (1984).

— Implied malice, nature and elements of homicide offenses.

"Implied malice" may be inferred from circumstances of killing, such as killing caused by defendant's intentional use of fatal force absent mitigating or justifying circumstances or when act which imparts danger to another is done so recklessly or wantonly as to manifest disregard for human life. *McClurkin v. United States*, 472 A.2d 1348, 1984 D.C. App. LEXIS 317 (1984), writ of certiorari denied by 469 U.S. 838, 105 S. Ct. 136, 83 L. Ed. 2d 76, 1984 U.S. LEXIS 3334, 53 U.S.L.W. 3237 (1984).

— Intent or design to effect death, nature and elements of homicide offenses.

One who acts with specific intent to kill or inflict serious bodily injury is guilty of murder, but if accompanied by recognized circumstances of mitigation, crime is voluntary manslaughter. D.C. Code 1981, §§ 22-2403, 22-3202. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

Second-degree murder is a specific intent crime. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

Theory of concurrent intent was properly used to sustain assault with intent to kill while armed (AWIKWA) conviction arising from injury of unintended victim by bullets fired at intended victim, even though defendant was convicted of AWIKWA against intended victim; evidence permitted finding concurrent intent to kill everyone in path of bullets fired at intended victim. D.C. Code 1981, §§ 22-501, 22-3202. *Ruffin v. United States*, 642 A.2d 1288, 1994 D.C. App. LEXIS 86 (1994).

Extremely negligent conduct which creates unjustifiable and very high degree of risk of death or serious bodily injury to another, without any intent to do either, may constitute murder. *Johnson v. United States*, 631 A.2d 871, 1993 D.C. App. LEXIS 225 (1993).

Transferred intent doctrine, which derives from common-law murder, provides that when

a defendant purposely attempts to kill one person but by mistake or accident kills another, felonious intent of defendant will be transferred from intended victim to actual, unintended victim. *O'Connor v. United States*, 399 A.2d 21, 1979 D.C. App. LEXIS 337 (1979).

— **Malice generally, nature and elements of homicide offenses.**

Even in absence of subjective intent to kill, malice may be determined by application of an objective standard, where conduct is reckless and wanton and a gross deviation from reasonable standard of care, of such nature that jury is warranted in inferring that defendant was aware of serious risk of death or serious bodily harm. *United States v. Cox*, 509 F.2d 390, 1974 U.S. App. LEXIS 5596 (C.A.D.C. 1974).

“Malice” is state of mind showing a heart that is without regard for the life and safety of others. *United States v. Hinkle*, 487 F.2d 1205, 1973 U.S. App. LEXIS 7168 (C.A.D.C. 1973).

If malice is proved beyond reasonable doubt and no affirmative defense applies, defendant who kills a human being is guilty of “murder”; if malice is not proved, he is guilty of “manslaughter”. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Malice is sole element differentiating murder from manslaughter. *United States v. Wharton*, 433 F.2d 451, 1970 U.S. App. LEXIS 11384 (C.A.D.C. 1970).

Malice may be established by either of two standards: first, a subjective standard, asking whether defendant actually intended or foresaw that death or serious bodily harm would result from his act; and second, an objective, “reasonable man” standard, asking whether defendant should have foreseen that such result was likely, and it is for jury to determine whether requisite state of mind or negligent pattern of behavior existed. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

“Malice” is a state of mind showing a heart fatally bent on mischief and unmindful of social duties and may also be defined as a condition of mind that prompts a person to do an injurious act wilfully to the injury of another; and malice may be implied or inferred from the act committed, or it may be expressed. *Fryer v. U.S.*, 207 F.2d 134, 1953 U.S. App. LEXIS 2841 (C.A.D.C. 1953).

Proof of motive is not essential to establishment of malice. *Liggins v. U.S.*, 297 F. 881, 1924 U.S. App. LEXIS 2910 (1924).

Malice could be established by either of two standards: first, subjective standard, asking whether defendant actually intended or foresaw that death or serious bodily harm would result

from his act; and second, an objective, “reasonable man” standard, asking whether defendant should have foreseen that such result was likely. D.C. Code § 22-2403. *Travelers Indem. Co. v. Walburn*, 378 F. Supp. 860, 1974 U.S. Dist. LEXIS 7811 (1974).

“Malice aforethought” or “malice” is a word of art and, in law of homicide, denotes a vicious and wicked state of mind and may be described as a heart fatally bent on mischief and unmindful of social duty. *U.S. v. Hamilton*, 182 F.Supp. 548, 1960 U.S. Dist. LEXIS 3027 (D.D.C.1960).

“Depraved heart malice” element of second-degree murder and manslaughter offenses exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Words cannot form sufficient provocation to negate the element of malice in a homicide case. *Boyd v. United States*, 732 A.2d 854, 1999 D.C. App. LEXIS 142 (1999).

Malice, which is a component of both first and second-degree murder, requires the absence of justification, excuse, or mitigation. *Herbin v. United States*, 683 A.2d 437, 1996 D.C. App. LEXIS 188 (1996).

Malice element of second-degree murder and voluntary manslaughter may be satisfied by proof of specific intent to inflict serious bodily harm or of wanton and willful disregard of unreasonable human risk. *Hebron v. United States*, 625 A.2d 884, 1993 D.C. App. LEXIS 127 (1993).

Under common law, “murder” constituted unjustified or unexcused homicide committed with “malice aforethought.” *Swanson v. United States*, 602 A.2d 1102, 1992 D.C. App. LEXIS 29 (1992).

Murders committed with “malice aforethought” include murders committed by individuals who, in causing another’s death, specifically intend to kill, intend to cause serious bodily harm, act with wanton and willful disregard of unreasonable human risk, or kill during intentional commission of felony. *Swanson v. United States*, 602 A.2d 1102, 1992 D.C. App. LEXIS 29 (1992).

Suddenness of homicidal act, standing alone, is insufficient to negate malice for murder conviction; thus, that homicide is impulsive or unplanned will not reduce second-degree murder to manslaughter. D.C. Code 1981, §§ 22-2403, 22-3202. *Swanson v. United States*, 602 A.2d 1102, 1992 D.C. App. LEXIS 29 (1992).

“Malice aforethought” denotes four types of murder, each accompanied by distinct mental state; killing is malicious where the perpetrator

acted with a specific intent to kill, killing is malicious where perpetrator has the specific intent to inflict serious bodily harm, act may involve such wanton and willful disregard of an unreasonable human risk as to constitute malice aforethought even if there is not actual intent to kill or injure, and a fourth kind of malice exists when a killing occurs in the course of the intentional commission of a felony. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury but engaged in that conduct nonetheless; malice may be found where the conduct is reckless and wanton and a gross deviation from a reasonable standard of care, or of such a nature that a jury is warranted in inferring that the defendant was aware of the serious risk of death or serious bodily harm. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Fact that a reasonable person would have been aware of the risk of death or serious bodily harm to another as the result of his actions will not sustain a finding of malice, though it may sustain a conviction for manslaughter. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Even where an individual kills with one of the four states of mind recognized as malice aforethought, the killing is not malicious if it is justified, excused, or committed under recognized circumstances of mitigation. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Implicit in the notion of malice aforethought is the absence of every sort of justification, excuse, or mitigation; absence of justification, excuse, or mitigation is thus an essential component of malice and, in turn, of second-degree murder, and the Government bears the ultimate burden of persuasion on that component. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Even an intentional killing, if it comports with legally accepted notions of self-defense, is not malicious; it is excused and it is accordingly no crime at all. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

At common law, unjustified or unexcused homicide rose to the level of murder if it was committed with malice aforethought, and that definition continues in the District of Columbia Code. D.C. Code 1981, § 22-2403. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

"Malice" must be defined for purposes of second-degree murder according to its technical common-law meaning. *Towles v. United States*, 496 A.2d 560, 1985 D.C. App. LEXIS 436 (1985), vacated by 497 A.2d 793, 1985 D.C. App.

LEXIS 513 (D.C. 1985), affirmed by 521 A.2d 651, 1987 D.C. App. LEXIS 311 (D.C. 1987).

At common law, "malice" included any killing, accidental or intentional, committed in course of felony that was itself a life-endangering crime, and state of mind that was viewed at common law as constituting "malice" was established by intent to commit felony; this intent was transferred to killing accompanying felony to make it killing done with "malice." *Towles v. United States*, 496 A.2d 560, 1985 D.C. App. LEXIS 436 (1985), vacated by 497 A.2d 793, 1985 D.C. App. LEXIS 513 (D.C. 1985), affirmed by 521 A.2d 651, 1987 D.C. App. LEXIS 311 (D.C. 1987).

Malice, the state of mind required for an act of murder, can not be equated with specific intent to kill. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

"Malice," state of mind required for murder, need not entail specific intent to cause death nor does it necessarily exist in every case in which a person acts with specific intent to kill; malice is wanton disregard for human life and the safety of others and may be found when conduct is reckless and wanton and a gross deviation from a reasonable standard of care of such nature that jury is warranted in inferring that defendant was aware of serious risk of death or serious bodily harm; malice may also exist when defendant actually intended or foresaw the death or serious bodily harm from his acts. D.C. Code 1981, § 22-501. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Malice necessary for murder may be mitigated, even though defendant acts for purpose, and with the specific intent, of causing a death, when killer has been provoked or is acting in the heat of passion and may also be mitigated when excessive force is used in self-defense or in defense of another and killing is committed in the mistaken belief that one may be in mortal danger, making defendant in each of these situations guilty of voluntary manslaughter not murder. D.C. Code 1981, § 22-501; Act March 2, 1831, § 1 et seq., 4 Stat. 448. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

— Time of death, nature and elements of homicide offenses.

Even though Congress codified elements of first and second-degree murder in District of Columbia, common-law year and day rule, under which an assailant may be prosecuted for homicide only if victim dies within a year and a day of the injury inflicted, was law in District of Columbia. D.C. Code 1981, §§ 22-2401, 22-2403, 49-301. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Prosecution for murder was not barred by fact that victim died more than one year and a

day after attack. D.C. Code 1981, §§ 22-2403, 22-3202. *United States v. Jackson*, 528 A.2d 1211, 1987 D.C. App. LEXIS 388 (1987).

Persons liable.

One defendant's motion for judgment of acquittal, based on absence of evidence that his blow with cane was direct cause of victim's death, was properly denied where defendant was charged as aider and abettor in second-degree murder. *Braxton v. United States*, 395 A.2d 759, 1978 D.C. App. LEXIS 366 (1978).

Defendant's conviction as an aider and abettor of voluntary manslaughter while armed was proper even though codefendant was convicted of second-degree murder in that voluntary manslaughter while armed is lesser included offense within second-degree murder while armed and jury necessarily found codefendant's conduct included voluntary manslaughter while armed. D.C. Code §§ 22-2405, 22-3202. *Branch v. United States*, 382 A.2d 1033, 1978 D.C. App. LEXIS 423 (1978).

Pleas.

Where evidence suggested that defendant might have been unable to control himself at time he committed murder, and other bizarre acts, trial court characterized acts as "impulsive and frenzied" when it reduced charge from first-degree to second-degree murder, defense counsel believed insanity defense appropriate but refused to raise it only because defendant prohibited him from doing so, reason for defendant's opposition was the belief that insanity defense would impugn on the credibility of his racial and political views and testimony of two of four physicians who examined defendant expressed views supportive of insanity plea, trial court acted properly in ordering hearing to determine if insanity defense should be raised sua sponte. D.C. Code § 22-2403. *United States v. Robertson*, 507 F.2d 1148, 1974 U.S. App. LEXIS 6413 (C.A.D.C. 1974).

Government did not breach plea agreement pursuant to which it promised that it would not object to defendant's request that sentence for second-degree murder not exceed mid-point of guideline range, by arguing at sentencing against imposition of minimum sentence and characterizing murder as premeditated; both parties understood that government would seek prison term of no more than 18 years, prosecutor avidly advocated for sentence of 18 years, and even if prosecutor's characterization of offense as premeditated murder suggested that 18 years was lenient, prosecutor explicitly conveyed that 18 years was appropriate given gravity of offense. *Johnson v. United States*, 30 A.3d 783, 2011 D.C. App. LEXIS 618 (2011).

Defendant's slight discomfort from stomach ailment at time of plea did not establish that fairness and justice required that he be allowed

to withdraw his negotiated guilty plea before sentencing for second-degree murder while armed. *White v. United States*, 863 A.2d 839, 2004 D.C. App. LEXIS 697 (2004), writ of certiorari denied by 547 U.S. 1197, 126 S. Ct. 2883, 165 L. Ed. 2d 905, 2006 U.S. LEXIS 4616, 74 U.S.L.W. 3686 (2006).

Delay between defendant's negotiated guilty plea and his mailing of letter asking judge to allow him to withdraw the plea did not weigh in favor of allowing withdrawal of plea before sentencing for second-degree murder while armed; delay was three weeks between entry of plea and mailing of letter, and defendant subsequently vacillated by telling counsel to "forget" the letter, and by accepting full responsibility for the crime and expressing remorse in another letter to judge and in statement made as part of presentencing investigation. *White v. United States*, 863 A.2d 839, 2004 D.C. App. LEXIS 697 (2004), writ of certiorari denied by 547 U.S. 1197, 126 S. Ct. 2883, 165 L. Ed. 2d 905, 2006 U.S. LEXIS 4616, 74 U.S.L.W. 3686 (2006).

Defendant's claim of legal innocence, based on self-defense, did not warrant withdrawal of negotiated guilty plea before sentencing for second-degree murder while armed; government made very strong factual proffer that shooting occurred during course of conspiracy to commit armed robbery, with one witness stating that victim had shot defendant only once and that defendant continued to shoot victim after victim was down on his back, and defendant made sworn adoption of government's proffer, in connection with guilty plea. *White v. United States*, 863 A.2d 839, 2004 D.C. App. LEXIS 697 (2004), writ of certiorari denied by 547 U.S. 1197, 126 S. Ct. 2883, 165 L. Ed. 2d 905, 2006 U.S. LEXIS 4616, 74 U.S.L.W. 3686 (2006).

Record supported trial court's conclusion that defendant's alleged mental incapacity as result of recent seizure and effect of prescribed narcotic drug in his system, as well as defendant's limited mental ability, were not factors that would weigh heavily in defendant's favor under fair and just standard for withdrawal of guilty plea to second-degree murder while armed; court conducted lengthy and thorough plea withdrawal hearing and listened to tape of plea hearing, and found that defendant had not suffered seizure two days before plea hearing and that there was no impairment in defendant's speech or mental functioning at plea hearing. D.C. Code 1981, § 22-2403; Criminal Rule 32(e). *Bennett v. United States*, 726 A.2d 156, 1999 D.C. App. LEXIS 43 (1999).

Record supported trial judge's implicit finding that competence of counsel factor did not provide basis for granting defendant's motion to withdraw guilty plea to second-degree murder while armed under fair and just standard;

though defendant claimed that counsel failed to notify court that defendant had just suffered seizure and was taking prescribed psychotropic medication, and that counsel continually pressured defendant to plead guilty, counsel testified at hearing that he met with defendant for more than an hour on day before defendant pled guilty, that defendant first expressed interest in pleading guilty on that day, and that he believed defendant understood substance of conversations with counsel. U.S. Const. Amend. 6; D.C. Code 1981, § 22-2403; Criminal Rule 32(e). *Bennett v. United States*, 726 A.2d 156, 1999 D.C. App. LEXIS 43 (1999).

In evaluating defendant's claim of innocence under fair and just standard for motion to withdraw guilty plea to second-degree murder while armed, trial court was free to discredit defendant's later testimony that he did not participate in murder and was not present at crime scene, in face of defendant's admissions at plea hearing that he in fact took part in commission of offense. D.C. Code 1981, § 22-2403; Criminal Rule 32(e). *Bennett v. United States*, 726 A.2d 156, 1999 D.C. App. LEXIS 43 (1999).

Trial judge was free to discredit defendant's claim of innocence, when determining whether to grant motion to withdraw guilty plea to second-degree murder while armed under fair and just standard, where defendant's testimony on issue conflicted directly with his sworn acknowledgment of culpability at plea hearing and defendant offered neither evidence in support of his innocence claim nor convincing explanation for his failure to assert that claim at that time. D.C. Code 1981, § 22-2403; Criminal Rule 32(e). *Bennett v. United States*, 726 A.2d 156, 1999 D.C. App. LEXIS 43 (1999).

Trial court did not abuse its discretion in denying defendant's motion to withdraw guilty plea to second-degree murder while armed, under fair and just standard, given defendant's weak and unsupported assertion of innocence, which conflicted with his earlier sworn admission of guilt, the less than prompt expression of defendant's desire to withdraw plea, and fact that defendant was represented by competent counsel during period leading up to and during entry of guilty plea. D.C. Code 1981, § 22-2403; Criminal Rule 32(e). *Bennett v. United States*, 726 A.2d 156, 1999 D.C. App. LEXIS 43 (1999).

Three-week delay between guilty plea to second-degree murder while armed and defendant's expression of desire to attorney to withdraw plea did not constitute "swift change of heart" under fair and just standard such that the length of delay factor would weigh in favor of withdrawal of plea. D.C. Code 1981, § 22-2403; Criminal Rule 32(e). *Bennett v. United States*, 726 A.2d 156, 1999 D.C. App. LEXIS 43 (1999).

Trial court did not abuse discretion in denying defendant's motion for withdrawal of guilty pleas to second-degree murder, attempted burglary and destruction of property where, inter alia, reasons given for defendant's change of heart did not amount to a claim of legal innocence, proffered evidence of guilt was overwhelmingly convincing and there was no claim of coercion or incapacity. D.C. Code §§ 22-403, 22-1801(b), 22-2403. *Taylor v. United States*, 366 A.2d 444, 1976 D.C. App. LEXIS 409 (1976).

Presumptions and burden of proof.

— Excuse or justification, presumptions and burden of proof.

In prosecution for second-degree murder and manslaughter, government is not required to disprove provocation in its case in chief, unless its own evidence would support a finding of adequate provocation and, if defense introduces some evidence of provocation, government will have an opportunity to rebut. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Where defendant is charged with second-degree murder and manslaughter, once some evidence of provocation is in the case, whether introduced by government or defense, defendant is entitled to instruction on provocation and manslaughter, burden of persuading jury of absence of provocation is on government, and jury is entitled to clear instruction to that effect. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Government's obligation to disprove justification, excuse, or mitigation arises only when there is some evidence or one or more of those circumstances; jury need not be instructed on issues of justification, excuse, or mitigation unless either the Government or the defense case has generated some evidence of one of those factors. *Comber v. United States*, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

— Grade or degree of offense, presumptions and burden of proof.

Malice necessary in second-degree murder can be inferred from excessive recklessness. D.C. Code § 22-2403. *United States v. Lucas*, 447 F.2d 338, 1971 U.S. App. LEXIS 9284 (C.A.D.C. 1971).

— Malice.

Law merely permits, but does not require, inference of presumed malice from use of deadly weapon in commission of homicide. *Mitchell v. United States*, 434 F.2d 483, 1970

U.S. App. LEXIS 9263 (C.A.D.C. 1970), writ of certiorari denied by 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106, 1970 U.S. LEXIS 775 (1970).

Malice to support second degree murder conviction may be implied from conduct which is so reckless or wanton as to manifest depravity of mind and disregard of human life. D.C. Code § 22-2403. *Mitchell v. United States*, 434 F.2d 483, 1970 U.S. App. LEXIS 9263 (C.A.D.C. 1970), writ of certiorari denied by 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106, 1970 U.S. LEXIS 775 (1970).

Commission of an act, natural and probable consequences of which are less than death or great bodily harm does not imply malice. D.C. Code § 22-2403. *Logan v. United States*, 411 F.2d 679, 1968 U.S. App. LEXIS 4548 (C.A.D.C. 1968).

Wrongful act intentionally done is not therefore done with malice. D.C. Code §§ 22-2401, 22-2403. *Green v. United States*, 405 F.2d 1368, 1968 U.S. App. LEXIS 5040 (C.A.D.C. 1968), US Supreme Court certiorari denied by 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447, 1971 U.S. LEXIS 3531 (1971).

"Malice aforethought," within District of Columbia statute providing that homicide committed with malice aforethought without deliberation and premeditation is second-degree murder, can be shown expressly or can be implied from the commission of the act itself. D.C. Code 1929, T. 6, § 21. *Bishop v. U.S.*, 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

Every person is presumed to intend the natural and probable consequence of his own act, and the use of a dangerous weapon, resulting in a homicide, by one having no right to use the weapon, in the absence of mitigating facts, is evidence of malice aforethought. *Liggins v. U.S.*, 297 F. 881, 1924 U.S. App. LEXIS 2910 (1924).

Malice, an essential element of second-degree murder, may be inferred from use of dangerous weapon such as gun. D.C. Code § 22-2403. *Curry v. United States*, 322 A.2d 268, 1974 D.C. App. LEXIS 246 (1974).

For second-degree murder and manslaughter, where the element of malice is based on a wanton and willful disregard of an unreasonable human risk, the accused's knowledge of the risk is to be judged under a subjective standard. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

The element of malice required to prove second-degree murder and manslaughter may be established by showing that the accused had: (1) a specific intent to kill; (2) a specific intent to inflict serious bodily injury; or (3) acted in conscious disregard of an extreme risk of death or serious bodily injury to the decedent. *Wil-*

liams v. United States, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Where defendant is shown to have fired three shots into deceased at close quarters, in the absence of other evidence, the act is presumed to have been malicious and premeditated. *U.S. v. Schneider*, 21 D.C. 381, 1893 U.S. App. LEXIS 3081 (D.C.Supp. 1893).

— Self-defense, presumptions and burden of proof.

In prosecution for assault with intent to murder while armed, when issue of provocation is in the case, government has burden of proving as element of crime that there were no circumstances of provocation mitigating a finding of malice, even without regard to any claim of self-defense. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Where defendant has introduced evidence of provocation, government must prove its absence beyond reasonable doubt in order to show malice and convict defendant of assault with intent to murder while armed; government must prove absence of mitigating circumstances because presence of mitigating circumstances may preclude finding of malice. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

Once there is sufficient evidence to justify a self-defense instruction in homicide case, burden is on government to disprove self-defense, by meeting its burden of proof negating defendant's subjective actual belief or objective reasonableness. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Questions of law and fact.

— Defense of another, questions of law and fact.

Issue as to defendant's relationship to apartment in which victim was killed by defendant, who alleged that he was protecting woman in his home from assault and rape, was jury question. *Byrd v. U.S.*, 312 F.2d 357, 1962 U.S. App. LEXIS 3286 (C.A.D.C. 1962).

— Elements of offense, questions of law and fact.

Whether defendants, who had left victim's apartment upon victim's demand emphasized by his brandishing kitchen knife and who had lingered in hall outside apartment before reentering apartment and shooting victim had killed with premeditation was jury question. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Significance on issue of premeditation of victim's being beaten after he was shot was properly left for interpretation by jury and not the court. D.C. Code § 22-2401. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Where prosecution's evidence in murder case is insufficient to go to jury on issues of premeditation and deliberation it may not infuse vitality into the charge on theory that defendant, by going forward with evidence, has waived this critical defect. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Evidence was sufficient in murder prosecution to support submission to jury of elements of premeditation and deliberation. *Belton v. United States*, 382 F.2d 150, 1967 U.S. App. LEXIS 5998 (C.A.D.C. 1967).

Existence of premeditation or deliberation is determinable from circumstances of case as fact question by jury. *Aldridge v. U.S.*, 47 F.2d 407, 1931 U.S. App. LEXIS 3454 (1931).

— Grade or degree of offense, questions of law and fact.

Evidence in second-degree murder prosecution did not warrant submission to the jury of the issue of the difference in the nature of recklessness required for second-degree murder, and that required for manslaughter. *United States v. Hinkle*, 487 F.2d 1205, 1973 U.S. App. LEXIS 7168 (C.A.D.C. 1973).

Evidence in second-degree murder prosecution was sufficient to support submission to jury of manslaughter alternative. *Brown v. United States*, 411 F.2d 716, 1969 U.S. App. LEXIS 12584 (C.A.D.C. 1969).

Jury may consider issue of second-degree murder on indictment of first-degree felony-murder only if it finds some defect with proof as to felony-murder. D.C. Code §§ 22-2401, 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Where government testimony did not show any motive for killing of victim who had been in company of defendant the night of homicide nor was there any showing of prior threats or quarrels which might supply inference of premeditation and deliberation in defendant's killing of victim by multiple stab wounds inflicted with knife defendant had been carrying with him, that night, government's evidence was insufficient to warrant submission of an issue of premeditation and deliberation to jury and defendant's motion for acquittal of first-degree murder should have been granted at conclusion of prosecution's case. D.C. Code 1961, §§ 22-

2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

In prosecution for perpetrating a robbery and for killing a person in course of perpetrating it, evidence was sufficient to submit issue of second-degree murder to jury. *Kitchen v. U.S.*, 221 F.2d 832, 1955 U.S. App. LEXIS 3583 (C.A.D.C. 1955).

Whether or not reflection and consideration amounting to deliberation required for first-degree murder actually occurred must be determined by jury, properly instructed by court, from circumstances preceding, and surrounding the killing. *Weakley v. U.S.*, 198 F.2d 940, 1952 U.S. App. LEXIS 3260 (C.A.D.C. 1952).

Evidence that defendant found deceased with a woman with whom defendant was friendly, that some discussion ensued, and that later all went outside, where an altercation occurred and defendant cut deceased with a knife resulting in death, was sufficient evidence of deliberation and premeditation to go to jury upon charge of first-degree murder. D.C. Code 1940, §§ 22-2401, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

Where the evidence was sufficient for jury on charge of first-degree murder and jury was properly instructed, court's refusal to direct a verdict on first-degree murder charge could not be held to have erroneously influenced jury in reaching its verdict of second-degree murder. D.C. Code 1940, §§ 22-2401, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

The trial court in murder prosecution was not under duty to weigh evidence and determine whether defendant was guilty of murder or manslaughter, but merely to determine the preliminary question whether there was such a complete absence of evidence on issue of manslaughter as to require that it be taken from the consideration of the jury. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

— In general.

Criminal responsibility of defendant for second-degree murder with respect to fatal shooting occurring during struggle with deceased was for jury. *Young v. United States*, 369 F.2d 959, 1966 U.S. App. LEXIS 4871 (C.A.D.C. 1966).

In a prosecution for murder in the second degree, evidence that, during a struggle between defendant and his sister, defendant shot twice in the same general direction, and the second shot killed defendant's sister-in-law, held to authorize a refusal to direct an acquittal. *Liggins v. U.S.*, 297 F. 881, 1924 U.S. App. LEXIS 2910 (1924).

Jury, which was given broad definitions of concept of malice in prosecution for second-degree murder while armed and assault with a

dangerous weapon, was free to apply those concepts on the basis of its own findings of fact. D.C. Code 1981, §§ 22-502, 22-2403, 22-3202. *Powell v. United States*, 485 A.2d 596, 1984 D.C. App. LEXIS 565 (1984), writ of certiorari denied by 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339, 1985 U.S. LEXIS 4406, 54 U.S.L.W. 3328 (1985).

— **Insanity or intoxication, questions of law and fact.**

Question of defendant's mental responsibility for act of shooting another was for jury in prosecution for first-degree murder. *United States v. Marshall*, 471 F.2d 1051, 1972 U.S. App. LEXIS 7096 (C.A.D.C. 1972).

Defendant's sanity at time of commission of offense was question for jury in murder prosecution. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

On conflicting testimony in murder prosecution in which defendant raised defense of insanity, it could not be said that trial judge, after hearing all evidence, was required to find that evidence was sufficient to compel reasonable juror to entertain reasonable doubt concerning accused's responsibility, and hence trial judge did not err in refusing to direct judgment of acquittal of second-degree murder by reason of insanity. *Stewart v. United States*, 394 F.2d 778, 1968 U.S. App. LEXIS 7189 (C.A.D.C. 1968).

Expert testimony in support of insanity defense was not sufficient to compel a reasonable juror to entertain a reasonable doubt concerning the accused's responsibility and hence was not sufficient to require judge to direct a verdict of not guilty by reason of insanity, in murder prosecution. *King v. United States*, 372 F.2d 383, 1966 U.S. App. LEXIS 3952 (C.A.D.C. 1966).

Whether defendant was insane at time that he murdered his wife was a jury question to be determined upon consideration of both expert and lay testimony after proper instructions. *Barkley v. United States*, 323 F.2d 804, 1963 U.S. App. LEXIS 4989 (C.A.D.C. 1963).

Evidence, in prosecution for murder, presented question for jury as to defendant's insanity. *Blocher v. United States*, 320 F.2d 800, 1963 U.S. App. LEXIS 4742 (C.A.D.C. 1963), writ of certiorari denied by 375 U.S. 923, 84 S. Ct. 269, 11 L. Ed. 2d 167, 1963 U.S. LEXIS 212 (1963).

In murder prosecution, where only three of eleven psychiatrists could say that killings in question were product of defendant's mental disease or defect, evidence was insufficient to raise, as a matter of law, reasonable doubt as to defendant's sanity and conflict in medical tes-

timony became issue for jury. *Williams v. U.S.*, 312 F.2d 862, 1962 U.S. App. LEXIS 3538 (C.A.D.C. 1962).

Evidence of mental abnormality of defendant, in addition to evidence that his I.Q. was only 68, entitled defendant to submission of issue of mental defect in homicide prosecution. *Williams v. U.S.*, 312 F.2d 862, 1962 U.S. App. LEXIS 3538 (C.A.D.C. 1962).

Government, which did not request instruction or examine expert witnesses as to defendant's cognition, volition or capacity to control behavior, although defendant, at one time, had been adjudged mentally incompetent to stand trial, and which did not offer any evidence on issue of mental competency, so that its case consisted solely of evidence of events of shooting by defendant and cross-examination of defense experts who could not say whether mental disturbance produced killing, did not sustain its burden of proof under *Durham v. United States*, 94 U.S.App.D.C. 228, 214 F.2d 862, and *Davis v. United States*, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499, and directed verdict should have been entered finding defendant not guilty by reason of insanity. *Frigillana v. U.S.*, 307 F.2d 665, 1962 U.S. App. LEXIS 4770 (C.A.D.C. 1962).

Question whether defendant sustained defense of insanity in homicide prosecution was for jury. *Frigillana v. U.S.*, 307 F.2d 665, 1962 U.S. App. LEXIS 4770 (C.A.D.C. 1962).

In homicide prosecution, evidence raised question for jury as to whether defendant was not guilty by reason of insanity. D.C. Code 1951, § 22-2403. *Rose v. U.S.*, 283 F.2d 376, 1960 U.S. App. LEXIS 3589 (C.A.D.C. 1960).

Where there was strong showing of insanity of defendant in murder prosecution, more than minimal evidence of sanity was necessary to send case to jury. *Wright v. U.S.*, 250 F.2d 4, 1957 U.S. App. LEXIS 4105 (C.A.D.C. 1957).

Where four and one half years had elapsed between time of homicide and time of murder prosecution, and during that interval defendant had gone through long courses of treatment in two mental institutions, fact that defendant was of sound mind at time of prosecution was not sufficiently probative of sanity at time of homicide to take case to jury on issue of sanity. *Wright v. U.S.*, 250 F.2d 4, 1957 U.S. App. LEXIS 4105 (C.A.D.C. 1957).

In prosecution of defendant for killing of his wife's paramour who had engaged in improper relations with defendant's wife, wherein defendant asserted that he was of unsound mind at time of commission of the homicide, and introduced evidence of two psychiatrists in support thereof, evidence warranted submission of question to jury. *Bell v. U.S.*, 210 F.2d 711, 1953 U.S. App. LEXIS 2708 (C.A.D.C. 1953).

In first degree murder prosecution, whether by reason of drunkenness or otherwise ac-

cused's condition was such as to make him incapable of deliberation or premeditation was for jury under conflicting evidence. D.C. Code 1929, T. 6, § 21. *McAffee v. U.S.*, 111 F.2d 199, 1940 U.S. App. LEXIS 3609 (1940).

While intoxication per se is no defense to fact of guilt, stated condition of defendant's mind at time of killing in respect of ability to form intent to kill, or if formed to deliberate and premeditate thereupon, is proper subject for consideration, inquiry and determination by jury. *Bishop v. U.S.*, 107 F.2d 297, 1939 U.S. App. LEXIS 2732 (1939).

In murder prosecution, evidence presented fact question for jury as to defendant's mental competency when crime was committed. D.C. Code 1951, § 24-301. *U.S. v. Fielding*, 148 F.Supp. 46, 1957 U.S. Dist. LEXIS 3974 (D.D.C.1957).

Extent of defendant's intoxication was properly submitted to jury in resolving issue whether defendant was incapable of forming requisite intent to kill or of premeditating and deliberating homicide. D.C. Code § 22-2401. *Harris v. United States*, 375 A.2d 505, 1977 D.C. App. LEXIS 345 (1977).

— Principals and accessories, questions of law and fact.

In murder prosecution against two defendants one of whom shot the victim, whether the codefendant had aided and abetted the offense was for jury under the evidence. D.C. Code §§ 22-105, 22-2403. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

— Self-defense, questions of law and fact.

It is the function of jury, where defendant urges, in the alternative, killing upon provocation in heat of passion and self-defense, under proper instructions to determine whether either defense is available to the defendant under the circumstances of the particular case. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

If the facts in the judgment of the court are not such as to admit of self-defense, that issue should not be left to the mere speculation of the jury. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

Accused testified that he shot twice in rapid succession from a second-story window of his house, but with no intention of hitting deceased, who, just prior to the shooting, had been throwing stones at him, one of which had gone through the window and broken a lamp, and that deceased was in the act of picking up stones when accused went to get his pistol. Deceased was shot in the back at some distance from the house. Held, it was not error to refuse to submit to the jury the question whether defendant acted in self-defense. *Fearson v.*

U.S., 10 App.D.C. 536, 1897 U.S. App. LEXIS 3189 (1897).

When defendant raises claim of self-defense, trial court must decide, as matter of law, whether there is record evidence sufficient to support the claim. *Howard v. United States*, 656 A.2d 1106, 1995 D.C. App. LEXIS 29 (1995).

It is for the jury to determine whether murder defendant had reasonable grounds to believe he was in imminent danger of bodily harm, thereby justifying appropriate self-defense measures. *Bowler v. United States*, 480 A.2d 678, 1984 D.C. App. LEXIS 571 (1984).

While issue of self-defense is always question of fact for jury, question of whether self-defense can be invoked under evidence adduced is question of law for trial court in first instance. *Mitchell v. United States*, 399 A.2d 866, 1979 D.C. App. LEXIS 296 (1979).

Review.

— Determination and disposition, review.

Since it could not be said that defendants, whose first trial on charge of second-degree murder ended with a declaration of mistrial and who were then reindicted and found guilty on charge of first-degree murder, were not prejudiced by having to defend, on the retrial, against the higher, illegal charge, the Court of Appeals would not, under those circumstances, remand the case with directions to simply enter convictions for second-degree murder. D.C. Code §§ 22-2401, 22-2403. *United States v. Jamison*, 505 F.2d 407, 1974 U.S. App. LEXIS 6511 (C.A.D.C. 1974).

Where prosecutor's improper closing and rebuttal arguments were so highly prejudicial as to require reversal of conviction of defendant who relied upon insanity as a defense and was convicted of first-degree murder and assault with intent to kill while armed, judgment of conviction of codefendant, who was charged as an aider and abettor, asserted lack of intent to commit murder, and was convicted of second-degree murder, would also be nullified. D.C. Code §§ 22-105, 22-501, 22-502, 22-2401, 22-2403, 22-3202. *United States v. Hawkins*, 480 F.2d 1151, 1973 U.S. App. LEXIS 9498 (C.A.D.C. 1973).

An appellate court can order entry of conviction as to second-degree murder when evidence is insufficient only as to premeditation. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Where defendant's conviction for first-degree murder was set aside because of prosecution's failure to establish premeditation but evidence as to guilt of second-degree murder was overwhelming, case would be remanded to trial court for sentencing for second-degree murder

without new trial. *Hemphill v. United States*, 402 F.2d 187, 1968 U.S. App. LEXIS 6575 (C.A.D.C. 1968).

Where defendant in homicide prosecution was not prejudiced by trial court's alleged error of submission of first-degree murder when there was no evidence of premeditation and deliberation and jury returned verdict of second-degree murder, Court of Appeals would not remand cause to district court with directions to enter judgment of guilty of murder in second-degree unless district court determines that new trial is in interest of justice. *Howard v. United States*, 389 F.2d 287, 1967 U.S. App. LEXIS 4276 (C.A.D.C. 1967).

Defendant was not entitled to new trial, though government witness recanted his testimony one year after defendant was convicted of second degree murder while armed, as defendant did not show that new trial would probably produce acquittal; jury apparently convicted defendant as aider and abettor, and testimony of three nonrecanting witnesses established that defendant aided in crime by concealing homemade knife used to stab victim. D.C. Code 1981, §§ 22-2403, 22-3202. *Graham v. United States*, 703 A.2d 825, 1997 D.C. App. LEXIS 268 (1997).

Motions judge did not abuse discretion in denying defendant's motion for new trial, which was based on recantation of government witness in one-page affidavit one year after defendant's conviction for second-degree murder while armed, though motions judge had not presided over trial and did not hold hearing on motion, as witness offered no evidence for claim he testified under duress, and his claim of not witnessing victim's killing was belied by his pleading guilty to manslaughter while armed in connection with victim's death. D.C. Code 1981, §§ 22-2403, 22-3202. *Graham v. United States*, 703 A.2d 825, 1997 D.C. App. LEXIS 268 (1997).

While prosecutor's statements, indirectly alluding to the fact that defendant did not testify, did not alone require reversal, this error was but one in a myriad of errors which so prejudiced the jury as to deny defendant a fair trial on charge of second-degree murder. D.C. Code 1981, §§ 22-2403, 22-3202. *Bowler v. United States*, 480 A.2d 678, 1984 D.C. App. LEXIS 571 (1984).

Where prosecution had already established beyond reasonable doubt defendant's factual culpability on charges of murder and arson and error in denying appointment of private psychiatrist to assist defendant in determining whether proper basis for insanity defense existed did not contaminate jury finding of factual issue, it was unnecessary to retry defendant on remand on other than insanity question. D.C. Code §§ 22-401, 22-2403, 22-3202. *Gaither v.*

United States, 391 A.2d 1364, 1978 D.C. App. LEXIS 311 (1978).

Where trial court, in prosecution for second-degree murder, gave full and proper instructions on self-defense and evidence was such that refusal to give manslaughter instruction constituted reversible error, case was an appropriate one for the Government to consider its consent to entry of judgment of guilty of manslaughter on remand and for the trial court to consider such a final disposition. D.C. Code § 22-2403. *Pendergrast v. United States*, 332 A.2d 919, 1975 D.C. App. LEXIS 326 (1975).

— In general.

Fact that government's notice of appeal of trial court's order denying its request to admit Drew evidence in second-degree murder prosecution was filed before issuance of trial court's written order did not render appeal fatally premature; government appealed based upon trial court's oral ruling, written order did not deviate in substance from such oral ruling, and defendant failed to establish any prejudice, harassment, or delay. D.C. Code 1981, §§ 22-2403, 22-3202; Court of Appeals Rule 4(b)(1). *United States v. Williams*, 697 A.2d 1244, 1997 D.C. App. LEXIS 165 (1997).

— Matters reviewable.

That appellate court might have reached different conclusion from that of jury on question whether accused in first-degree murder prosecution fired shot purposely or not, would not justify court in substituting its views on weight of evidence for those of jury. D.C. Code 1929, T. 6, § 21. *Jordon v. U.S.*, 87 F.2d 64, 1936 U.S. App. LEXIS 2780 (1936).

On appeal from conviction, Court of Appeals could consider actual testimony of child at trial in reviewing and evaluating trial court's exercise of discretion in determining whether child was competent to testify. D.C. Code §§ 22-2403, 22-3202, 22-3203. *Smith v. United States*, 414 A.2d 1189, 1980 D.C. App. LEXIS 290 (1980).

Judgment as to credibility of two witnesses, who were questioned by trial judge in connection with defendant's allegations that government witnesses had been discussing second-degree murder trial with spectator, was that of trial court. D.C. Code §§ 17-305, 22-2403. *Parker v. United States*, 363 A.2d 975, 1976 D.C. App. LEXIS 377 (1976).

— Presentation and reservation of grounds for review.

Proper standard for review of District of Columbia prisoner's collateral attack on malice instruction in first-degree murder prosecution was not "plain error" but "cause and actual prejudice." 18 U.S.C. § 2255; Fed. Rules Cr. Proc. Rule 52(b), 18 U.S.C.; D.C. Code 1981, §§ 22-2401, 22-2403. *U.S. v. Frady*, 102 S.Ct. 1584, 1982 U.S. LEXIS 95 (U.S. Dist. Col. 1982).

In murder prosecution, admission of testimony by decedent's wife that her marriage was trouble-free did not constitute plain error and hence was not reviewable, where no objection to its admission was made. D.C. Code §§ 22-2401, 22-2403; Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *United States v. Smith*, 490 F.2d 789, 1974 U.S. App. LEXIS 10651 (C.A.D.C. 1974).

Failure in second-degree murder prosecution to give limiting instruction concerning evidence, which pertained to prior assaults on victim-child by defendant, which was relevant and material to issues of malice, intent and willfulness and which refuted defendant's contention that burning of child was accidental since defendant felt kindly toward him, was not plain error. D.C. Code §§ 22-2403, 22-2405. *United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Failure in second-degree murder prosecution to strike victim's mother's testimony that upon her becoming angry with defendant for beating victim "[defendant] strangled me and he slapped me and about that time I was pregnant with his child," or to declare a mistrial sua sponte because of such testimony was not plain error. D.C. Code §§ 22-2403, 22-2405. *United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Admission, in second-degree murder prosecution brought against defendant who allegedly pushed wife from porch thereby causing injuries resulting in her death, of testimony that defendant had struck wife with chair seven months prior to alleged homicide, without instruction that such evidence came in only on issue of malice, was plain error requiring reversal, though such instruction had not been requested, where there had been extensive colloquy at bench over admissibility of such evidence and no one disputed that it was admissible only to prove malice. D.C. Code § 22-2403; Fed.Rules Crim.Proc. rules 30, 52(b), 18 U.S.C. *United States v. McClain*, 440 F.2d 241, 1971 U.S. App. LEXIS 12190 (C.A.D.C. 1971).

Error in murder prosecution instruction stating that in determining whether act is done with malice aforethought jury should bear in mind that every man is presumed to intend consequences of his act, without including elements of willfulness or want of justification, was not plain error in absence of other error in instructions. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.; D.C. Code §§ 22-2403, 22-3204. *Mitchell v. United States*, 434 F.2d 483, 1970 U.S. App. LEXIS 9263 (C.A.D.C. 1970), writ of certiorari denied by 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106, 1970 U.S. LEXIS 775 (1970).

Where trial judge's charge contained two erroneous instructions equating intent with malice as essential ingredient of murder and stating that law infers or presumes malice from use of deadly weapon in commission of homi-

cide and both instructions were later reread to jury and jury returned verdict, not of first-degree murder, but of murder in second degree and jury did not accept whole of government's evidence bearing on degree of defendant's culpability, instructional errors would be noticed by Court of Appeals despite defendant's failure to object at trial and would require reversal of conviction of murder in second degree. D.C. Code §§ 22-2401, 22-3204; Fed.Rules Crim.Proc. rules 30, 52(b), 18 U.S.C. *United States v. Wharton*, 433 F.2d 451, 1970 U.S. App. LEXIS 11384 (C.A.D.C. 1970).

Where indictment charged in separate counts both first-degree felony-murder and first-degree premeditated murder and trial judge charged with respect to both felony-murder and second-degree murder, in absence of any request, motion or objection by defendant, failure to further charge that jury, which returned verdicts of guilty both as to felony-murder and as to manslaughter as lesser included offense, should consider question of second-degree murder only if it determined government had not met its burden as to some element of first-degree murder charged was not plain error and was not reversible error. D.C. Code §§ 22-2401 to 22-2403. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

In homicide prosecution, omission to define "malice aforethought" and omission to charge on involuntary manslaughter constituted plain error, and second-degree murder conviction would have to be reversed and case remanded for new trial even though trial counsel had not requested such charges. D.C. Code 1951, § 22-2403. *McDonald v. U.S.*, 284 F.2d 232, 1960 U.S. App. LEXIS 3409 (C.A.D.C. 1960).

Driver/defendant preserved for review issue of whether admission of hearsay statement of passenger/driver that he argued with another passenger in driver/defendant's car over who would use knife to stab passerby required severance of driver/defendant's trial, in prosecution of five defendants arising out of beating of homeless man and murder and assaults of passersby who tried to intervene, where driver/defendant filed a pre-trial motion to sever based on the possibility that incriminating out-of-court statements by codefendants might be admitted, and at trial driver/defendant objected that passenger/defendant's hearsay statement would incriminate him. *Perez v. United States*, 968 A.2d 39, 2009 D.C. App. LEXIS 57 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 474, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7527, 78 U.S.L.W. 3237 (2009), writ of certiorari denied by 558 U.S. 975, 130 S. Ct. 473, 175 L. Ed. 2d 317, 2009 U.S. LEXIS 7505, 78 U.S.L.W. 3237 (2009).

Absent objection in murder prosecution to allegedly conflicting instructions regarding imperfect self-defense and mitigating circumstances that may reduce second-degree murder to manslaughter, claim was reviewable only for plain error. *Jackson v. United States*, 653 A.2d 843, 1995 D.C. App. LEXIS 10 (1995).

Conviction of assault to kill while armed, an offense not charged in indictment, did not constitute plain error; defendant was indicted for second-degree murder while armed and requested a lesser included offense instruction of simple assault, defendant's counsel accepted trial court's proposal to instruct on assault to kill while armed as tactical decision, and defendant had ample notice that he had to defend against evidence of malice aforethought. D.C. Code 1981, §§ 22-501, 22-2403, 22-3202. *Jackson v. United States*, 650 A.2d 659, 1994 D.C. App. LEXIS 218 (1994).

Trial court did not commit plain error in failing to instruct jury on lesser included offense of second-degree felony murder, given uncertainty as to whether such category even existed, or whether it would fit defendant's circumstances. *Everetts v. United States*, 627 A.2d 981, 1993 D.C. App. LEXIS 158 (1993), writ of certiorari denied by 513 U.S. 848, 115 S. Ct. 144, 130 L. Ed. 2d 84, 1994 U.S. LEXIS 5983, 63 U.S.L.W. 3260 (1994).

Trial court's failure to sua sponte give special instruction on causation was not plain error in voluntary manslaughter prosecution, where court instructed jury on elements of voluntary manslaughter, including requirement that Government proves that defendant inflicted injury upon victim from which victim died. D.C. Code 1981, §§ 22-2403, 22-3202. *Doe v. United States*, 583 A.2d 670, 1990 D.C. App. LEXIS 310 (1990).

Where defendant in prosecution for second-degree murder failed to object to cautionary instruction procedure adopted by court with respect to testimony of witnesses regarding prior threatening statements and conduct by defendant toward victim, defendant had heavy burden of demonstrating that court committed "plain error," which is error so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

Where trial court gave shortened cautionary instructions immediately after testimony regarding prior threatening statements and conduct by defendant toward victim, and court gave a full cautionary instruction at end of the trial, defendant did not demonstrate that court committed plain error by using such cautionary instruction procedure in prosecution for second-degree murder. D.C. Code §§ 22-2403, 22-

3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

In homicide prosecution, defendant was not substantially prejudiced by alleged prosecutorial misconduct in closing argument which included fact that prosecutor suggested that life meant "almost nothing" to defendant because he had been in the military and served in Vietnam. D.C. Code § 22-2403. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

Plain error in instructions did not occur in second-degree murder prosecution where instructions given were standard instructions on manslaughter and second-degree murder and no objection was made to charge. D.C. Code § 22-2403. *Curry v. United States*, 322 A.2d 268, 1974 D.C. App. LEXIS 246 (1974).

— Right of review.

Trial court's written pretrial order denying government's request to introduce Drew evidence in prosecution for second-degree murder and voluntary manslaughter was appealable, though judge indicated at oral ruling that her ruling was only advisory and that trial judge would have freedom to reconsider ruling in context of trial. D.C. Code 1981, §§ 22-2403, 22-2405, 22-3202, 23-104(a)(1). *United States v. Williams*, 697 A.2d 1244, 1997 D.C. App. LEXIS 165 (1997).

Self-defense.

— Aggression or provocation, self-defense.

Generally, defense of self-defense is not available to one who provokes difficulty. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

Notwithstanding that deceased provoked the original quarrel, and accused cannot, after that quarrel has ended or deceased has withdrawn, invoke the right of self-defense in a subsequent difficulty which he himself causes or brings on. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One cannot support a claim of self-defense by a self-generated necessity to kill; right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Fact that deceased struck the first blow, fired the first shot or made the first menacing gesture does not legalize a self-defense claim if in fact claimant was the actual provoker. *United*

States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation; only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One cannot provoke fight and then rely on claim of self-defense when such provocation results in counterattack unless he has previously withdrawn from fray and communicated such withdrawal. *Harris v. United States*, 364 F.2d 701, 1966 U.S. App. LEXIS 5634 (C.A.D.C. 1966).

In a murder case in order to admit of the application of the law of self defense, it must be shown that the assault upon the defendant was imminently perilous. If it appears that the conflict was in any way premeditated by the defendant, that defense can no longer be set up. He must show that he was attacked and that he had good reason to believe that he was in imminent peril of his life or of great bodily harm. *Hopkins v. U.S.*, 4 App.D.C. 430, 1894 U.S. App. LEXIS 3349 (1894).

The plea of self-defense is not available to one who is not wholly free from fault in bringing on the difficulty. *Hopkins v. U.S.*, 4 App.D.C. 430, 1894 U.S. App. LEXIS 3349 (1894).

Defendant cannot claim self-defense in homicide case, where defendant was the aggressor, or if he or she provoked the conflict. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant in homicide case is not precluded from asserting imperfect self-defense even if defendant placed himself in position likely to provoke the trouble. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant cannot raise legitimate self-defense claim when he went out of his way to look for trouble. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

On occasion, where defendant claims self-defense, defendant's subjective belief of danger can be determined from objective circumstances of killing; it is possible, therefore, for defendant to rely on self-defense, based on circumstantial evidence of reasonable fear of imminent serious bodily injury, without defendant's own testimony. *Gray v. United States*, 589 A.2d 912, 1991 D.C. App. LEXIS 80 (1991).

— Apprehension of danger, self-defense.

The essence of self-defense situation is a reasonable and bona fide belief of the immi-

nence of death or great bodily harm, and heat of passion may or may not be present. *Kinard v. U.S.*, 96 F.2d 522, 1938 U.S. App. LEXIS 3512 (1938).

Before any one is justified in taking life under the apprehension that he is in danger of his own life or of serious bodily harm from the violence of another, it must appear that he had a reasonable right to believe from all the facts and circumstances presented to his mind that he was in such danger. The test is not the actual belief of the accused, but whether a reasonably prudent person, similarly situated, would have believed that he was in such danger. *Sacrine v. U.S.*, 38 App.D.C. 371, 1912 U.S. App. LEXIS 2136 (1912).

Defendant is justified in the use of deadly force in self-defense if he actually and reasonably believed at the time of the incident that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against the assailant. *Herbin v. United States*, 683 A.2d 437, 1996 D.C. App. LEXIS 188 (1996).

In order to make out legally cognizable claim of self-defense, accused using deadly force must at time of incident actually believe and reasonably believe that he is in imminent peril of death or serious bodily harm. *Binion v. United States*, 658 A.2d 187, 1995 D.C. App. LEXIS 94 (1995).

To be acquitted for self-defense in homicide case, defendant must have had actual belief both that he or she was in imminent danger of serious bodily harm or death, and that use of deadly force was needed in order to save himself or herself, and both of those beliefs must be objectively reasonable. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant's actual belief both in presence of danger and need to resort to force, even if one or both beliefs be objectively unreasonable, constitutes a legally sufficient mitigating factor to warrant finding of voluntary manslaughter rather than second-degree murder. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

To invoke legitimate claim of self-defense, defendant must satisfy the following conditions: there was actual or apparent threat; threat was unlawful and immediate; defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm; and defendant's response was necessary to save himself from danger. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Defendant must have honestly and reasonably believed that he was in imminent danger of death or serious bodily harm in light of surrounding circumstances to be entitled to self-defense instruction in homicide prosecu-

tion. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

To support self-defense claim, accused may show prior acts of violence committed by victim about which accused knew; such evidence is relevant to reasonableness of accused's fear of victim. *Harris v. United States*, 618 A.2d 140, 1992 D.C. App. LEXIS 316 (1992).

Right of self-defense, and especially degree of force victim is permitted to use to prevent bodily harm, is premised substantially on victim's own reasonable perceptions of what is happening; victim's perceptions may include, for example, an enhanced sense of peril based on personal knowledge that attacker has committed prior acts of violence. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Victim's personal perceptions are so significant that they may justify use of reasonable, including deadly, force in self-defense even though it may afterwards have turned out that appearances were false. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Victim's subjective perceptions are prime determinative of right to use force, and degree of force required, in self-defense, subject only to constraint that such perceptions be reasonable under the circumstances. *Fersner v. United States*, 482 A.2d 387, 1984 D.C. App. LEXIS 486 (1984).

Defendant's state of mind, her reasonable apprehension of imminent, serious bodily harm, with reference to the victim during the period up to and including the time of the killing was relevant to her claim of self-defense in prosecution for second-degree murder. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

— Duty to retreat, self-defense.

Where homicide defendant could not be found without fault in bringing conflict on, in that following prior verbal exchange he had obtained pistol from his house and, while displaying weapon by back fence, dared victim to come in and threatened to kill victim if he did, defendant, who asserted that fatal shooting was in self-defense but who did not retreat when victim came at him with lug wrench, was not so blameless that he was entitled to fall back on the "castle" doctrine of no retreat before resorting to use of deadly force in repelling attack on one in his home. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Under District of Columbia law, one seeking to justify homicide on ground of self-defense must have retreated to the wall before using

deadly force. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Self-defense doctrine of retreat to the wall was not intended to enhance risk to the innocent; its proper application does not require a faultless victim to increase his assailant's safety at the expense of his own; the faultless victim can stand his ground and use deadly force otherwise appropriate if the alternative were perilous or if to him it reasonably appeared to be. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

The self-defense doctrine of retreat to the wall recognizes the principle that there is no duty to retreat from an assault producing an imminent danger of death or grievous bodily harm. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One who through no fault of his own is attacked in his home is under no duty to retreat therefrom before he may use deadly force in his self-defense. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Any rule of no retreat which may protect an innocent victim of affray would, like other incidents of the forfeited right of self-defense, be unavailable to the party who provokes or stimulates the conflict; the "castle" doctrine of no retreat from attack in one's home can be invoked only by one who is without fault in bringing the conflict on. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Before a person can avail himself of the plea of self-defense against a charge of homicide, he must do everything in his power consistent with his safety to avoid the danger, and avoid the necessity of taking life. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

A defendant claiming the right of self-defense is not required to retreat, when he is assailed in a place where he has a right to be, unless by so doing an affray can be clearly avoided. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

The right of a defendant when in imminent danger to take life does not depend upon whether there was an opportunity to escape. One under such circumstances is not compelled

to step aside or flee. *Marshall v. U.S.*, 45 App.D.C. 373, 1916 U.S. App. LEXIS 2700 (1916).

Mortal wounding of person by another, prevented from retreating by fierceness of former's attack, is justifiable homicide. *U.S. v. Herbert*, 26 F.Cas. 287, 1856 U.S. App. LEXIS 615 (1856).

Whether "castle doctrine" required one who was attacked in his home, through no fault of his own, by invitee whose invitation was withdrawn, to retreat was unresolved under current law, and thus court's failure to instruct on that issue was not plain error. *Smith v. United States*, 686 A.2d 537, 1996 D.C. App. LEXIS 259 (1996), writ of certiorari denied by 522 U.S. 839, 118 S. Ct. 115, 139 L. Ed. 2d 67, 1997 U.S. LEXIS 5021, 66 U.S.L.W. 3257 (1997).

— In general.

Instigator of an encounter that ultimately proves fatal may claim self-defense if, prior to fatal blow, he has attempted in good faith to disengage himself from the altercation and has communicated his desire to do so to his opponent. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

Effect of disengagement of parties from altercation which had occurred one hour prior to fatal shooting was to restore them to status quo ante, deceased's privilege of self-defense as to earlier assault by defendant had dissipated at time of fatal shooting and any attack he might have launched upon defendant would have constituted unlawful retaliation; thus, any disability of defendant due to his prior aggression had been lifted at time of the fatal shooting and he was not precluded from raising defense of self-defense with respect to the fatal shooting. *United States v. Grover*, 485 F.2d 1039, 1973 U.S. App. LEXIS 8052 (C.A.D.C. 1973).

To kill or maim in self-defense there must have been a threat, actual or apparent, of the use of deadly force against the defender; the threat must have been unlawful and immediate and the defender must have believed that he was in imminent peril of death or serious bodily harm and that his response was necessary to save himself therefrom; such beliefs must not only have been honestly entertained but also objectively reasonable in light of surrounding circumstances; no less than a concurrence of these elements will suffice. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Right of self-defense arises only when the necessity begins and equally ends with the necessity; never must the necessity be greater than when the force employed defensively is deadly; the necessity must bear all semblance of reality and appear to admit no other alter-

native. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help and the settlement of potentially fatal personal conflicts. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Self-defense may not be successfully claimed by one who deliberately places himself in position where he has reason to believe his presence will provoke trouble. *Rowe v. United States*, 370 F.2d 240, 1966 U.S. App. LEXIS 4197 (C.A.D.C. 1966).

Law of self-defense is based on necessity, which must bear all semblance to reality, and appear to admit of no alternative. *Holmes v. U.S.*, 11 F.2d 569, 1926 U.S. App. LEXIS 2541 (1926).

One may defend his domicile or his property to the extent of taking life, when necessary in the defense of his property, or to protect himself or those in his charge from death or bodily injury. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

Self-defense is not available to a defendant who deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble even if his purpose in putting himself in that position was benign. *Outlaw v. United States*, 806 A.2d 1192, 2002 D.C. App. LEXIS 516 (2002).

The trial court's refusal to allow defendant to introduce his theory of self-defense in his opening statement was not an abuse of discretion, in prosecution for murder and other crimes; defendant was allowed to describe how defendant perceived the situation and explained how defendant feared for his life, and defendant was only prohibited from arguing the law of self-defense in his opening statement. *Lopez v. United States*, 801 A.2d 39, 2002 D.C. App. LEXIS 301 (2002).

Self-defense may not be claimed by one who deliberately places himself in position where he has reason to believe his presence would provoke trouble. *Mitchell v. United States*, 399 A.2d 866, 1979 D.C. App. LEXIS 296 (1979).

One who commits an armed robbery forfeits his right to claim the right of self-defense against either the intended victim or any person intervening to prevent the crime. *Taylor v. United States*, 380 A.2d 989, 1977 D.C. App. LEXIS 284 (1977).

"Self-defense" is the use of reasonable force to repel a danger which a person reasonably believes may cause him imminent bodily harm.

Gezmu v. United States, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

— **Voluntary participation in combat, self-defense.**

Where a person voluntarily participated in a contest or mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary on the ground of self-defense. *Laney v. U.S.*, 294 F. 412, 1923 U.S. App. LEXIS 2501 (1923).

Sentence and punishment.

Purpose and effect of the "except" clause in provision stating that whoever with malice aforethought, except as provided in sections defining first-degree murder, kills another is guilty of second-degree murder is to say that all homicides with malice are murder and punishable by maximum of life imprisonment set forth for murder in second-degree except those particularly heinous murders which are listed in first-degree section as punishable capitally. D.C. Code §§ 22-2403, 22-2404. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Record sustained conviction of juvenile of manslaughter and assault with a deadly weapon, and decision of juvenile court that juvenile was within its jurisdiction and should be committed to custody of Department of Public Welfare for indeterminate period was proper. D.C. Code §§ 22-502, 22-2403. *In re Bumphus*, 254 A.2d 400, 1969 D.C. App. LEXIS 267 (App. 1969).

Speedy trial rights.

Defendant's allegation that 14-month prearrest delay enabled a minor witness to become a competent witness in criminal prosecution was insufficient to support a due process claim in that it was based on pure speculation, 14-month delay could easily have worked to defendant's advantage by causing child's memory to fade, and defendant made no claim that presentation of his own evidence was in any way impaired. D.C. Code §§ 22-2403, 22-3202, 22-3203; U.S. Const. Amend. 5. *Smith v. United States*, 414 A.2d 1189, 1980 D.C. App. LEXIS 290 (1980).

While defendant, who was incarcerated less than two weeks following his arrest and who was free on bond for pendency of entire proceedings, may have suffered some anxiety and impairment of memory as a result of 17-month period between his arrest and trial, which delay was not due to any bad faith on part of Government, that prejudice, when considered in overall context of case, was not sufficiently serious to warrant dismissal of second-degree murder while armed charge against defendant. D.C. Code §§ 22-2403, 22-3202; U.S. Const.

Amends. 6, 14. *Campbell v. United States*, 391 A.2d 283, 1978 D.C. App. LEXIS 566 (1978).

While five-month delay between dismissal of Government's appeal from dismissal of original indictment and defendant's reindictment for second-degree murder while armed appeared to have been somewhat excessive, it did not constitute an unreasonable delay, for purposes of determining whether defendant's speedy trial rights were violated as result of 17-month delay in bringing him to trial, where much of that time was spent in obtaining and developing ballistics testimony, and ballistics evidence, together with hearsay testimony, constituted crux of Government's case. D.C. Code §§ 22-2403, 22-3202; U.S. Const. Amends. 6, 14. *Campbell v. United States*, 391 A.2d 283, 1978 D.C. App. LEXIS 566 (1978).

Defendant was not denied his right to speedy trial as result of 17-month delay between arrest and trial on second-degree murder while armed charge, one month of which was due to continuance sought by Government which was unopposed by defendant, and 16 months of which resulted from administrative delay, taking of an interlocutory appeal and development of expert ballistics testimony, where defendant did not assert his right to speedy trial until almost 16 months after his arrest and defendant did not suffer prejudice sufficiently serious to warrant dismissal of charge against him. D.C. Code §§ 22-2403, 22-3202; U.S. Const. Amends. 6, 14. *Campbell v. United States*, 391 A.2d 283, 1978 D.C. App. LEXIS 566 (1978).

Defendant in prosecution for second-degree murder was not denied right to speedy trial in light of balancing of factors, including 18-month delay, lack of deliberateness in causing delay, failure of defendant to assert speedy trial right in trial court and absence of any allegation of concrete instances of prejudice. D.C. Code §§ 22-2403, 22-3202. *Rink v. United States*, 388 A.2d 52, 1978 D.C. App. LEXIS 526 (1978).

Verdict.

Where separate counts charge both first-degree murder and second-degree murder, a defendant desiring to have submitted the second-degree count solely as a lesser included offense must make a request for striking that count, and in absence of such request, verdict of second-degree murder in addition to first-degree murder is akin to special finding sought by prosecution and acquiesced in by defense as to state of mind concerning homicide apart from intent as to felony. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Convictions for both robbery and second degree murder could stand even if they were

inconsistent where the conviction of robbery was consistent with the evidence and the conviction of second degree murder was also consistent with the evidence. D.C. Code 1961, §§ 22-2403, 22-2901. *Jackson v. U.S.*, 313 F.2d 572, 1962 U.S. App. LEXIS 3288 (C.A.D.C. 1962).

Trial court's use of special verdict form did not confuse jury or prejudice defendant, in prosecution for first-degree burglary, murder, and assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202. *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

Weight and sufficiency of evidence.

— Cause or time of death, weight and sufficiency of evidence.

Evidence sustained conviction of manslaughter notwithstanding defense of an intervening cause of death. D.C. Code 1951, § 22-2403. *Ross v. U.S.*, 267 F.2d 618, 1959 U.S. App. LEXIS 3878 (C.A.D.C. 1959).

— Commission of or attempt to commit other offense, weight and sufficiency of evidence.

Evidence, including the testimony of an eyewitness involving all three defendants in the assault upon victim, was sufficient to support verdict of jury finding defendants guilty of felony-murder and assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

— Commission of or participation in act by accused, weight and sufficiency of evidence.

Evidence was sufficient to establish defendant's identity as perpetrator of second-degree murder while armed and other offenses; four eyewitnesses, each of whom had known defendant for several years and described the attack in nearly identical fashion, testified that they had opportunity to see defendant moments before shooting when he asked each of them where victim was, that they watched defendant shoot victim at close range, and that they had opportunity to see defendant moments after shooting, and two of those eyewitnesses testified that defendant shot victim with same weapon that he had been seen carrying before incident. *Adams v. United States*, 883 A.2d 76, 2005 D.C. App. LEXIS 469 (2005).

Evidence that defendant drove car to scene of shootings, that he and other occupants of car called out to intended victim, pointed their guns and fired shots, was sufficient to show

that defendant had specific intent to kill intended victim, as required to support conviction for second-degree murder of victim who was actually shot. *Williams v. United States*, 881 A.2d 557, 2005 D.C. App. LEXIS 453 (2005), writ of certiorari denied by 546 U.S. 1112, 126 S. Ct. 1132, 163 L. Ed. 2d 892, 2006 U.S. LEXIS 700 (2006).

Defendant's own testimony that he shot victim and eyewitness' testimony that he saw defendant shoot victim and victim fall to ground after bullet went through his head was sufficient to sustain defendant's convictions for second-degree murder while armed, possession of firearm during crime of violence, and carrying pistol without license, though neither gun nor bullet was recovered. D.C. Code 1981, §§ 22-2403, 22-3202, 22-3204(b). *Curington v. United States*, 621 A.2d 819, 1993 D.C. App. LEXIS 52 (1993).

Evidence that shooting victim gave nickname of one of his assailants prior to his death and that defendant was only person present at scene with that nickname was sufficient to support second-degree murder conviction. D.C. Code 1981, §§ 22-2403, 22-3202. *Gayden v. United States*, 584 A.2d 578, 1990 D.C. App. LEXIS 325 (1990), writ of certiorari denied by 502 U.S. 843, 112 S. Ct. 137, 116 L. Ed. 2d 104, 1991 U.S. LEXIS 5565, 60 U.S.L.W. 3260 (1991).

— Degree of homicide generally, weight and sufficiency of evidence.

Evidence justified finding of malice warranting conviction of second-degree murder rather than manslaughter, in case arising out of shooting following one victim's racial remark, in view of testimony of surviving victims that all victims were standing motionless staring at codefendant's gun when defendant came in, drew his gun, and began firing. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

— Degree of murder, weight and sufficiency of evidence.

Evidence that defendant was armed and was threatening one individual with serious bodily injury, that he was aware that he was being followed by uniformed special officer and that defendant turned and shot uniformed officer was sufficient, apart from issue of mental responsibility, to support verdict finding defendant guilty of second-degree murder of the officer and of carrying a dangerous weapon. D.C. Code §§ 22-2401, 22-3204. *United States v. Taylor*, 510 F.2d 1283, 1975 U.S. App. LEXIS 15297 (C.A.D.C. 1975).

In murder prosecution against two defendants one of whom shot the victim, evidence

including showing of continuous association of codefendant with defendant who shot the victim, their furtive consultation immediately preceding the murder and codefendant's holding of bags of valuables that other defendant carried moments earlier, and standing close by while the defendant fought with and shot the victim sustained conviction of second-degree murder. D.C. Code §§ 22-105, 22-2403. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Evidence sustained conviction for second-degree murder, although it was largely circumstantial and government's chief witness was allegedly too intoxicated at time of event to accurately perceive what occurred. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Evidence that defendant was alone with his wife when fatal shot was fired, that he was somewhat inebriated at the time, that shells and bullet holes were found throughout the room, that lethal bullet had traveled in a downward trajectory and came to rest in mattress of bed on which wife was seated, and that it was unlikely that rifle could misfire in manner suggested by defendant, i.e., in an upward trajectory, was sufficient to form a reasonable basis upon which to disbelieve defendant's defense and to infer that he shot his wife, thus satisfying causation and malice requirement for second-degree murder. D.C. Code § 22-2403. *United States v. Lucas*, 447 F.2d 338, 1971 U.S. App. LEXIS 9284 (C.A.D.C. 1971).

Evidence supported conviction of second-degree murder by willful and malicious beating and kicking victim. D.C. Code § 22-2403. *Logan v. United States*, 411 F.2d 679, 1968 U.S. App. LEXIS 4548 (C.A.D.C. 1968).

Evidence sustained conviction for second-degree murder. D.C. Code 1961, § 22-2403. *Lewis v. United States*, 381 F.2d 894, 1967 U.S. App. LEXIS 5799 (C.A.D.C. 1967).

In homicide prosecution against decedent's wife and two others, wherein wife and one defendant were convicted of murder in second degree and the other defendant of manslaughter, and there was proof that they had given decedent a merciless beating and placed him in an automobile alive and later buried his body, evidence on issue of whether he had died from the beating or from falling out of the automobile supported verdicts of guilty. *Simms v. U.S.*, 248 F.2d 626, 1957 U.S. App. LEXIS 3842 (C.A.D.C. 1957).

Evidence that defendant found deceased with a woman with whom defendant was friendly, that some discussion ensued, followed by an altercation during which defendant cut deceased with a knife resulting in death, justified a finding that defendant acted with the malice aforethought essential to crime of second degree murder. D.C. Code 1940, § 22-2403.

Thomas v. U.S., 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

Circumstantial evidence was sufficient to sustain conviction for second-degree murder. *Morton v. U.S.*, 147 F.2d 28, 1945 U.S. App. LEXIS 2111 (1945).

Evidence that defendant approached deceased and others with a knife in his hand and wantonly stabbed deceased during an altercation, resulting in death, warranted conviction of murder in the second degree. *U.S. v. Edmonds*, 63 F.Supp. 968, 1946 U.S. Dist. LEXIS 2946 (D.D.C.1946).

Evidence was sufficient to support conviction for second-degree murder while armed; defendant had recently been served with complaint for divorce from victim, resulting in altercation in which defendant threatened victim, defendant's brother testified that, on the evening of the murder, defendant left the house at about midnight with a nine-millimeter handgun, which, according to expert testimony, was the kind of weapon used in the killing, and less than a half hour after, several eyewitnesses observed a man matching defendant's description shoot the victim as she sat in the driver's seat of her vehicle. *Williams v. U.S.*, 2012 WL 2159301 (2012).

Evidence that defendant kept infant daughters in scalding bath for lengthy period despite his older daughter's warnings that it was too hot, that infants would have been squirming and screaming to get out, and that infant daughter who died from burns was kept in tub even after defendant noticed signs of injury on other infant after removing her supported finding, in resulting second-degree murder prosecution, that defendant acted in conscious disregard of an extreme risk of death or serious bodily injury. *Edwards v. United States*, 767 A.2d 241, 2001 D.C. App. LEXIS 45 (2001).

Defendant's conviction for second-degree murder as aider and abettor was supported by evidence that defendant was part of group of five or six young men that surrounded bicyclist in connection with apparent dispute over neighborhood turf, that defendant stood behind rear wheel of bicycle and helped to prevent bicyclist's escape in that direction, that bicyclist was shot five or six times, and that, after shooting, defendant stood over bicyclist and gloated and uttered little slurs. *Davis v. United States*, 735 A.2d 467, 1999 D.C. App. LEXIS 165 (1999).

Defendant's conviction for second-degree murder was supported by his admission that he stabbed victim and by testimony describing the mutual shoving between victim and defendant before defendant stabbed victim. *Herbin v. United States*, 683 A.2d 437, 1996 D.C. App. LEXIS 188 (1996).

Evidence of requisite malice supporting conviction for second-degree murder of child was

supplied by specific intent to inflict serious bodily harm by striking eight-year-old girl in the eye with fist, and, if child did not die as result of that blow alone, by evidence of drowning her in bathtub. D.C. Code 1981, § 22-2403. *Byrd v. United States*, 618 A.2d 596, 1992 D.C. App. LEXIS 353 (1992).

Unrefuted evidence that decedent was fatally shot at close range after retreating to vehicle and attempting to escape scene of attempted drug purchase proved requisite malice for second-degree murder conviction. D.C. Code 1981, §§ 22-2403, 22-3202. *Price v. United States*, 602 A.2d 641, 1992 D.C. App. LEXIS 22 (1992).

Evidence in homicide prosecution for death of defendant's grandmother, with whom he was living, was sufficient to permit guilty verdict for offense of second-degree murder while armed. D.C. Code §§ 22-2403 to 22-3202. *Fox v. United States*, 421 A.2d 9, 1980 D.C. App. LEXIS 370 (1980).

— In general.

Accused who put on defense to first-degree murder case did not thereby waive earlier motion for acquittal or expose himself to death penalty which government was not entitled to pursue in view of fact that at close of prosecution's case defendant was entitled to acquittal of first-degree murder charge because evidence adduced by prosecution was not sufficient to permit a reasonable man to find that elements of first-degree murder existed beyond reasonable doubt. D.C. Code 1961, §§ 22-2401, 22-2403. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

Convictions on charges including second-degree murder while armed that arose from drive-by shooting were supported by prior statement by driver of getaway car identifying defendants as the gunmen, by forensic evidence linking two recovered guns to the scene of the crime and linking each defendant to one or the other of those guns, by fact that car involved in shooting was owned by one defendant's mother and was discovered near home where one of the guns was recovered, and by discovery of other defendant's fingerprint in car. *Johnson v. United States*, 820 A.2d 551, 2003 D.C. App. LEXIS 153 (2003), writ of certiorari denied by 541 U.S. 980, 124 S. Ct. 1895, 158 L. Ed. 2d 481, 2004 U.S. LEXIS 2684, 72 U.S.L.W. 3633 (2004).

— Insanity or other incapacity, weight and sufficiency of evidence.

Evidence sustained conviction of second-degree murder despite defense of insanity. *United States v. Marshall*, 471 F.2d 1051, 1972 U.S. App. LEXIS 7096 (C.A.D.C. 1972).

Conflicting expert testimony on defendant's mental condition was sufficient to support jury

finding that defendant, tried and convicted of second degree murder, was not suffering from a mental disease. *Strickland v. United States*, 316 F.2d 656, 1963 U.S. App. LEXIS 5949 (C.A.D.C. 1963).

Evidence of defendant's sanity at time of killing his wife was sufficient to sustain his conviction for second degree murder. *Starr v. U.S.*, 264 F.2d 377 (C.A.D.C. 1958).

In murder prosecution, when the issue of insanity is properly raised by the evidence, the burden is on the government to prove sanity beyond a reasonable doubt. *Carter v. U.S.*, 252 F.2d 608, 1957 U.S. App. LEXIS 4250 (C.A.D.C. 1957).

Evidence that, inter alia, defendant suffered from severe personality disorder that caused him on occasion to disassociate when his sexual advances were rejected, and that while defendant was in this state, he did not have capacity for choice or control, was sufficient to allow jury to reasonably infer from all evidence that defendant had necessary mental capacity for first degree burglary when he entered victim's apartment armed with knife but that he did not have capacity for choice or control when he killed victim because of a then dissociative condition. D.C. Code §§ 22-501, 22-1801(a), 22-2403, 22-3202, 24-301(j). *Harman v. United States*, 351 A.2d 504, 1976 D.C. App. LEXIS 468 (1976), writ of certiorari denied by 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110, 1976 U.S. LEXIS 2668 (1976).

— Malice, weight and sufficiency of evidence.

Evidence, including evidence that bullet entered victim's head on trajectory horizontal to floor and that defendant intentionally fired gun at floor in room where several persons were present was sufficient, in second degree murder prosecution, to support finding of express or implied malice. D.C. Code § 22-2403. *Mitchell v. United States*, 434 F.2d 483, 1970 U.S. App. LEXIS 9263 (C.A.D.C. 1970), writ of certiorari denied by 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106, 1970 U.S. LEXIS 775 (1970).

Evidence of malice is sufficient to support a conviction for second-degree murder if the defendant's conduct involved such wanton and willful disregard of an unreasonable human risk as to constitute malice aforethought, even if there is not actual intent to kill or injure, or if the defendant has the specific intent to inflict serious bodily harm. *Wilson-Bey v. United States*, 903 A.2d 818, 2006 D.C. App. LEXIS 424 (2006), writ of certiorari denied by 550 U.S. 933, 127 S. Ct. 2248, 167 L. Ed. 2d 1089, 2007 U.S. LEXIS 5173, 75 U.S.L.W. 3607 (2007).

— Passion and provocation, weight and sufficiency of evidence.

When defendant is charged with second-degree murder and manslaughter and defendant,

or government has introduced evidence of provocation, government must prove absence or inadequacy of provocation beyond a reasonable doubt and it should be explained to jury that provocation is not element of manslaughter, whether voluntary or involuntary, but a defense to second-degree murder. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

— **Principals and accessories, weight and sufficiency of evidence.**

Evidence was sufficient to convict defendant of second-degree murder, either as an aider or abettor or as a co-conspirator, even though witnesses described that defendant's gun failed at site of shooting; witnesses testified that gang members drove up to school soccer field, that one gang member went onto the field and began shooting, that when victim fell to the ground that same member went to him, aimed, and shot him again, that defendant was among the gang members who went onto the field, and that something went wrong with the gun defendant was holding, causing it not to fire. *Castillo-Campos v. United States*, 987 A.2d 476, 2010 D.C. App. LEXIS 10 (2010), writ of certiorari denied by 131 S. Ct. 1514, 179 L. Ed. 2d 336, 2011 U.S. LEXIS 1556, 79 U.S.L.W. 3477 (U.S. 2011).

Sufficient evidence supported convictions for second-degree murder while armed and weapons charges; although defendant argued trial court erred by not granting his motion for judgment of acquittal since there was no direct evidence that he shot victim and circumstantial evidence was extremely weak, three government eyewitnesses implicated defendant in the murder of victim, and jurors could reasonably conclude that government presented sufficient evidence to convict defendant of lesser-included offense of second-degree murder while armed and weapons charges lodged against him, either as principal or as aider and abettor. *Hartridge v. United States*, 896 A.2d 198, 2006 D.C. App. LEXIS 142 (2006), writ of certiorari denied by 549 U.S. 1272, 127 S. Ct. 1503, 167 L. Ed. 2d 242, 2007 U.S. LEXIS 2963, 75 U.S.L.W. 3473 (2007).

Sufficient evidence supported finding that defendant was guilty, as aider and abettor, of murder where defendant shared common purpose with codefendant to kill victim in retaliation for stealing cocaine from them, witness

saw defendant, codefendant, and murderer arguing with victim, codefendant told murderer to go get pistol, and defendant furnished murderer with weapon. D.C. Code 1981, §§ 22-2403, 22-3202. *Lyons v. United States*, 683 A.2d 1080, 1996 D.C. App. LEXIS 306 (1996).

Evidence was sufficient for jury to conclude that codefendant had aided and abetted murders in question arising out of alleged robbery and armed robbery thus refuting contention that conviction for a second-degree murder while armed should be reversed, notwithstanding that principal had been found guilty of first-degree murder of which codefendant had been acquitted. *Ellis v. United States*, 395 A.2d 404, 1978 D.C. App. LEXIS 570 (1978), writ of certiorari denied by 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280, 1979 U.S. LEXIS 2309 (1979).

In second-degree murder prosecution which resulted in conviction for involuntary manslaughter, evidence was sufficient to support finding that defendant, with full knowledge of affray that was taking place, voluntarily and without demand, returned a pistol to its owner which owner then used to shoot and kill victim, and to sustain verdict convicting defendant of aiding and abetting homicide. *Stewart v. United States*, 383 A.2d 330, 1978 D.C. App. LEXIS 425 (1978).

— **Self-defense, weight and sufficiency of evidence.**

Evidence sustained conviction of second degree murder as against contention that fatal wound was inflicted in self-defense. D.C. Code, 1940, § 22-2403. *Parker v. U.S.*, 158 F.2d 185, 1946 U.S. App. LEXIS 2356 (1946).

Once self-defense issue was introduced, Government was required to prove beyond reasonable doubt that defendant had not acted in self-defense. *Allen v. United States*, 603 A.2d 1219, 1992 D.C. App. LEXIS 58 (1992), writ of certiorari denied by 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916, 1992 U.S. LEXIS 4713, 60 U.S.L.W. 3879 (1992).

Once raised, self-defense is element of homicide which must be disproved by Government beyond reasonable doubt. *Gray v. United States*, 589 A.2d 912, 1991 D.C. App. LEXIS 80 (1991).

Evidence in homicide prosecution was sufficient for jury to reasonably reject defendant's claim that he acted in self-defense. D.C. Code § 22-2403. *Bennett v. United States*, 375 A.2d 499, 1977 D.C. App. LEXIS 344 (1977).

§ 22-2104. Penalty for murder in first and second degrees.

(a) The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release, except that the court may impose a prison sentence in excess of 60 years only in accordance with

§ 22-2104.01 or § 24-403.01(b-2). The prosecution shall notify the defendant in writing at least 30 days prior to trial that it intends to seek a sentence of life imprisonment without release as provided in § 22-2104.01; provided that, no person who was less than 18 years of age at the time the murder was committed shall be sentenced to life imprisonment without release.

(b) Notwithstanding any other provision of law, a person convicted of murder in the first degree shall not be released from prison prior to the expiration of 30 years from the date of the commencement of the sentence.

(c) Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life, except that the court may impose a prison sentence in excess of 40 years only in accordance with § 24-403.01(b-2).

(d) For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the first degree and murder in the second degree are Class A felonies.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 801; Jan. 30, 1925, 43 Stat. 798, ch. 115, § 1; Mar. 22, 1962, 76 Stat. 46, Pub. L. 87-423, § 1; Feb. 26, 1981, D.C. Law 3-113, § 2, 27 DCR 5624; Sept. 26, 1992, D.C. Law 9-153, § 2(b), (c), 39 DCR 3868; May 23, 1995, D.C. Law 10-256, § 2(a), 42 DCR 20; June 8, 2001, D.C. Law 13-302, § 4(d), 47 DCR 7249.)

Cross references. — Committing crime when armed, additional penalty, see §§ 22-4501 and 22-4502.

Good time credits, exceptions, see § 24-434.

Minimum sentence upon imposition of life imprisonment, see § 24-403.

Section references. — This section is referred to in §§ 11-502, 22-2104.01.

Prior Codifications. — 1981 Ed., § 22-2404.

1973 Ed., § 22-2404.

Effect of amendments. — D.C. Law 13-302 rewrote the section which had read:

“(a) The punishment for murder in the first degree shall be life imprisonment, except that the court may impose a punishment of life imprisonment without parole in accordance with § 22-2104.1. The prosecution shall notify the defendant in writing at least 30 days prior to trial that it intends to seek a sentence of life imprisonment without parole as provided in § 22-2104.1; provided that, no person who was less than 18 years of age at the time the murder was committed shall be sentenced to life imprisonment without parole.

“(b) Notwithstanding any other provision of law, a person convicted of murder in the first degree and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of 30 years from the date of the commencement of the sentence.

“(c) Whoever is guilty of murder in the second degree shall be sentenced to a maximum period of incarceration of not less than 20 years and

not more than life. Notwithstanding any other provision of law, where the maximum sentence imposed is life imprisonment, a minimum sentence shall be imposed which shall not exceed 20 years imprisonment.”

Emergency legislation. — For temporary (90-day) amendment of section, see § 4(d) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of section, see § 4(d) of the Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 4(d) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(d) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 3-113. — Law 3-113, the “District of Columbia Death Penalty Repeal Act of 1980,” was introduced in Council and assigned Bill No. 3-395, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 12, 1980 and December 9, 1980, respectively. Signed by the Mayor on December 17, 1980, it was assigned Act No. 3-307 and trans-

mitted to both Houses of Congress for its review.

Legislative history of Law 9-153. — For legislative history of D.C. Law 9-153, see Historical and Statutory Notes following § 22-2104.1.

Legislative history of Law 10-256. — Law 10-256, the “Public Safety and Law Enforcement Support Amendment Act of 1994,” was introduced in Council and assigned Bill No.

10-628, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-375 and transmitted to both Houses of Congress for its review. D.C. Law 10-256 became effective May 23, 1995.

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

CASE NOTES

ANALYSIS

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Admissibility of evidence.

Question of guilt of murder and question of punishment were properly submitted together, defendant being permitted to introduce character testimony, possibly relevant to choice of sentences, before submission. D.C. Code 1961, § 22-2404. *United States v. White*, 225 F. Supp. 514, 1963 U.S. Dist. LEXIS 6247 (D.D.C.1963), remanded by 349 F.2d 965, 121 U.S. App. D.C. 287, 1965 U.S. App. LEXIS 5055 (1965).

Arguments and conduct of counsel.

Defendant was not prejudiced by any deficient performance of counsel in failing to introduce additional mitigation evidence during penalty phase of capital murder trial, and thus, defendant was not deprived of effective assistance of counsel on that basis; counsel presented substantial mitigating evidence, including testimony from nine witnesses regarding

his terrible childhood and the abuse he suffered, and his religious conversion, some proposed additional mitigating evidence would have been cumulative, expert testimony or other mitigation evidence as to defendant's non-violent character or propensity would have triggered admission of evidence that defendant committed a prior, brutal murder, which counsel had been successful in excluding, but which trial court stated would be admissible for rebuttal purposes, and the aggravating evidence was overwhelming. *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 175 L. Ed. 2d 328, 2009 U.S. LEXIS 8117 (2009).

Defense counsel's allocution at sentencing for murder defendant was not deficient, nor did it prejudice defendant, and, as such, counsel did not render ineffective assistance; counsel opposed government's requested sentence of life imprisonment without parole and sought leniency in form of concurrent sentencing, he brought defendant's family to court, presented letter from defendant's mother, and urged trial court to disregard resentencing report writer's finding that defendant showed no remorse, and defendant received minimum possible sentence for first-degree murder. *Kitt v. United States*, 904 A.2d 348, 2006 D.C. App. LEXIS 440 (2006), writ of certiorari denied by 552 U.S. 824, 128 S. Ct. 180, 169 L. Ed. 2d 35, 2007 U.S. LEXIS 9135, 76 U.S.L.W. 3157 (2007).

Prosecutor did not mislead jury when he stated that there was little difference between maximum penalties for first and second-degree murder in view of fact that punishment for first-degree murder was life imprisonment and maximum sentence for second-degree murder was life imprisonment. D.C. Code 1981, § 22-2404(a, c). *Townsend v. United States*, 512 A.2d 994, 1986 D.C. App. LEXIS 380 (1986), writ of certiorari denied by 481 U.S. 1052, 107 S. Ct. 2188, 95 L. Ed. 2d 843, 1987 U.S. LEXIS 2150, 55 U.S.L.W. 3776 (1987).

Prosecutor understated benefit coparticipant in felony-murder received when he was permitted to plead guilty to second-degree murder in exchange for his testimony against defendant, in view of the fact that a person convicted of first-degree murder must serve 20 years before

being eligible for parole, while there is no such mandatory minimum time for person convicted of second-degree murder. D.C. Code 1981, § 22-2404(a, c). *Townsend v. United States*, 512 A.2d 994, 1986 D.C. App. LEXIS 380 (1986), writ of certiorari denied by 481 U.S. 1052, 107 S. Ct. 2188, 95 L. Ed. 2d 843, 1987 U.S. LEXIS 2150, 55 U.S.L.W. 3776 (1987).

Construction with federal law.

The District of Columbia is not within the "special maritime and territorial jurisdiction of the United States" within meaning of federal homicide statute, and murder prosecution and sentence predicated upon acts assertedly committed within District of Columbia is properly under district statute and not federal statute. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 5; Fed.Rules Crim.Proc. rules 25, 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Different offenses in same transaction.

Conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape so that consecutive punishments for killing in the course of rape and rape are not authorized under District of Columbia law. D.C. Code §§ 22-2401, 22-2404, 22-2801, 23-112. *Whalen v. U.S.*, 100 S.Ct. 1432, 1980 U.S. LEXIS 15 (U.S.Dist.Col. 1980).

For purposes of imposing cumulative sentences under District of Columbia law, Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of a rape. D.C. Code §§ 22-2401, 22-2404, 22-2801, 23-112. *Whalen v. U.S.*, 100 S.Ct. 1432, 1980 U.S. LEXIS 15 (U.S.Dist.Col. 1980).

Offenses of murder, housebreaking, and larceny each requires elements of proof which are not common to other two and each offense is historically an independent crime. D.C. Code § 22-2404. *United States v. Butler*, 462 F.2d 1195, 1972 U.S. App. LEXIS 10266 (C.A.D.C. 1972).

Voluntary manslaughter while armed was lesser included offense of second-degree murder while armed, so that defendants could be convicted of manslaughter offense after being charged only with murder offense, though at time of trial, maximum penalty for manslaughter offense exceeded maximum penalty for murder offense by \$1,000 fine; two offenses had identical elements except that murder offense also required malice, and court could avoid misapplication of statute by refraining from imposing fine. D.C. Code 1981, §§ 22-2403, 22-2404, 22-2405, 22-3202; Fed.R.Cr.Proc. Rule 31(c), 18 U.S.C.; Criminal Rule 31(c). *Lee v. United States*, 668 A.2d 822, 1995 D.C. App. LEXIS 252 (1995).

Double jeopardy.

Where jury was authorized at first trial to

find defendant guilty of either first degree murder or second degree murder, and jury found defendant guilty of second degree murder, but on appeal that conviction was reversed and the case was remanded for a new trial, second trial of defendant for first degree murder placed him in jeopardy twice for same offense in violation of the constitutional prohibition against double jeopardy and defendant had not waived that defense by making successful appeal of erroneous conviction of second degree murder. D.C. Code 1951, §§ 22-401, 22-2401, 22-2404; U.S. Const. Amend. 5. *Green v. U.S.*, 78 S.Ct. 221, 1957 U.S. LEXIS 1 (U.S.Dist.Col. 1957).

Where jury was authorized to find defendant guilty of either first degree murder or alternatively of second degree murder and jury found him guilty of second degree murder, defendant, by appealing, did not prolong his original jeopardy, and when his conviction for second degree murder was reversed and case remanded he could not be tried again for first degree murder without placing him in new jeopardy. D.C. Code 1951, §§ 22-401, 22-2401, 22-2404; U.S. Const. Amend. 5. *Green v. U.S.*, 78 S.Ct. 221, 1957 U.S. LEXIS 1 (U.S.Dist.Col. 1957).

Eligibility for parole.

Prison officials did not illegally alter defendant's sentence by aggregating three consecutive sentences totaling 18 to 54 years imposed for federal bank robbery convictions with 40-year total minimum sentences under his two consecutive life sentences imposed for murders under District of Columbia law since all criminal offenses in violation of United States Code and District of Columbia Code were federal offenses against the same sovereign and defendant would not even be eligible for consideration for parole on offenses until the year 2017. D.C. Code 1973, §§ 22-2404, 24-425; 18 U.S.C. § 4161. *Bryant v. Civiletti*, 663 F.2d 286, 1981 U.S. App. LEXIS 18335 (C.A.D.C. 1981).

Provision in statute that person sentenced for first-degree murder shall not be eligible for parole until 20 years after he begins serving his sentence applies only to person convicted of first-degree murder upon whom sentence of life imprisonment is imposed. D.C. Code § 22-2404. *United States v. Howard*, 449 F.2d 1086, 1971 U.S. App. LEXIS 9212 (C.A.D.C. 1971).

Good time credit.

District of Columbia Good Time Credit Act did not supersede provision of statute providing for 20-year minimum year period of incarceration prior to parole eligibility for persons convicted of first-degree murder. D.C. Code 1981, §§ 22-428(a), 22-2402, 22-2404(b). *Poole v. Kelly*, 954 F.2d 760, 1992 U.S. App. LEXIS 1059 (C.A.D.C. 1992).

Inmate serving mandatory minimum sentence of 20 years for conviction of first-degree

felony-murder was entitled to credits under District of Columbia Good Time Credits Act; statute under which defendant was sentenced was not specifically exempted from provisions for institutional good time credits under Act. D.C. Code 1981, §§ 22-2401, 22-2404, 24-428(a), 24-434. *Cunningham v. Williams*, 711 F. Supp. 644, 1989 U.S. Dist. LEXIS 5351 (1989), reversed by 954 F.2d 760, 293 U.S. App. D.C. 329, 1992 U.S. App. LEXIS 1059 (1992).

Homicide; degrees of offense.

Homicide; degrees of offense.

— First degree.

Evidence was sufficient to establish premeditation and deliberation, as required in order to convict defendant of two counts of first-degree murder while armed with aggravating circumstances, at trial of two defendants for murder and other crimes arising out of a retaliatory shooting; two victims died from gunshot wounds, witnesses to the shooting testified that such defendant emerged from behind a dumpster and began shooting without provocation, and police officer who heard the shooting testified that he noticed a black sports utility vehicle (SUV) with its engine running near the scene of the crime and saw two men run from the direction of the shooting and get into the SUV. *Mitchell v. United States*, 985 A.2d 1125, 2009 D.C. App. LEXIS 651 (2009), writ of certiorari denied by 131 S. Ct. 226, 178 L. Ed. 2d 150, 2010 U.S. LEXIS 6110, 79 U.S.L.W. 3201 (U.S. 2010).

— Second degree.

Second-degree murder statute does not define substantive offense of second-degree murder so as to exclude therefrom all crimes that also come within first-degree murder statutes. D.C. Code §§ 22-2403, 22-2404. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Indictment and information.

Statutory definition of crimes of first and second-degree murder do not impel requirement that they be charged in the alternative, as their substantive elements do not conflict. D.C. Code §§ 22-2403, 22-2404. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Instructions.

Under District of Columbia law, an accused in a criminal trial is not entitled to an instruction based on evidence of mental weakness short of legal insanity, which would reduce his crime from first to second-degree murder. D.C.

Code 1940, §§ 22-2401, 22-2403, 22-2404. *Fisher v. U.S.*, 66 S.Ct. 1318, 1946 U.S. LEXIS 2178 (U.S. Dist. Col. 1946).

Court's refusal in homicide prosecution to state that the time one must have for deliberation be "some appreciable period of time" rather than "some period of time" as originally proposed by judge was compounded by charge of court that the time to deliberate may be in the nature of hours, minutes or seconds. D.C. Code 1961, §§ 22-2401, 22-2404. *Austin v. United States*, 382 F.2d 129, 1967 U.S. App. LEXIS 5997 (C.A.D.C. 1967).

In prosecution for murder resulting in conviction of second-degree murder, the court's charge covering premeditation, malice, and self-defense was not erroneous. D.C. Code 1940, §§ 22-2404, 22-2403. *Thomas v. U.S.*, 158 F.2d 97, 1946 U.S. App. LEXIS 2341 (1946).

Juvenile and youthful offenders.

Juvenile's conviction of first-degree murder did not preclude sentencing under Youth Corrections Act even though penalty for first-degree murder was death or life imprisonment. 18 U.S.C. § 5005 et seq.; D.C. Code § 22-2404. *United States v. Howard*, 449 F.2d 1086, 1971 U.S. App. LEXIS 9212 (C.A.D.C. 1971).

Twenty-year-old defendant, who had been convicted of first-degree felony-murder, as well as attempted robbery while armed and carrying a dangerous weapon, in violation of District of Columbia law, was ineligible to receive an indeterminate adult sentence pursuant to statute governing fixing of eligibility for parole at time of sentencing, as recommended in report prepared in accordance with Federal Youth Corrections Act. D.C. Code §§ 22-2401, 22-2404, 22-3202, 22-3204; Fed. Rules Crim. Proc. rule 35, 18 U.S.C.; 18 U.S.C. §§ 4208(a)(2), 5010(e). *United States v. Tillman*, 374 F. Supp. 215, 1974 U.S. Dist. LEXIS 9524 (1974).

Trial judge had discretionary authority to impose a sentence under Federal Youth Corrections Act against an accused who had been convicted of first-degree felony-murder. D.C. Code §§ 22-2401, 22-2404; 18 U.S.C. §§ 5005 et seq., 5010(a, b). *United States v. Stokes*, 365 A.2d 615, 1976 D.C. App. LEXIS 398 (1976).

The trial court's consideration of deterrence, punishment, and danger to the community in declining to impose sentence under the Youth Corrections Act, under which average confinement was 19 months, against a 21-year-old defendant who had been convicted of exceptionally vicious murder, was not improper. D.C. Code SCR Criminal Rule 11; D.C. Code § 22-2404; 18 U.S.C. §§ 5005 et seq., 5010, 5010(e). *Cambrel v. United States*, 330 A.2d 746, 1975 D.C. App. LEXIS 300 (1975).

Legislative intent.

Under statutory proviso that in homicide cases tried prior to March 22, 1962, and before

court for sentence or resentence, judge, in sole discretion, may consider circumstances in mitigation and aggravation and make determination of whether case justifies life sentence, Congress intended and due process considerations required appropriate hearing as to all factors bearing upon choice of sentences, and failure to accord hearing required reversal. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 5; Fed.Rules Crim.Proc. rules 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Life sentence.

Defendant's two life sentences for murder in the first degree were not illegal on basis that defendant never received a minimum sentence as required by law since statute establishing that defendant would be eligible for parole after first-degree murder conviction after expiration of 20 years, notwithstanding any provision of law, was a special statute which controlled statute providing that, where maximum sentence imposed is life imprisonment, minimum sentence shall be imposed which shall not exceed 15 years. D.C. Code 1973, §§ 22-2404, 24-203. *Bryant v. Civiletti*, 663 F.2d 286, 1981 U.S. App. LEXIS 18335 (C.A.D.C. 1981).

Robbery, which was element of felony murder, could also be used as aggravating factor to raise defendant's sentence to life imprisonment without possibility of parole (LWOP); statutory provision pertaining to sentencing for murder provided sufficiently narrow class of murderers eligible for LWOP by restricting it to first-degree murder, and permitted trial judge to consider presence of aggravating factors, such as robbery, in imposing LWOP. D.C. Code 1981, §§ 22-2404(a), 22-2404.1. *Page v. United States*, 715 A.2d 890, 1998 D.C. App. LEXIS 140 (1998), writ of certiorari denied by 528 U.S. 855, 120 S. Ct. 139, 145 L. Ed. 2d 118, 1999 U.S. LEXIS 5578, 68 U.S.L.W. 3226 (1999).

Defendant's sentence to life imprisonment for first-degree premeditated murder satisfied mandate of statute that punishment of first-degree murder shall be life imprisonment, even though felony-murder conviction was vacated to avoid double jeopardy problem. D.C. Code 1981, § 22-2404. *Garris v. United States*, 491 A.2d 511, 1985 D.C. App. LEXIS 375 (1985).

Nature and extent of punishment, generally.

Sentences imposed by trial court for defendant's convictions of murder in the first degree were not erroneous by trial court's failure to explicitly set forth minimum term of incarceration since sentences for first-degree murder were outside District of Columbia Code requirement that, where maximum sentence imposed is life imprisonment, minimum sentence shall

be imposed which shall not exceed 15 years' imprisonment, but were controlled by special statute providing that, notwithstanding any other provision of law, person convicted of first-degree murder and upon whom life imprisonment sentence is imposed shall be eligible for parole after expiration of 20 years. D.C. Code 1973, §§ 22-2404, 24-203. *United States v. Bryant*, 663 F.2d 293, 1981 U.S. App. LEXIS 18333 (C.A.D.C. 1981).

Purpose and effect of the "except" clause in provision stating that whoever with malice aforethought, except as provided in sections defining first-degree murder, kills another is guilty of second-degree murder is to say that all homicides with malice are murder and punishable by maximum of life imprisonment set forth for murder in second-degree except those particularly heinous murders which are listed in first-degree section as punishable capitally. D.C. Code §§ 22-2403, 22-2404. *Fuller v. United States*, 407 F.2d 1199, 1967 U.S. App. LEXIS 4480 (C.A.D.C. 1967), writ of certiorari denied by 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125, 1969 U.S. LEXIS 2411 (1969).

Trial judge has no discretion when passing sentence on first-degree murder conviction. D.C. Code 1981, § 22-2404. *Garris v. United States*, 491 A.2d 511, 1985 D.C. App. LEXIS 375 (1985).

Where sentencing court considered alternative sentence under Youth Corrections Act, and found that 21-year-old defendant would not benefit from it, the fact that the court also considered other factors did not invalidate adult sentence of 20 years to life in prison imposed for murder. D.C. Code SCR Criminal Rule 11; D.C. Code § 22-2404; 18 U.S.C. §§ 5005 et seq., 5010, 5010(e). *Cambrel v. United States*, 330 A.2d 746, 1975 D.C. App. LEXIS 300 (1975).

Notice of intent to seek life sentence.

Government's notice of its intent to seek life without parole sentence, which was given to defendant in writing at least 30 days prior to trial, but which did not specify particular aggravating circumstances government intended to rely upon as basis for sentence, was not defective, as it gave defendant timely notice so that he could reasonably assess whether to plead guilty or proceed to trial; there was no statutory requirement that notice had to set forth specific aggravating factors that government intended to rely upon as basis for life without parole sentence. D.C. Code 1981, §§ 22-2404(a), 22-2404.1. *Page v. United States*, 715 A.2d 890, 1998 D.C. App. LEXIS 140 (1998), writ of certiorari denied by 528 U.S. 855, 120 S. Ct. 139, 145 L. Ed. 2d 118, 1999 U.S. LEXIS 5578, 68 U.S.L.W. 3226 (1999).

Defendant was properly put on notice that government would be seeking sentence of life

without possibility of parole in murder prosecution, where notice was filed with the court and transmitted to defendant's counsel by facsimile. D.C. Code 1981, § 22-2404(a). *Rider v. United States*, 687 A.2d 1348, 1996 D.C. App. LEXIS 286 (1996).

Powers and duties of successor judges.

Judge who deemed himself competent to act upon post trial motions to reduce sentence and vacate sentence, after judge who had pronounced sentence retired and undertook no new assignments, was not disqualified from passing upon motions predicated upon proviso permitting life sentences in murder cases before court for sentence or resentencing by fact that he was not judge who had originally presided. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 5; Fed. Rules Crim. Proc. rules 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Questions of law or fact.

Statute abolishing mandatory death penalty in District of Columbia leaves for jury's determination the question of whether sentence shall be death or life imprisonment or, if jury cannot agree on punishment, question is for the judge. D.C. Code 1961, §§ 22-2401, 22-2404. *Coleman v. United States*, 357 F.2d 563, 1965 U.S. App. LEXIS 4172 (C.A.D.C. 1965).

Review.

— Determination and disposition, review.

Where defendant who was convicted of first-degree murder and robbery was originally sentenced to "death by electrocution" on murder charge and five to 15 years' imprisonment on robbery charge, but Court of Appeals held that death sentence had been erroneously imposed and directed district court to resentence defendant to life imprisonment, trial court's action in altering sentence imposed for robbery to make it run consecutively to life sentence imposed for murder placed defendant twice in jeopardy for same offense, since original sentence for robbery was legal in all respects and its service had begun before it was changed from concurrent to consecutive, and change in robbery sentence had the effect of impermissibly extending time defendant would be required to be imprisoned due to robbery conviction. 18 U.S.C. § 3568; D.C. Code § 22-2404. *United States v. Frady*, 607 F.2d 383, 1979 U.S. App. LEXIS 14152 (C.A.D.C. 1979).

Inasmuch as recommendation of youth center that defendant convicted of first-degree felony murder be denied Youth Corrections Act sentencing and be sentenced as an adult for the shortest term legally possible was based on misinformation in that the mandatory minimum sentence was 20 years' imprisonment

with no possibility of a parole, and it appeared sentencing judge placed full reliance on the recommendation, resentencing was required. 18 U.S.C. § 5010(e); D.C. Code § 22-2404. *United States v. Dancy*, 510 F.2d 779, 1975 U.S. App. LEXIS 16781 (C.A.D.C. 1975).

Where counsel and court at original sentencing of defendant were under mistaken view that defendant could not be sentenced under the Youth Corrections Act, and on remand for consideration of possibility of sentencing under the Youth Corrections Act defendant was not granted right of allocution, case would be remanded to trial court to afford defendant his right of allocution. Fed. Rules Crim. Proc. rule 32, 18 U.S.C.; D.C. Code § 22-2404. *United States v. Howard*, 470 F.2d 374, 1972 U.S. App. LEXIS 7472 (C.A.D.C. 1972).

Government's introduction at third murder trial of crucial testimony given by defendant at his first trial at which he did not have the constitutionally guaranteed right to assistance of counsel, impinged on defendant's constitutional rights requiring a reversal of his conviction for felony murder. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 6. *Harrison v. United States*, 387 F.2d 203, 1967 U.S. App. LEXIS 6332 (C.A.D.C. 1967), reversed by 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047, 1968 U.S. LEXIS 1349 (1968).

Court of Appeals, sitting en banc, set aside death sentences, with directions that each defendant be resentenced to life imprisonment on verdicts of guilty of first-degree murder; four judges being of view that there was error in instruction as to penalty and that poll of jurors did not show unanimity as to punishment, and three judges being of view that guilt and punishment should have been tried in separate stages. D.C. Code 1961, §§ 22-2401, 22-2404; 18 U.S.C. § 2106. *Frady v. United States*, 348 F.2d 84, 1965 U.S. App. LEXIS 5665 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 909, 86 S. Ct. 247, 15 L. Ed. 2d 160, 1965 U.S. LEXIS 376 (1965).

Investigation conducted by court through three court-appointed psychiatrists who had merely talked to defendant through cell bars for a brief time when defendant refused to cooperate with them formed no adequate basis for establishing truth or falsity of allegation of post-conviction unsoundness of mind contained in unrefuted affidavit of defendant's sister and required remand for further proceedings. D.C. Code 1961, § 22-2404. *Jones v. United States*, 327 F.2d 867, 1963 U.S. App. LEXIS 3445 (C.A.D.C. 1963).

Statute mandating that punishment of first-degree murder shall be life imprisonment does not restrain trial court from vacating first-degree murder conviction to correct double jeopardy or other constitutional violation. D.C.

Code 1981, § 22-2404. *Garris v. United States*, 491 A.2d 511, 1985 D.C. App. LEXIS 375 (1985).

— **Harmless or reversible error, review.**

In murder prosecution wherein sole defense was insanity, and defendant's gibberish testimony was such as to raise issues as to whether defendant feigned such testimony and whether at time of the third trial his mental condition represented his condition at time of act charged, cross-examination disclosing defendant's failure to take stand at two previous trials which resulted in convictions was erroneous and was not harmless but was sufficiently prejudicial to warrant the granting of a mistrial even though defense made no request for cautionary instructions. U.S. Const. Amend. 5; 18 U.S.C. § 3481; D.C. Code 1951, §§ 22-2401, 22-2404, 24-301. *Stewart v. U.S.*, 81 S.Ct. 941, 1961 U.S. LEXIS 1266 (U.S. Dist. Col. 1961).

Even if trial judge's statement in charge that if jury found defendant guilty of murder and left sentencing to him, he would impose death penalty had affected jury in its deliberations as to punishment and caused its inability to agree, where, after sentencing the Supreme Court entered decision outlawing death penalty, the statement was harmless. U.S. Const. Amends. 8, 14; D.C. Code § 22-2404. *United States v. Lee*, 489 F.2d 1242, 1973 U.S. App. LEXIS 6990 (C.A.D.C. 1973).

— **In general.**

Challenge made for first time to Court of Appeals that judge who pronounced original sentence in homicide case was only judge competent to hear and act upon motions to reduce sentence or to vacate sentence came too late. D.C. Code 1961, §§ 22-2401, 22-2404; U.S. Const. Amend. 5; Fed. Rules Crim. Proc. rules 32(a, c), 35, 52(b), 18 U.S.C. *Coleman v. United States*, 334 F.2d 558, 1964 U.S. App. LEXIS 5495 (C.A.D.C. 1964).

Separate trial on issue of insanity.

Trial court did not abuse its discretion in murder prosecution by denying motion for bifurcated trial with two juries on issues of insanity and defense to the merits. D.C. Code § 22-

2404; Fed. Rules Crim. Proc. rule 40(b), 18 U.S.C. *Parman v. United States*, 399 F.2d 559, 1968 U.S. App. LEXIS 6880 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126, 1968 U.S. LEXIS 797 (1968).

Validity of sentence.

Where trial court considered multiple pre-sentence documents and issued a lengthy opinion in which it carefully articulated its reasons for concluding that Youth Corrections Act's treatment would be inappropriate for 21-year-old defendant who had committed exceptionally vicious murder, defendant was not denied due process on the ground that the court's statement of reasons for denying sentencing under the Act was insufficient. D.C. Code SCR, Criminal Rule 11; D.C. Code § 22-2404; 18 U.S.C. §§ 5005 et seq., 5010, 5010(e). *Cambrel v. United States*, 330 A.2d 746, 1975 D.C. App. LEXIS 300 (1975).

Weight and sufficiency of evidence.

Proof in homicide prosecution was legally sufficient to support a verdict predicated on thesis that shotgun was discharged killing victim while a robbery was then being attempted. D.C. Code 1961, §§ 22-2401, 22-2404. *Harrison v. United States*, 387 F.2d 203, 1967 U.S. App. LEXIS 6332 (C.A.D.C. 1967), reversed by 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047, 1968 U.S. LEXIS 1349 (1968).

Evidence was sufficient to sustain conviction of one defendant of felony murder. D.C. Code 1961, §§ 22-2401, 22-2404. *Harrison v. United States*, 387 F.2d 203, 1967 U.S. App. LEXIS 6332 (C.A.D.C. 1967), reversed by 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047, 1968 U.S. LEXIS 1349 (1968).

In prosecution for murder in first degree committed in perpetration of offense of house-breaking while armed with a deadly weapon, without considering defendant's written confession, evidence was sufficient to justify submission of case to jury and to support verdict of guilty. D.C. Code 1940, §§ 22-2401, 22-2404. *Tyler v. U.S.*, 193 F.2d 24, 1951 U.S. App. LEXIS 2855 (C.A.D.C. 1951).

§ 22-2104.01. Sentencing procedure for murder in the first degree.

(a) If a defendant is convicted of murder in the first degree, and if the prosecution has given the notice required under § 22-2104(a), a separate sentencing procedure shall be conducted as soon as practicable after the trial has been completed to determine whether to impose a sentence of more than 60 years up to, and including, life imprisonment without possibility of release.

(b) In determining the sentence, a finding shall be made whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The murder was committed in the course of kidnapping or abduction, or an attempt to kidnap or abduct;

(2) The murder was committed for hire;

(3) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(4) The murder was especially heinous, atrocious, or cruel;

(5) The murder was a drive-by or random shooting;

(6) There was more than 1 offense of murder in the first degree arising out of 1 incident;

(7) The murder was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A));

(8) The murder was committed while committing or attempting to commit a robbery, arson, rape, or sexual offense;

(9) The murder was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding, or the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;

(10) The murder victim was especially vulnerable due to age or a mental or physical infirmity;

(11) The murder is committed after substantial planning; or

(12) At the time of the commission of the murder, the defendant had previously been convicted and sentenced, whether in a court of the District of Columbia, of the United States, or of any state, for (A) murder, (B) manslaughter, (C) any attempt, solicitation, or conspiracy to commit murder, (D) assault with intent to kill, (E) assault with intent to murder, or (F) at least twice, for any offense or offenses, described in § 22-4501(f) [now § 22-4501(4)], whether committed in the District of Columbia or any other state, or the United States. A person shall be considered as having been convicted and sentenced twice for an offense or offenses when the initial sentencing for the conviction in the first offense preceded the commission of the second offense and the initial sentencing for the second offense preceded the commission of the instant murder.

(c) The finding shall state in writing whether, beyond a reasonable doubt, 1 or more of the aggravating circumstances exist. If 1 or more aggravating circumstances exist, a sentence of more than 60 years up to, and including, life imprisonment without release may be imposed.

(d) If the trial court is reversed on appeal because of error only in the separate sentencing procedure, any new proceeding before the trial court shall pertain only to the issue of sentencing.

(Mar. 3, 1901, ch. 854, § 801a, as added Sept. 26, 1992, D.C. Law 9-153, § 2(d), 39 DCR 3868; May 23, 1995, D.C. Law 10-256, § 2(b), 42 DCR 20; June 3, 1997, D.C. Law 11-275, § 5, 44 DCR 1408; June 8, 2001, D.C. Law 13-302, § 4(e), 47 DCR 7249; June 25, 2008, D.C. Law 17-177, § 11, 55 DCR 3696.)

Section references. — This section is referred to in § 22-2104.

Prior Codifications. — 1981 Ed., § 22-2404.1.

Effect of amendments. — D.C. Law 13-302 substituted “release” for “parole” throughout the section; in subsec. (a), substituted “more than 60 years up to, and including,” for “life

imprisonment or”; in subsec. (b), substituted “a finding shall be made” for “the court shall consider”; and, in subsec. (c), substituted “finding shall” for “court shall”, deleted “the court finds that” following “If”, and inserted “more than 60 years up to, and including”.

D.C. Law 17-177, in subsec. (b)(7), substituted “sexual orientation, gender identity or expression (as defined in § 2-1401.02(12A))” for “or sexual orientation”.

Emergency legislation. — For temporary (90-day) amendment of section, see § 4(e) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of section, see § 4(e) of the Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 4(e) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(e) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 9-153. — Law 9-153, the “First Degree Murder Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-118, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 7,

1992, and May 6, 1992, respectively. Signed by the Mayor on May 28, 1992, it was assigned Act No. 9-213 and transmitted to both Houses of Congress for its review. D.C. Law 9-153 became effective on September 26, 1992.

Legislative history of Law 10-256. — For legislative history of D.C. Law 10-256, see Historical and Statutory Notes following § 22-2104.

Legislative history of Law 11-275. — Law 11-275, the “Second Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-909, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-520 and transmitted to both Houses of Congress for its review. D.C. Law 11-275 became effective on June 3, 1997.

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

Legislative history of Law 17-177. — Law 17-177, the “Prohibition of Discrimination on the Basis of Gender Identity and Expression Amendment Act of 2008”, was introduced in Council and assigned Bill No. 17-330, which was referred to the Committee on Workforce Development and Government Operations. The Bill was adopted on first and second readings on February 5, 2008, and March 4, 2008, respectively. Signed by the Mayor on March 19, 2008, it was assigned Act No. 17-329 and transmitted to both Houses of Congress for its review. D.C. Law 17-177 became effective on June 25, 2008.

CASE NOTES

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Aggravating factors.

Aggravating factors relied upon by sentencing court in imposing sentences of life imprisonment without parole (LWOP) upon defendant convicted of two counts of premeditated murder were necessarily found beyond reasonable doubt by jury in convicting defendant of felony murder in course of robbery and of felony murder in course of kidnapping, as coextensive with such convictions. *Robinson v. United States*,

946 A.2d 334, 2008 D.C. App. LEXIS 127 (2008).

In order to sentence a defendant to life without parole and not violate Apprendi, any “court finding” or “consideration” that a statutory aggravating factor exists beyond a reasonable doubt must be predicated upon a jury finding beyond a reasonable doubt of, or coextensive with, that same factor; the trial court is not foreclosed from exercising its discretion to impose life without parole, but, rather, in order to trigger that discretion, the trial court’s “consideration” of the existence of an aggravating factor, or “finding” thereof, must be based on a jury finding beyond a reasonable doubt on that specific factor. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

Robbery, which was element of felony murder, could also be used as aggravating factor to raise defendant’s sentence to life imprisonment without possibility of parole (LWOP); statutory provision pertaining to sentencing for murder provided sufficiently narrow class of murderers

eligible for LWOP by restricting it to first-degree murder, and permitted trial judge to consider presence of aggravating factors, such as robbery, in imposing LWOP. D.C. Code 1981, §§ 22-2404(a), 22-2404.1. Page v. United States, 715 A.2d 890, 1998 D.C. App. LEXIS 140 (1998), writ of certiorari denied by 528 U.S. 855, 120 S. Ct. 139, 145 L. Ed. 2d 118, 1999 U.S. LEXIS 5578, 68 U.S.L.W. 3226 (1999).

Aggravating factor for sentencing purposes, that murder was especially heinous, atrocious, or cruel, existed in prosecution for first-degree murder while armed; medical testimony established that victim suffered numerous bruises, abrasions, scrapes, and stab wounds to her back, victim was attempting to avoid attack, victim's throat was cut deeply while she was alive, and victim was strangled so as to result in death. D.C. Code 1981, §§ 22-2401, 22-2404.1(b)(4), (c), 22-3202. Henderson v. United States, 678 A.2d 20, 1996 D.C. App. LEXIS 107 (1996).

Aggravating factor for sentencing purposes, that 78-year-old victim was especially vulnerable due to her age, existed in prosecution for first-degree murder while armed, despite fact that victim was in excellent physical condition for woman of 78 years of age; at time of incident, defendant was 37-year-old man in good health who could easily overcome will of 78-year-old woman, and evidence suggested that defendant easily overcame victim's will. D.C. Code 1981, §§ 22-2401, 22-2404.1(b)(10), (c), 22-3202. Henderson v. United States, 678 A.2d 20, 1996 D.C. App. LEXIS 107 (1996).

Defendant was permissibly sentenced to life imprisonment without possibility of parole for first-degree murder while armed; aggravating circumstances, that murder was especially heinous, atrocious, or cruel and that 78-year-old victim was especially vulnerable due to her age, existed, crime involved violation of trust and extreme disregard for human life, and motive for killing was so defendant could avoid returning to jail because victim had seen defendant's face. D.C. Code 1981, §§ 22-2401, 22-2404.1(b)(4), (10), (c), 22-3202. Henderson v. United States, 678 A.2d 20, 1996 D.C. App. LEXIS 107 (1996).

Construction and application.

Application of statute governing sentencing for life without parole is not limited to instances in which victim is tortured or suffers extreme physical pain. D.C. Code 1981, § 22-2404.1(b)(4). Rider v. United States, 687 A.2d 1348, 1996 D.C. App. LEXIS 286 (1996).

Effectiveness of counsel.

Defendant was not prejudiced by any deficient performance of counsel in failing to introduce additional mitigation evidence during penalty phase of capital murder trial, and thus,

defendant was not deprived of effective assistance of counsel on that basis; counsel presented substantial mitigating evidence, including testimony from nine witnesses regarding his terrible childhood and the abuse he suffered, and his religious conversion, some proposed additional mitigating evidence would have been cumulative, expert testimony or other mitigation evidence as to defendant's non-violent character or propensity would have triggered admission of evidence that defendant committed a prior, brutal murder, which counsel had been successful in excluding, but which trial court stated would be admissible for rebuttal purposes, and the aggravating evidence was overwhelming. Wong v. Belmontes, 558 U.S. 15, 130 S. Ct. 383, 175 L. Ed. 2d 328, 2009 U.S. LEXIS 8117 (2009).

Felony murder.

Finding that murder occurred in course of kidnapping was supported by record, including jury verdict, and trial court therefore had authority to sentence defendant to life without parole. D.C. Code 1981, § 22-2404.1(b)(1). Parker v. United States, 692 A.2d 913, 1997 D.C. App. LEXIS 61 (1997).

Heinous, atrocious or cruel.

Trial court could find beyond reasonable doubt that defendant's crime was "especially heinous, atrocious, or cruel" for purposes of statute which authorizes sentences of life without parole, even though victim was not tortured or subject to extreme physical pain before he died, where defendant crushed victim's skull, and slashed his ankles and scrotum. D.C. Code 1981, § 22-2404.1. Rider v. United States, 687 A.2d 1348, 1996 D.C. App. LEXIS 286 (1996).

Notice of intent.

Government's notice of its intent to seek life without parole sentence, which was given to defendant in writing at least 30 days prior to trial, but which did not specify particular aggravating circumstances government intended to rely upon as basis for sentence, was not defective, as it gave defendant timely notice so that he could reasonably assess whether to plead guilty or proceed to trial; there was no statutory requirement that notice had to set forth specific aggravating factors that government intended to rely upon as basis for life without parole sentence. D.C. Code 1981, §§ 22-2404(a), 22-2404.1. Page v. United States, 715 A.2d 890, 1998 D.C. App. LEXIS 140 (1998), writ of certiorari denied by 528 U.S. 855, 120 S. Ct. 139, 145 L. Ed. 2d 118, 1999 U.S. LEXIS 5578, 68 U.S.L.W. 3226 (1999).

Untimely filing of the "Notice of Intent to Seek Sentence of Life Imprisonment Without Parole" did not constitute such actual prejudice as to warrant dismissal of the case for denying the defendant his constitutional right to a

speedy trial. *United States v. Montgomery*, 123 WLR 1665 (Super. Ct. 1995).

Remand.

Predicate offenses underlying felony murder convictions vacated on appeal as having merged with convictions for premeditated murder were properly relied upon on remand to enhance sentences for premeditated murder; vacation of convictions did not eliminate legal force of underlying circumstances found by jury in connection with such convictions. *Robinson v. United States*, 946 A.2d 334, 2008 D.C. App. LEXIS 127 (2008).

Review.

Remand for resentencing was required, where defendant was sentenced to life without parole for first-degree murder conviction based on finding of two aggravating factors that were not supported by corresponding jury findings. *Dockery v. United States*, 853 A.2d 687, 2004 D.C. App. LEXIS 274 (2004).

Trial court committed plain error by sentencing felony murder defendant, in violation of Apprendi, to life without parole based on its determination that three aggravating factors existed; although jury's verdict supported the existence of the aggravating factor that the crime was committed during a robbery, the other aggravating factors, i.e., that the crime was heinous or cruel and that the victim was vulnerable due to age or infirmity, were not supported by corresponding jury findings. *Keels v. United States*, 785 A.2d 672, 2001 D.C. App. LEXIS 243 (2001).

Sentencing procedure, generally.

Enhanced sentences of life without parole for felony murder based on aggravating factors not found by jury nor coextensive with verdicts violated defendant's right to jury trial under Apprendi. *Robinson v. United States*, 890 A.2d 674, 2006 D.C. App. LEXIS 14 (2006).

Convictions of felony murder and premeditated murder of the same victim merged for sentencing purposes. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

Statute relating to sentencing for first-degree murder did not require trial court to conduct separate sentencing procedure devoted solely to issue of imposing sentence of life imprisonment without parole apart from sentencing procedure commonly conducted separate from trial. D.C. Code 1981, § 22-2404.1(a). *Parker v. United States*, 692 A.2d 913, 1997 D.C. App. LEXIS 61 (1997).

Trial court findings.

Trial court made sufficient findings setting out specific factors upon which it relied in

determining that defendant's conduct was "especially heinous, atrocious, or cruel," and thus, reviewing court did not have to address claim that those statutory terms were unconstitutionally vague; without provocation, defendant followed victim, who had broken off their relationship, into garage, dragged her to his car, shoved her inside and shot her multiple times, and victim was cognizant of her injuries, asked if she was going to die, and was in excruciating pain. D.C. Code 1981, § 22-2404.1. *Parker v. United States*, 692 A.2d 913, 1997 D.C. App. LEXIS 61 (1997).

Trial court's incorporating its oral findings into written order satisfied requirement that court state in writing whether, beyond reasonable doubt, one or more aggravating circumstances existed in murder prosecution. D.C. Code 1981, § 22-2404.1(c). *Parker v. United States*, 692 A.2d 913, 1997 D.C. App. LEXIS 61 (1997).

Trial court's written order, setting forth findings of fact on which it based determination that murder was "especially heinous, atrocious, or cruel," satisfied statutory requirement that court state in writing whether one or more aggravating circumstances exist beyond reasonable doubt, independent of court's incorporation of oral findings into written order. D.C. Code 1981, § 22-2404.1(c). *Parker v. United States*, 692 A.2d 913, 1997 D.C. App. LEXIS 61 (1997).

Since felony murder conviction merged into premeditated murder conviction, and would be vacated on remand, no written finding, in support of life without parole sentence for felony murder charge, was required. D.C. Code 1981, § 22-2404.1. *Devonshire v. United States*, 691 A.2d 165, 1997 D.C. App. LEXIS 48 (1997), writ of certiorari denied by 520 U.S. 1247, 117 S. Ct. 1859, 137 L. Ed. 2d 1060, 1997 U.S. LEXIS 3370, 65 U.S.L.W. 3782 (1997).

Court's written findings of fact in support of imprisoning murder defendant for life without parole was sufficient, even though it merely stated that court found "beyond a reasonable doubt that the murder committed by the defendant, _____, was especially heinous, atrocious, and cruel," where defendant raised objection for first time on appeal. D.C. Code 1981, § 22-2404.1. *Rider v. United States*, 687 A.2d 1348, 1996 D.C. App. LEXIS 286 (1996).

Statute governing sentence of life without parole does not require trial court to detail for record reasons for its finding that aggravating circumstance existed, at least absent a request. D.C. Code 1981, § 22-2404.1(c). *Rider v. United States*, 687 A.2d 1348, 1996 D.C. App. LEXIS 286 (1996).

Jury verdict that defendant was guilty of kidnapping while armed supported trial court's finding that murder was committed during the course of a kidnapping, as an aggravating fac-

tor in sentencing for first-degree murder while armed. *United States v. Parker*, 136 WLR 141 (Super. Ct. 2008).

§ 22-2105. Penalty for manslaughter.

Whoever is guilty of manslaughter shall be sentenced to a period of imprisonment not exceeding 30 years.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802; May 23, 1995, D.C. Law 10-256, § 2(c), 42 DCR 20.)

Cross references. — Committing crime when armed, additional penalty, see §§ 22-4501 and 22-4502.

Negligent homicide, see §§ 50-2203.01 and 50-2203.02.

Operation of a motor vehicle, driving under influence *prima facie* evidence, see § 50-2205.02.

Section references. — This section is referred to in §§ 11-502.

Prior Codifications. — 1981 Ed., § 22-2405.

1973 Ed., § 22-2405.

Legislative history of Law 10-256. — For legislative history of D.C. Law 10-256, see Historical and Statutory Notes following § 22-2104.

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Defendant was not prejudiced in voluntary manslaughter prosecution when defense counsel failed to pursue causation as defense; although defense counsel cross-examined expert witnesses concerning whether victim died from stab wounds or from heart failure, adequate evidence was presented to show that victim died as result of stab wounds and secondary complications due to those wounds. *U.S. Const. Amend. 6. Doe v. United States*, 583 A.2d 670, 1990 D.C. App. LEXIS 310 (1990).

Admissibility of evidence.

Where defendant, before being charged or arrested for any crime and without interrogation or coercion of any sort, stated, in reply to police officer's mere request that he identify himself, that he had killed person at given address, statement was voluntarily given and admissible in evidence despite fact that defendant was admittedly inebriated at time statement was made. *D.C. Code §§ 22-2403, 22-2405; 18 U.S.C. § 3501; U.S. Const. Amends. 5, 14. United States v. Bennett*, 495 F.2d 943, 1974 U.S. App. LEXIS 10650 (C.A.D.C. 1974).

In a prosecution for manslaughter, by recklessly driving an automobile so as to throw deceased therefrom, it was not error to exclude testimony that similar accidents had occurred at the same place, since those accidents may have been the result of recklessness; but evidence as to the condition of the street and that there was a "right mean turn" there was properly admitted. *Sinclair v. U.S.*, 265 F. 991, 1920 U.S. App. LEXIS 1490 (1920).

Admission of evidence of Government witness' plea agreement on direct examination was not abuse of discretion, even if defendant had stipulated that he would not use agreement for impeachment purposes, in trial for murder; elicitation during direct examination of plea agreement containing promise to testify truthfully did not impermissibly bolster witness' credibility, plea agreement was relevant to witness' credibility, evidence served to extinguish jury speculation about why witness connected with crime was not charged, and jury was instructed to receive witness' testimony with caution and to scrutinize it with care. *Woods v. United States*, 987 A.2d 451, 2010 D.C. App. LEXIS 11 (2010).

Probative value of evidence, consisting of defendant's handwritten rap lyrics, was not outweighed by its prejudicial effect in prosecution for voluntary manslaughter while armed and related weapons offenses; lyrics were probative of defendant's identity as shooter, and lyrics were not only evidence that defendant was a drug dealer, since witness testified that defendant had sold marijuana to her and her

friends on night of shooting, and one of those friends testified that defendant had been his supplier of marijuana for over a year. *Dorsey v. United States*, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

The three basic requirements for admission of a declarant's prior statement to be admissible under spontaneous utterance exception to hearsay rule are (1) a serious occurrence which causes a state of nervous excitement or physical shock in the declarant, (2) a declaration made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it, and (3) the presence of circumstances which, in their totality, suggest spontaneity and sincerity of the remark. *Brisbon v. United States*, 894 A.2d 1121, 2006 D.C. App. LEXIS 144 (2006).

Testimony from defendant that shortly after shooting occurred, he told defense witness that someone tried to rob him, was not admissible in murder trial under spontaneous utterance exception to hearsay rule; no evidence corroborated defendant's testimony. *Brisbon v. United States*, 894 A.2d 1121, 2006 D.C. App. LEXIS 144 (2006).

Testimony from defense witness that shortly after shooting occurred, defendant told witness that someone tried to rob him, was admissible in murder trial under spontaneous utterance exception to hearsay rule; witness testified that when defendant made the statement, he was shaking and looked hysterical, scared, and terrified, and while witness was a longtime friend of defendant's, question of whether witness was reliable was for the jury. *Brisbon v. United States*, 894 A.2d 1121, 2006 D.C. App. LEXIS 144 (2006).

Defense counsel failed to call firearms expert's attention to pages of firearms treatise that counsel sought to read before jury, as required by rule of evidence permitting use of learned treatises as substantive evidence to extent called to attention of expert upon cross-examination or relied upon by him in direct examination, and, as such, trial court properly denied counsel's request to read to jury from treatise, in prosecution for involuntary manslaughter while armed and other offenses; counsel did not call expert's attention to pages of treatise from which he sought to read, although some of defense counsel's questioning was based on information that appeared in treatise, it was not clear that expert's responses were based on specific pages of treatise defense counsel wanted to read, and defense counsel did not elicit expert's interpretation of that portion of the treatise prior to seeking to read it to jury. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS 259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct.

1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Trial court did not abuse its discretion in murder trial by refusing to admit evidence that victim had a folded pocketknife on his person at time of shooting to show that victim was first aggressor; no evidence existed that suggested victim possessed pocketknife to use it as a possible weapon, as victim was not seen to brandish the pocketknife or reach for it. *Williams v. United States*, 877 A.2d 125, 2005 D.C. App. LEXIS 322 (2005).

Finding that defendant's videotaped confession was voluntary, in prosecution for voluntary manslaughter, was supported by evidence that police officers informed defendant of his Miranda rights and that defendant voluntarily waived them, defendant expressed that he was not threatened and that he was not forced to give his statement, defendant articulated he did not want a lawyer present, and defendant appeared comfortable on the videotape. D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

The admission of statements by non-testifying codefendants did not violate defendant's Sixth Amendment confrontation rights, in prosecution for voluntary manslaughter; there was no reference to defendant's existence or participation in the offense because the statements did not introduce the names or descriptions of individual participants, and the statement's use of the plural neutral pronoun, "we," when referring to the group that attacked the victim, in no way specifically linked defendant to the crime because there was no dispute that the incident was a group assault. U.S. Const.Amend. 6; D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

Evidence of homicide and assault victims' debt to defendant from prior drug sale was admissible, to explain reason for defendant's attempted dummy sale, to victims, of soap for cocaine intended to make up outstanding debt from prior sale. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Telling victim that defendant was coming to kill him was admissible hearsay in murder prosecution which resulted in manslaughter conviction. *Allen v. United States*, 603 A.2d 1219, 1992 D.C. App. LEXIS 58 (1992), writ of certiorari denied by 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916, 1992 U.S. LEXIS 4713, 60 U.S.L.W. 3879 (1992).

Defendant's failure to report victim's death or to preserve scene for investigators, flight, and assumed identity were relevant to informed assessment of state of mind in self-defense claim in manslaughter prosecution. *Al-*

len v. United States, 603 A.2d 1219, 1992 D.C. App. LEXIS 58 (1992), writ of certiorari denied by 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916, 1992 U.S. LEXIS 4713, 60 U.S.L.W. 3879 (1992).

Manslaughter defendant was not denied fair trial by prosecutor's comment that victim's children would grow up without their father. D.C. Code 1981, §§ 22-2405, 22-3202; U.S.C. Const.Amend. 6. *Dixon v. United States*, 565 A.2d 72, 1989 D.C. App. LEXIS 206 (1989).

Unless a defendant expressly puts her own good character in issue, her introduction of evidence of deceased victim's violent character to support her claim of self-defense does not permit prosecution to offer similar evidence about the defendant. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

Whether a defendant or some other defense witness in homicide prosecution testifies about deceased victim's violent character or its relevance to "reasonable fear" and/or "aggressor" aspects of self-defense claim, general rule of policy against admission of evidence about defendant's own character shall prevail, unless defendant first places her own good character in issue. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

At least when a defendant is charged with homicide, she has right to present evidence of victim's violent character to support claim of self-defense and evidence of violent character may be testimony of specific acts, including acts of violence unrelated to crime at issue, or it may be evidence of general reputation for violence. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

In prosecution wherein defendants were convicted of involuntary manslaughter of their infant son, there was no abuse of discretion in admitting photographs of body of infant, Government having laid foundation for their introduction. D.C. Code § 22-2405. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

In homicide prosecution, trial court properly admitted into evidence extrajudicial statements which tended to show state of mind of the defendant and the victim, the defendant's wife. D.C. Code §§ 22-2403, 22-2405, 22-3202. *Gezmu v. United States*, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

Trial judge, at prosecution of defendant for second-degree murder, properly denied admission of certified copy of decedent's conviction for carrying pistol without license, as bare fact of proof of conviction for carrying pistol without license did not in and of itself prove a specific violent act which could be used to support defendant's claim of self-defense. *Carmichael v. United States*, 363 A.2d 302, 1976 D.C. App. LEXIS 356 (1976).

Since specific provision upon which motorist, charged in connection with death of two persons in automobile accident, relied, in his argument that evidentiary exclusion, contained in Implied Consent Act and providing for chemical testing to determine blood alcohol content of two categories of motor vehicle operators, i.e., those operating motor vehicles, who are arrested and believed to be under influence of alcohol, and those who are involved in accidents resulting in death or personal injury, applies to both categories of motorists, does not unambiguously differentiate between two categories of motorists governed by statute, its import would be judged according to goals which Congress intended overall Act to effectuate. D.C. Code §§ 40-1001 et seq., 40-1002(a, b), 40-1005(a, b). *Murray v. United States*, 358 A.2d 314, 1976 D.C. App. LEXIS 282 (1976).

Arguments and conduct of counsel.

Prosecutor's comments during closing argument, in which he referred to defendant's testimony as a "house of cards" that had come tumbling down and otherwise commented on defendant's veracity, were fair comments on the evidence, and, as such, were not improper, in prosecution for involuntary manslaughter while armed and other offenses; defendant admitted in testimony that he did not tell the truth initially about his involvement in shooting, and there were many bases in evidence to challenge defendant's credibility. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS 259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct. 1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Prosecutor's comments during closing argument "that is all not the truth," and that everything defendant had said about certain individuals being present at shooting was not the truth were based on logical inferences from the evidence, and, as such, comments were not improper, in prosecution for involuntary manslaughter while armed and other offenses. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS 259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct. 1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Prosecutor's use of word "guarantee" in his comment during rebuttal argument that he "guaranteed" that, contrary to defendant's assertion, defendant had not touched rearview mirror in vehicle, was not improper expression of opinion, in prosecution for involuntary manslaughter while armed and other offenses; in context, word appeared to have been used for emphasis in making arguments based on evidence, and, as such, it remained within acceptable range of argument. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS

259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct. 1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Prosecutor's comments during rebuttal argument that, contrary to defendant's version of events, vehicle's rearview mirror had never been touched while defendant drove his wounded friend to hospital following shooting were not improper, in prosecution for involuntary manslaughter while armed and other offenses, as evidence, including that mirror was in its customary position when photographed at hospital by crime scene officers, was sufficient to permit reasonable inference that no opportunity had been shown when defendant could have moved mirror back to its customary position, and, thus, it had not been turned toward defendant as he described. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS 259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct. 1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Defendant was not entitled to argue during closing argument that one of two brothers committed the murder, in prosecution for voluntary manslaughter; mere fact that brothers were present at time of shooting failed to establish reasonable possibility that one of them was the shooter, fact that there was an alleged shootout between one or both brothers and victim several months prior to murder was too speculative to support argument, and defendant failed to proffer any facts indicating that witnesses had a motive to lie to protect brothers. *Hager v. United States*, 791 A.2d 911, 2002 D.C. App. LEXIS 40 (2002), writ of certiorari denied by 543 U.S. 846, 125 S. Ct. 290, 160 L. Ed. 2d 74, 2004 U.S. LEXIS 6032, 73 U.S.L.W. 3208 (2004).

Prosecutor's comments in closing argument of prosecution for assault with dangerous weapon and voluntary manslaughter while armed, which referred to assault on witness after she was disclosed to defendant's family as person who identified defendant in lineup, amounted to misconduct, where it had effect of linking defendant and his confederate with assault on witness when there was no record evidence that anyone connected with either defendant had assaulted witness. *Carpenter v. United States*, 635 A.2d 1289, 1993 D.C. App. LEXIS 326 (1993).

Cross-examination of defendant and closing argument about defendant's failure to collect or preserve evidence arguably relevant to self-defense or to request eyewitness to keep in touch did not run afoul of missing witness or missing evidence doctrine in manslaughter prosecution; prosecutor was not urging that failure to produce gun, shell casing, or eyewitness created presumption that evidence would be unfavorable, and prosecutor was asking jury

to draw reasonable inferences from defendant's conduct. *Allen v. United States*, 603 A.2d 1219, 1992 D.C. App. LEXIS 58 (1992), writ of certiorari denied by 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916, 1992 U.S. LEXIS 4713, 60 U.S.L.W. 3879 (1992).

In manslaughter prosecution, prosecutor's statements undermining claim of self-defense did not misstate evidence of victim's physical condition; prosecutor's closing argument that victim's heart condition and brain swelling prevented victim from inflicting serious injury or death on defendant was based on medical testimony. D.C. Code 1981, §§ 22-2405, 22-3202. *Gray v. United States*, 589 A.2d 912, 1991 D.C. App. LEXIS 80 (1991).

In manslaughter prosecution in which defendant claimed self-defense, prosecutor's comments that there was no evidence that defendant "actually believed" and "actually felt" fear of death or serious bodily injury did not implicate defendant's failure to testify at trial, and, at worst, reflected on evidence that defendant had not mentioned in his sworn statement to police that he actually had felt or believed his life was in danger when he was choking victim. D.C. Code 1981, §§ 22-2405, 22-3202; U.S. Const. Amend. 5. *Gray v. United States*, 589 A.2d 912, 1991 D.C. App. LEXIS 80 (1991).

In prosecution for voluntary manslaughter while armed, court properly concluded that prosecutor's adducing testimony from police officer about blood on victim's shirt, and prosecutor's reference to flow of blood in his closing argument, did not constitute prosecutorial misconduct. D.C. Code 1981, §§ 22-2405, 22-3202; U.S. Const. Amend. 6. *Dixon v. United States*, 565 A.2d 72, 1989 D.C. App. LEXIS 206 (1989).

Defenses, generally.

Only defense to charge of causing another's death—aside from self-defense, insanity, duress and so forth—is that the homicide was inadvertent and that defendant's negligence, if any, was not sufficient to convict him of involuntary manslaughter. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Discovery.

Government failed during murder trial to comply with discovery rule mandating pretrial disclosure of testimony of any expert witness that government intended to use during its case-in-chief at trial; when it became obvious to government that testimony of alleged victim's treating physician would not be consistent with what physician had related to defense counsel during pre-trial interview, government's oral conveyance of this fact to defense counsel did not comply with rule's requirement of written

summary of physician's testimony. *Ferguson v. United States*, 866 A.2d 54, 2005 D.C. App. LEXIS 7 (2005).

Double jeopardy.

Reversal of defendant's convictions of manslaughter while armed and of carrying pistol without license did not preclude new trial on same charges, where reversal was based on prosecutorial misconduct and not on evidentiary insufficiency and was unrelated to defendant's guilt or innocence. U.S. Const. Amend. 5; D.C. Code 1981, §§ 22-2405, 22-3202, 22-3204. *Coreas v. United States*, 585 A.2d 1376, 1991 D.C. App. LEXIS 30 (1991), writ of certiorari denied by 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130, 1991 U.S. LEXIS 4310, 60 U.S.L.W. 3261 (1991).

Offense of manslaughter is determined by reference to number of victims who die as result of defendant's actions, not by reference to number of acts causing death; therefore, even if defendant's act of striking seven pedestrians and killing them constituted only single act, sentencing defendant on seven counts of manslaughter did not violate the double jeopardy clause. U.S. Const. Amend. 5; D.C. Code 1981, § 22-2405. *Williams v. United States*, 569 A.2d 97, 1989 D.C. App. LEXIS 221 (1989).

Examination of witnesses.

Trial court did not abuse its discretion in finding prosecution witness, who had been diagnosed with paranoid schizophrenia and recently hospitalized for psychiatric problems, competent to testify in prosecution for manslaughter while armed and related weapons offenses; witness did not display kinds of mental impairments that would suggest testimonial incapacity, witness demonstrated understanding of what it meant to testify truthfully and was oriented in time and place, and testimony of witness, although her memory was imperfect, was responsive and her account of events at issue was coherent and consistent with recollections of other witnesses. *Dorsey v. United States*, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

When defendant in homicide prosecution introduces evidence of victim's violent character, whether known to defendant or not, to demonstrate that deceased was more likely aggressor, she opens door for government rebuttal with evidence of victim's peaceable character. *Johns v. United States*, 434 A.2d 463, 1981 D.C. App. LEXIS 342 (1981).

Indictment and information.

— Act or omission causing death, indictment and information.

Where manslaughter indictment charged landlord, its vice president, and tenant, who operated rooming house, with negligently fail-

ing to have a dumbwaiter shaft constructed of fire-resistive materials and negligently failing to provide a front fire escape, and that defendants were under duty to roomers to comply with all orders, rules, regulations, and ordinances relating to use, occupancy and safety of buildings, and particularly building code and elevator code of District of Columbia, and that regulations required dumb-waiter shaft to be of fire-resistive construction, the indictment did not sufficiently plead existence of applicable regulations requiring use of fire-resistive materials in dumb-waiter shafts and installation of front fire escape. *U.S. v. Interstate Properties*, 153 F.2d 469, 1946 U.S. App. LEXIS 1944 (1946).

Manslaughter indictment charging violations of elevator regulations should point out with particularity what regulations were violated and should plead facts concerning physical situation to show the regulations relied on were correctly applicable to the situation. *U.S. v. Interstate Properties*, 153 F.2d 469, 1946 U.S. App. LEXIS 1944 (1946).

Where manslaughter indictment charged that, by reason of failure of landlord, its vice president, and tenant, who operated rooming house, to provide a dumb-waiter shaft of fire-resistive materials, and a front fire escape, and by reason of their acts in permitting shaftway to be used as a trash receptacle a fire started and a named individual received fatal burns, the indictment was insufficient to charge that absence of fire escape contributed to the death. *U.S. v. Interstate Properties*, 153 F.2d 469, 1946 U.S. App. LEXIS 1944 (1946).

An indictment charging defendants with involuntary manslaughter for a death resulting from the collapse of a theater, alleging that defendants undertook and assumed jointly to construct the building, one was to furnish the steel and one the cement, one to draw the plans, one to superintend the construction, and another to inspect the work, but not alleging any contract, or in what way any one of the defendants could be responsible for the neglect of the others, held insufficient. *U.S. v. Geare*, 293 F. 997, 1923 U.S. App. LEXIS 1708 (1923).

An indictment charging the persons constructing a theater with involuntary manslaughter for a death resulting from the collapse of the theater held not to sufficiently allege criminal negligence. *U.S. v. Geare*, 293 F. 997, 1923 U.S. App. LEXIS 1708 (1923).

— In general.

Where manslaughter indictment against landlord, its vice president, and tenant, who operated rooming house, charged acts of negligence which were not violations of common law duties jointly owed by defendants, and indictment was uncertain concerning statutory and regulatory requirements with which defen-

dants allegedly failed to comply, the indictment was bad on demurrer. *U.S. v. Interstate Properties*, 153 F.2d 469, 1946 U.S. App. LEXIS 1944 (1946).

Indictment for manslaughter by striking with automobile held not wanting in definiteness. *Story v. U.S.*, 16 F.2d 342, 1926 U.S. App. LEXIS 3842 (1926).

Inclusion of counts of both voluntary and involuntary manslaughter in one indictment does not deny due process. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

Indictment which alleged that the accused "feloniously, wantonly and with gross negligence" shot the deceased charged involuntary manslaughter only under District of Columbia statutes and was not sufficient, as claimed by government, to also charge voluntary manslaughter. D.C. Code § 22-2405. *United States v. Pender*, 309 A.2d 492, 1973 D.C. App. LEXIS 356 (1973).

— Joinder of parties or issues, indictment and information.

Where manslaughter indictment charged landlord, its vice president, and tenant, who operated rooming house, with violation of alleged joint duty to use reasonable care to maintain premises in a reasonably safe condition, that defendants negligently failed to have a dumb-waiter shaft constructed of fire-resistive materials, that they negligently failed to forbid use of shaft as a receptacle for waste, and that they negligently failed to provide a front fire escape, the acts of negligence charged were not violations of common-law duties jointly owed by the defendants, and there was a misjoinder of defendants under common law principles. *U.S. v. Interstate Properties*, 153 F.2d 469, 1946 U.S. App. LEXIS 1944 (1946).

Although voluntary and involuntary manslaughter are separate offenses which must be charged in separate counts if Government desires to charge both, original duplicitous nature of indictment, charging motorist with manslaughter in connection with death of two persons as result of automobile accident, which duplicity arose from fact that indictment failed to distinguish between voluntary and involuntary manslaughter, was corrected when Government elected to proceed solely upon theory of involuntary manslaughter, which election was appropriate remedy for such duplicitous indictment, and thus, indictment was not fatally defective. *Murray v. United States*, 358 A.2d 314, 1976 D.C. App. LEXIS 282 (1976).

After Government's election to proceed only on theory of involuntary manslaughter under duplicitous indictment which failed to distinguish between voluntary and involuntary manslaughter, trial suffered none of infirmities associated with one based upon duplicitous

indictment, in that Government adduced no proof inconsistent with charge of involuntary manslaughter, motions for judgments of acquittal were addressed solely to that charge and to charge of negligent homicide, lesser included offense, and jury was instructed only on involuntary manslaughter; furthermore, jury acquitted motorist on charge of manslaughter as to both victims, which abrogated any question as to which crime indictment referred. D.C. Code § 40-606. *Murray v. United States*, 358 A.2d 314, 1976 D.C. App. LEXIS 282 (1976).

Voluntary and involuntary manslaughter are separate offenses which must, if charged in single indictment, be charged in separate counts. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

Duplicitious count is improper in that, upon conviction, it would not be clear to which crime guilty verdict referred and thus what penalty should be imposed, it would hamper both judge and jury in considering evidence, general verdict of guilty would not reveal whether defendant was unanimously found guilty of all offenses charged, right of protection against double jeopardy might be violated and it might deny right to notice of nature and cause of accusation. D.C. Code SCR, Criminal Rules 7(c), 8(a), 31(a); D.C. Code § 22-2405; U.S. Const. Amends. 5, 6. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

— **Lesser grade or degree of offense charged, indictment and information; joinder—election.**

Involuntary manslaughter is a lesser-included offense of second-degree murder. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

Voluntary manslaughter while armed was lesser included offense of second-degree murder while armed, so that defendants could be convicted of manslaughter offense after being charged only with murder offense, though at time of trial, maximum penalty for manslaughter offense exceeded maximum penalty for murder offense by \$1,000 fine; two offenses had identical elements except that murder offense also required malice, and court could avoid misapplication of statute by refraining from imposing fine. D.C. Code 1981, §§ 22-2403, 22-2404, 22-2405, 22-3202; Fed.R.Cr.Proc. Rule 31(c), 18 U.S.C.; Criminal Rule 31(c). *Lee v. United States*, 668 A.2d 822, 1995 D.C. App. LEXIS 252 (1995).

Manslaughter is a lesser included offense of second-degree murder. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

Involuntary manslaughter is lesser included offense of second-degree murder. *Carmichael v.*

United States, 363 A.2d 302, 1976 D.C. App. LEXIS 356 (1976).

Manslaughter is a lesser included offense of second-degree murder. D.C. Code§ 22-2403. *Pendergrast v. United States*, 332 A.2d 919, 1975 D.C. App. LEXIS 326 (1975).

Inheritance rights of convicted persons.

Conviction for involuntary manslaughter triggers bar of slayer statute upon person convicted of felonious homicide from taking an estate or interest from victim. D.C. Code 1981, § 19-320. *Cheatle v. Cheatle*, 662 A.2d 1362, 1995 D.C. App. LEXIS 146 (1995).

Instructions.

— **Accident or misfortune, instructions.**

Record failed to establish proof of claim that trial court erred in failing to instruct jury adequately as to accidental homicide. *United States v. Dent*, 477 F.2d 447, 1973 U.S. App. LEXIS 10804 (C.A.D.C. 1973).

— **Harmless or reversible error, instructions.**

Giving of instruction, which was made in response to jury request for explanation of manslaughter charge, and in which jury was admonished that “they must recall all of the other instructions the court has given. . . , instructions with respect to reasonable doubt and self-defense. . . you can assume that I have repeated all those matters to you at this time and I will simply at this time discuss the elements of manslaughter,” was not plain error. Fed.Rules Crim.Proc. rules 30, 52, 52(b), 18 U.S.C. *United States v. Jones*, 482 F.2d 747, 1973 U.S. App. LEXIS 8777 (C.A.D.C. 1973).

Instructions providing, inter alia, that high degree of recklessness requisite to prove malice as an element of murder is distinguished from lesser recklessness constituting manslaughter by reason of quality of defendant’s awareness of risk either actually or from showing of such danger that any reasonable person must have been aware of it were not prejudicially erroneous. *United States v. Dent*, 477 F.2d 447, 1973 U.S. App. LEXIS 10804 (C.A.D.C. 1973).

Failure in second-degree murder prosecution to give limiting instruction concerning evidence, which pertained to prior assaults on victim-child by defendant, which was relevant and material to issues of malice, intent and willfulness and which refuted defendant’s contention that burning of child was accidental since defendant felt kindly toward him, was not plain error. D.C. Code §§ 22-2403, 22-2405. *United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Where evidence was insufficient to give rise to reasonable doubt that defendant intended to shoot one of the young men in group standing near corner, trial court did not err in failing to

instruct jury on involuntary manslaughter. D.C. Code § 22-2405. *Simon v. United States*, 424 F.2d 796, 1970 U.S. App. LEXIS 11395 (C.A.D.C. 1970).

Trial court's error in failing to respond to jury's question concerning what constituted an "assault," in context of jury instruction concerning reasonableness of defendant's use of deadly force against decedent, was not harmless beyond a reasonable doubt in prosecution for manslaughter while armed; issue of what constituted assault was central to defendant's self-defense claim, jury had to determine whether defendant acted in heat of passion caused by assault, and court's failure to respond to jury's question on central issue to defense in close case created unacceptable risk that verdict stemmed from mistaken understanding of law. *Preacher v. United States*, 934 A.2d 363, 2007 D.C. App. LEXIS 559 (2007).

Under harmless error standard, an appellate court must be satisfied with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error. *Brisbon v. United States*, 894 A.2d 1121, 2006 D.C. App. LEXIS 144 (2006).

Trial court's error in issuing "first aggressor" or provocation instruction to jury was harmful in prosecution for voluntary manslaughter while armed; by giving instruction and telling jurors that if they found that defendant was aggressor or if he provoked conflict upon himself, he could not rely upon right of self-defense to justify his use of force, court not only effectively and improperly took away government's burden to disprove self-defense, but also effectively deprived defendant of his ability to claim self-defense. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

Trial court's instruction to jury on order of considering verdicts, that jury could consider offense of voluntary manslaughter only after making all "reasonable efforts" to reach a verdict on voluntary manslaughter did not constitute plain error; defendant made no specific objection to inclusion of "reasonable efforts" language, and did not propose any alternative language. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

Even if submission of involuntary manslaughter to jury was erroneous, error was harmless where defendant was not convicted of involuntary manslaughter, and conviction for lesser offense of negligent homicide was fully supported by evidence. *Garcia v. United States*, 848 A.2d 600, 2004 D.C. App. LEXIS 204 (2004).

Although defendant was improperly denied "imperfect self-defense" instruction, error was harmless where jury was instructed on first and second-degree murder, and jury found de-

fendant guilty of first-degree murder; jury's finding of premeditation could not coexist with defendant's mitigation claim, and if jury believed defendant acted in self defense, even if unreasonably, it would have convicted appellant of second-degree murder. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Error on part of trial court when, having agreed to instruct jury on both voluntary and involuntary manslaughter, it omitted latter instruction from its charge in prosecution for first-degree murder was not a basis for obtaining reversal under plain error rule in absence of a showing that defendant was deprived of substantial rights. D.C. Code 1981, §§ 22-2401, 22-2405, 22-3202, 22-3204; Criminal Rule 30. *Morris v. United States*, 469 A.2d 432, 1983 D.C. App. LEXIS 520 (1983).

Instruction on involuntary manslaughter was not reversibly erroneous because in requiring proof that death resulted from injuries received through commission of an unlawful act which was a misdemeanor involving danger of injury, it did not also require proof that unlawful act was proximate cause of death. D.C. Code §§ 22-2405, 22-3204. *Walker v. United States*, 403 A.2d 1163, 1979 D.C. App. LEXIS 420 (1979).

Trial judge did not err in refusing to give manslaughter instruction where jury, which was given instruction on second-degree murder as a lesser included offense, found defendant guilty of first-degree murder. *Dean v. United States*, 377 A.2d 423, 1977 D.C. App. LEXIS 375 (1977).

In homicide prosecution, trial court did not commit reversible error in failing to give limiting instruction concerning extrajudicial statements admitted to show state of mind of the defendant and the victim, the defendant's wife. D.C. Code §§ 22-2403, 22-2405, 22-3202. *Gezmu v. United States*, 375 A.2d 520, 1977 D.C. App. LEXIS 348 (1977).

Evidence, including defendant's testimony that he had seen victim wave his gun earlier on date of incident at issue and that he knew that victim had previously shot someone else in the neighborhood, as well as testimony that heated words were exchanged at fateful meeting of defendant and victim and that victim was moving his hand toward his pocket when defendant struck him with baseball bat, constituted some evidence that defendant lacked requisite malice for second degree murder; hence, failure to give requested instruction on lesser included offense of manslaughter was reversible error. *Pendergrast v. United States*, 332 A.2d 919, 1975 D.C. App. LEXIS 326 (1975).

Neither fact that other instructions in prosecution for manslaughter properly stated that the Government bore the burden of proof beyond reasonable doubt on all elements of the

offense nor the weakness of the self-defense claim made harmless erroneous instruction which called for a guilty verdict if the Government proved beyond a reasonable doubt that the defendant did not act in self-defense. D.C. Code § 22-2405; U.S. Const. Amend. 6. *Baker v. United States*, 324 A.2d 194, 1974 D.C. App. LEXIS 256 (1974).

— In general.

Charge, in prosecution for second-degree murder, considered as a whole, properly conveyed to jury correct rules on murder and manslaughter. D.C. Code 1961, §§ 22-2403, 22-2405. *Falls v. United States*, 321 F.2d 762, 1963 U.S. App. LEXIS 4665 (C.A.D.C. 1963).

Though a requested charge, directing acquittal if the proximate cause of the death was the breaking of the steering wheel of the automobile, was properly refused, because omitting the element of defendant's carelessness as a cause of the breaking, it was error to refuse a requested charge directing acquittal, if the death was due to breaking of wheel and the break was not caused by any unlawful act of defendant. *Sinclair v. U.S.*, 265 F. 991, 1920 U.S. App. LEXIS 1490 (1920).

— Instructions already given.

In prosecution for second-degree murder and manslaughter where there was evidence of provocation, instruction repeating that provocation must be adequate before defendant could be acquitted of second-degree murder and convicted instead of manslaughter and manslaughter instruction containing detailed statement of several issues which were clearly important for jury to consider when deciding whether to convict defendant of second-degree murder were confusing, but did not require reversal of conviction, where confusion might have prejudiced government as well as defendant. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

A requested charge that accused could not be convicted of manslaughter, unless the death was the result of excessive speed, recklessness, and gross negligence in driving the automobile, was substantially covered by a charge that before the jury could convict they must find defendant guilty of gross negligence or reckless negligence, so that the refusal of the request was not error, even if it was correct. *Sinclair v. U.S.*, 265 F. 991, 1920 U.S. App. LEXIS 1490 (1920).

— Intent, instructions.

In murder prosecution, refusal to instruct that a drug-induced stupor may negate specific intent, was not error, where there was evidence that defendant took amphetamines, drank a

quantity of liquor and had trouble driving to scene of the homicide, but there was no evidence that he was in a stupor at time of stabbing and, in any event, other instructions given on element of specific intent sufficed. *United States v. Marcey*, 440 F.2d 281, 1971 U.S. App. LEXIS 11708 (C.A.D.C. 1971).

Instructing jury that conscious disregard meant that defendant knowingly engaged in acts that ignored danger of such acts that reasonable person would know could cause death or serious bodily harm was not plain error; jury voting to convict defendant of voluntary manslaughter would not have voted to acquit him if informed of more stringent intent requirement, if properly instructed, it was unlikely that jury would have found that defendant was not subjectively aware that shooting victim in chest created high risk that victim would die or sustain serious injury, and even if defendant stated that he did not intend to kill or injure victim, his conduct reflected subjective awareness of extreme risk of death or serious injury. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Instructing jury that specific intent meant defendant knew he was acting wrongfully or was disregarding law when he fired shots at victim was not plain error; this was similar language used in state criminal jury instructions and another case, there was no likelihood that instruction would dilute government's burden of proof, after giving instruction, court immediately added correct statement of law, and instruction did not permit jury to reject defendant's self-defense claim, as trial court explained clearly that it was government's burden to prove beyond reasonable doubt that defendant did not act in self-defense. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

— Lesser included offenses, instructions.

If defendant charged with second-degree murder is entitled to charge on lesser included offense of manslaughter, instructions must take a form which distinguish clearly between those factors which constitute defenses to second-degree murder and those which constitute the elements of manslaughter, and which clearly instruct jury that when defense to second-degree murder—adequate provocation, for example—is put in issue, government must prove its absence beyond a reasonable doubt. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct.

541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Instruction concerning distinction between manslaughter and second-degree murder and factors that will reduce offense of murder to manslaughter are appropriate only when defendant is charged with second-degree murder as well as manslaughter. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Defendant, in second degree murder prosecution, was entitled to instruction on lesser-included offense of criminally negligent involuntary manslaughter; evidence was presented that altercation between defendant and victim occurred once the parties were outside defendant's home, photograph showed concrete stairs leading to defendant's door, several doctors testified that victim's injuries could have been sustained in a fall down such stairs, defendant told police he punched victim, that he may have pushed victim, and that victim might have sustained his non-facial injuries, "when he fell." *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

Defendants' fleeing from the scene after participating in the crime did not constitute legal withdrawal, such that they would be entitled to jury instruction on lesser-included offenses of assault with a deadly weapon and aggravated assault, in prosecution for voluntary manslaughter. D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

Evidence was insufficient in prosecution for voluntary manslaughter to support defendants' contention that their confrontation with the victim was a separate and distinct event, and thus, insufficient to support a jury instruction on lesser-included offenses of assault with a deadly weapon and aggravated assault, where one defendant, in his statement to the police, admitted he punched victim twice in the face, and witness who testified on behalf of other defendant stated that he picked up that defendant from the area of the incident. D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

Trial court properly refused to give lesser included instruction on manslaughter in second-degree murder prosecution where there was no evidence to support a jury finding of no malice. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

Requested instruction on manslaughter as lesser included offense of second-degree murder was properly refused absent an evidentiary predicate for finding of adequate legal provocation on which to base such a charge. D.C. Code

§ 22-2403. *Jamison v. United States*, 373 A.2d 594, 1977 D.C. App. LEXIS 477 (1977).

In prosecution for murder of defendant's estranged wife, instruction on lesser included offense of manslaughter was not warranted, where only testimony as to defendant's version of shooting incident came from a defense psychiatrist and was hearsay and could provide no factual predicate for proper consideration of manslaughter by jury. D.C. Code §§ 22-2403 to 22-2405. *Bethea v. U.S.*, 365 A.2d 64, 1976 D.C. App. LEXIS 374 (1976).

Evidence, in prosecution of defendant for second-degree murder, including defendant's signed statement admitting he had stabbed his stepfather because he believed stepfather had been responsible for his being beaten and robbed night before and that, upon confronting stepfather, stepfather came toward him with soft drink bottle in his hand, was sufficient to support charge to jury of lesser included offense of involuntary manslaughter. *Carmichael v. United States*, 363 A.2d 302, 1976 D.C. App. LEXIS 356 (1976).

— Necessity and sufficiency, instructions.

In a prosecution for manslaughter, resulting from unlawful speeding and reckless driving of an automobile, a charge authorizing conviction if the jury were satisfied death resulted from any negligent act or omission of the defendant was erroneous, as not limiting the jury to the acts of negligence alleged. *Sinclair v. U.S.*, 265 F. 991, 1920 U.S. App. LEXIS 1490 (1920).

In view of instructions as a whole, defendants convicted of involuntary manslaughter of infant son were not prejudiced by trial court's erroneously defining culpable negligence in terms of simple or civil negligence. D.C. Code § 22-2405. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

Where defendant was charged only with aiding and abetting, an instruction on unarmed manslaughter would have been inappropriate, since there was no evidence that principal committed crime while unarmed. D.C. Code §§ 22-2405, 22-3202. *Branch v. United States*, 382 A.2d 1033, 1978 D.C. App. LEXIS 423 (1978).

— Passion and provocation, instructions.

Court of Appeals stated sample instruction on provocation to be given in cases in which accused is charged with second-degree murder and manslaughter and adequate provocation is put in issue. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Where defendant is charged with second-degree murder and manslaughter, once some evidence of provocation is in the case, whether introduced by government or defense, defen-

dant is entitled to instruction on provocation and manslaughter, burden of persuading jury of absence of provocation is on government, and jury is entitled to clear instruction to that effect. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

In order to be entitled to a manslaughter instruction, there must be some evidence of adequate provocation or lack of malice. *Dean v. United States*, 377 A.2d 423, 1977 D.C. App. LEXIS 375 (1977).

Whatever passion was aroused by the rape of one of defendant's prostitutes was insufficient provocation to justify a manslaughter instruction for shooting of alleged rapist over an hour after defendant learned of the rape. *Dean v. United States*, 377 A.2d 423, 1977 D.C. App. LEXIS 375 (1977).

Defendant is entitled to a manslaughter instruction if there is some evidence to show adequate provocation or a lack of malice aforethought. *Harris v. United States*, 373 A.2d 590, 1977 D.C. App. LEXIS 475 (1977).

— Province of jury, instructions.

Instruction, in prosecution for manslaughter, to the effect that if the Government proved beyond a reasonable doubt that the defendant did not act in self-defense he must be found guilty denied the defendant his right to a jury trial and was error. D.C. Code § 22-2405; U.S. Const. Amend. 6. *Baker v. United States*, 324 A.2d 194, 1974 D.C. App. LEXIS 256 (1974).

— Recklessness and danger inherent in conduct, instructions.

Evidence indicating that defendant's beating of his child was not in a passion of hate and rage but with an intent to discipline that was carried to such unreasonable extremes as to involve a "gross deviation" and extreme risk of harm and death warranted instruction on manslaughter, where jury could have found that defendant indicted for murder lacked the kind of awareness of risk involved in the malice requirement of murder. *United States v. Grady*, 481 F.2d 1106, 1973 U.S. App. LEXIS 9077 (C.A.D.C. 1973).

Recklessness as to accuracy of defendant's aim in shooting toward group of men standing near corner was not type of recklessness that would justify an involuntary manslaughter instruction where defendant did intend to shoot one of the men. D.C. Code § 22-2405. *Simon v. United States*, 424 F.2d 796, 1970 U.S. App. LEXIS 11395 (C.A.D.C. 1970).

Evidence of reckless conduct unintentionally resulting in death may form basis for an involuntary manslaughter instruction. D.C. Code § 22-2405. *Simon v. United States*, 424 F.2d

796, 1970 U.S. App. LEXIS 11395 (C.A.D.C. 1970).

Trial court correctly instructed jury that involuntary manslaughter includes unreasonable failure to perceive risk of harm to others while engaging in conduct resulting in extreme danger to life or of serious bodily injury. D.C. Code § 22-2405. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

Trial court in homicide prosecution correctly instructed jury that conduct resulting in extreme danger to life or of serious bodily injury must be act or omission of culpable, i. e., criminal negligence but incorrectly defined culpable negligence as failure to exercise that degree of care rendered appropriate by particular circumstances in which man or woman of ordinary prudence in same situation and with equal experience would not have omitted. D.C. Code § 22-2405. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

— Self-defense, instructions.

Defendant was not entitled to jury instructions on self-defense and defense of a third person in prosecution for voluntary manslaughter while armed and related weapons offenses; victim was not armed, had uttered no threats, did not obtain control of weapon of defendant's brother or point it at defendant or brother, and had not inflicted any serious injury on brother, and thus, evidence did not show that defendant or his brother were in imminent peril of death or serious bodily harm, such that defendant reasonably could think lethal response necessary, even though victim was initial aggressor and he was struggling to disarm defendant's brother. *Dorsey v. United States*, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

Trial court's failure to respond to jury's question concerning what constituted an "assault," in context of instruction explaining that person acting in heat of passion caused by assault does not necessarily lose his claim of self-defense by using greater force than would seem necessary to a calm mind, was error in prosecution for manslaughter while armed; jury's question was clear, jury's question was central to their consideration of defendant's claim that he acted in self-defense, and court did not answer jury's specific question, but opted to repeat standard self-defense instructions. *Preacher v. United States*, 934 A.2d 363, 2007 D.C. App. LEXIS 559 (2007).

Trial court's sua sponte inclusion of "first aggressor" or provocation charge to jury, in its instruction regarding right of self-defense, despite express objection of defendant, was error in prosecution for voluntary manslaughter while armed; defendant's aggression toward third party did not turn defendant into aggressor against or provocateur toward victim, and although there was evidence supporting infer-

ence that defendant provoked some hostility during interaction of parties morning of incident, that evidence alone did not justify giving "first aggressor" or provocation instruction. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

Defendant's attempt to sell soap instead of cocaine to assault victim presented at least a factual issue for jury as to whether defendant invited and provoked encounter that led to shooting of homicide victim who was also present in room, and thus, trial court did not abuse its discretion in giving jury an instruction on provocation, with respect to claim of self-defense against homicide victim. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Defendant was not entitled to self-defense instruction as to one of two shooting victims, in homicide and assault prosecution arising from incident in which defendant shot victims upon victims' perceived discovery that defendant and friend were attempting to dupe victims by selling them soap rather than cocaine; defendant used excessive force when he fired two shots virtually straight down into victim's body, while victim's weaponless hands were visible and after defendant shot second victim in head, and defendant did not do everything in his power, consistent with his safety, to avoid danger and avoid necessity of taking a life. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Trial court did not err in instructing jury to assess defendant's actions against second shooting victim separately from defendant's actions against first shooting victim, in considering defendant's self-defense claim in homicide and assault prosecution arising from incident in which defendant shot victims upon victims' perceived discovery that defendant and friend were attempting to dupe victims by selling them soap rather than cocaine; by time defendant shot second victim, defendant no longer could reasonably believe that defendant faced a concerted threat from second victim and first victim, whom defendant had just killed. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Defendant was entitled to imperfect self-defense instruction in homicide trial, where reasonable jury could have found that defendant had subjective actual belief that his life was in danger and a like belief that he had to react with the force that he did, even though such beliefs of defendant were objectively unreasonable. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Once there is sufficient evidence to justify a self-defense instruction in homicide case, bur-

den is on government to disprove self-defense, by meeting its burden of proof negating defendant's subjective actual belief or objective reasonableness. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant was not entitled to have issue of self-defense submitted to jury in homicide prosecution, despite circumstances surrounding victim's yelling to passenger in defendant's car and his pursuit of defendant's car and discovery of pistol in victim's front pocket after his death, where victim made no threat, actual or apparent, prior to being shot to death by codefendant and there were many options available to defendant short of shooting victim. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Finding that defendant acted without malice was not consistent only with a complete exculpation of charge of second-degree murder, on basis of self-defense; finding of wanton malice was consistent with a finding of acting recklessly or on provocation, so as to justify instruction on lesser-included offense of manslaughter. *Pendergrast v. United States*, 332 A.2d 919, 1975 D.C. App. LEXIS 326 (1975).

— Voluntary and involuntary manslaughter, instructions.

Question whether a defendant is entitled to involuntary manslaughter instruction depends on existence of at least some evidence in record fairly tending to bear on issue of that offense. D.C. Code § 22-2405. *Simon v. United States*, 424 F.2d 796, 1970 U.S. App. LEXIS 11395 (C.A.D.C. 1970).

Defendant was not entitled to have jury instructed on involuntary manslaughter, as well as voluntary manslaughter, in homicide prosecution, as he failed to set forth at trial evidentiary basis demonstrating that he was unaware of risk of harm by providing his codefendant access to Uzi pistol at time of incident; defendant could not argue that he was aware of danger of his conduct for purposes of his self-defense claim, which was not submitted to jury, and then turn around and assert he was unaware of potential danger he had created by his conduct for purpose of asserting he was entitled to involuntary manslaughter charge. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Where evidence in a case might sustain a conviction for either voluntary or involuntary manslaughter, appropriate jury instructions defining the two offenses will permit the trial court to consider the offense of which the jury has convicted the defendant for sentencing purposes, and distinction may have significant collateral consequences, even though there is no statutory distinction between the two offenses. D.C. Code 1981, § 22-2405. *Comber v.*

United States, 584 A.2d 26, 1990 D.C. App. LEXIS 324 (1990).

Joint or separate trial.

Trial judge's decision not to sever defendant's trial from non-testifying codefendants, in prosecution for voluntary manslaughter was appropriate, where extrajudicial statements from the codefendants were admissible. D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

Jurisdiction.

Shift of jurisdiction over parolee from federal law to district law pursuant to district's court reorganization did not increase severity of his punishment after punishment was imposed and thus did not amount to constitutionally prohibited ex post facto law, since parolee was no worse off when he was paroled than he was at time of his conviction. D.C. Code 1981, §§ 11-502(2)(A)(v), 22-2405, 24-209; Court Reform and Criminal Procedure Act of 1970, § 101 et seq., 84 Stat. 473; 18 U.S.C. (1970 Ed.) § 4208(d). *Allen v. District of Columbia Hackers' License Appeal Bd.*, 471 A.2d 271, 1984 D.C. App. LEXIS 305 (1984).

Juvenile adjudications.

Trial court met requirements of Youth Rehabilitation Act by weighing and rejecting option of sentencing defendant under Act, for voluntary manslaughter, assault, and weapon convictions. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202, 22-3204, 24-801 et seq. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Merger of offenses.

Charge of cruelty to child did not merge into manslaughter conviction, in that count charging cruelty had societal purposes as well as essential elements differing from those in count which charged second-degree murder and under which defendant was convicted of manslaughter. D.C. Code §§ 22-901, 22-2403, 22-2405. *United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Mistrial.

Defendant was not entitled to mistrial after jury was told, through reading of indictment and prosecutor's opening statement, that defendant previously had been convicted of a felony crime of violence or a dangerous crime, in prosecution for manslaughter while armed and related weapons offenses; no actual evidence of defendant's prior convictions was presented, references to convictions were brief, non-specific, and not linked to central issue at trial, which was defendant's identification as perpetrator, government's proof of defendant's identification was strong and unrefuted, and court gave curative instructions at close of trial.

Dorsey v. United States, 935 A.2d 288, 2007 D.C. App. LEXIS 558 (2007).

Nature and elements of offenses.

— Absence of malice, nature and elements of offenses.

"Manslaughter" is the unlawful killing of a human being without malice. *Fryer v. U.S.*, 207 F.2d 134, 1953 U.S. App. LEXIS 2841 (C.A.D.C. 1953).

An element of second-degree murder which is not required for manslaughter is malice. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

Malice must be lacking in manslaughter or be mitigated by the presence of circumstances judicially recognized as reducing the degree of criminality. *Dean v. United States*, 377 A.2d 423, 1977 D.C. App. LEXIS 375 (1977).

— Homicide in commission of or attempt to commit other offense, nature and elements of offenses.

Involuntary manslaughter may occur as a result of an unlawful act which is a misdemeanor involving danger of injury. D.C. Code §§ 22-2405, 22-3204. *Walker v. United States*, 403 A.2d 1163, 1979 D.C. App. LEXIS 420 (1979).

The carrying of a pistol without a license is an unlawful act within the rule that involuntary manslaughter may occur as the result of unlawful act which is a misdemeanor involving danger of injury. D.C. Code §§ 22-2405, 22-3204. *Walker v. United States*, 403 A.2d 1163, 1979 D.C. App. LEXIS 420 (1979).

The crime of carrying a pistol without a license exposes the community to such inherent risk of harm that, when death results, even though an unintended consequence, the defendant may nonetheless be charged with involuntary manslaughter; the risk of the crime does not decrease when the resulting death is unforeseeable, because of a pistol's hidden defects, as well as unintended. D.C. Code §§ 22-2405, 22-3204. *Walker v. United States*, 403 A.2d 1163, 1979 D.C. App. LEXIS 420 (1979).

Carrying a pistol without a license exposes the community to such inherent risk of harm that when death results, even though an unintended consequence, defendant may nonetheless be charged with involuntary manslaughter. D.C. Code § 22-3204. *United States v. Walker*, 380 A.2d 1388, 1977 D.C. App. LEXIS 302 (1977).

A violation of statutory proscription against carrying a pistol without a license, if it results in shooting and death of another, constitutes involuntary manslaughter because violation is dangerous in and of itself. D.C. Code § 22-3204. *United States v. Walker*, 380 A.2d 1388, 1977 D.C. App. LEXIS 302 (1977).

An unlawful killing of a human being, with either the intent to commit a misdemeanor dangerous in itself or of unreasonable failure to perceive any risk of harm to others, constitutes involuntary manslaughter. *United States v. Walker*, 380 A.2d 1388, 1977 D.C. App. LEXIS 302 (1977).

— In general.

When government is aware that suspect claims there are mitigating circumstances regarding his state of mind at time of homicide, prosecutor should not bring or maintain charges involving malice unless he or she has sufficient admissible evidence to persuade jury that suspect indeed acted with intent to kill and without adequate provocation, justification or excuse. D.C. Code 1981, §§ 22-501, 22-2405; Code of Prof.Resp., DR7-103(A). *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

— Intent or malice, nature and elements of offenses.

“Manslaughter” is the unlawful, that is, unexcused, killing of human being without malice. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

“Manslaughter” is the unlawful killing of a human being without malice aforethought. *U.S. v. Edmonds*, 63 F.Supp. 968, 1946 U.S. Dist. LEXIS 2946 (D.D.C.1946).

Where defendant was aware of the risk of harm, but acted in conscious disregard of it, the killing is murder or “voluntary manslaughter,” and where the defendant is not aware of the risk of harm, but should have been, the killing will be “involuntary manslaughter.” *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

The offense of involuntary manslaughter is not limited to those killings in which the perpetrator did not intend the conduct which caused the death, but encompasses cases in which the conduct was intentionally committed by an actor who should have been, but was not, aware of the risk of death or serious bodily injury. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

The intent necessary to prove criminal negligence involuntary manslaughter is a lack of awareness or failure to perceive the risk of injury from a course of conduct under circumstances in which the actor should have been aware of the risk. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

Person may be convicted of assault with intent to kill even though state of mind at time of the crime was not sufficient to constitute

murder; person who commits an assault with specific intent to kill but who acts with adequate provocation, justification or excuse may be charged and convicted despite the fact that, had the victim of the assault died, charge of manslaughter not murder would have been appropriate. D.C. Code 1981, §§ 22-501, 22-2405. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Manslaughter is a general intent crime. D.C. Code 1981, § 22-2405. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Proximate cause, or foreseeability, is not an element of offense of misdemeanor manslaughter, any more than it is an element of felony-murder. D.C. Code §§ 22-2405, 22-3204. *Walker v. United States*, 403 A.2d 1163, 1979 D.C. App. LEXIS 420 (1979).

In absence of statutory definition, common-law definition of manslaughter is used in the District of Columbia. D.C. Code § 22-2405. *United States v. Pender*, 309 A.2d 492, 1973 D.C. App. LEXIS 356 (1973).

For second-degree murder and manslaughter, where the element of malice is based on a wanton and willful disregard of an unreasonable human risk, the accused's knowledge of the risk is to be judged under a subjective standard. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

“Depraved heart malice” element of second-degree murder and manslaughter offenses exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

— Involuntary manslaughter, nature and elements of offenses.

“Involuntary manslaughter” occurs when a killing is committed without a specific intent to kill or do serious bodily injury, or with conscious disregard of an extreme risk of death or serious bodily injury. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

A homicide constitutes “voluntary manslaughter” where the perpetrator kills with a state of mind which, but for the presence of legally recognized mitigating circumstances, would render the killing murder. *Donaldson v. United States*, 856 A.2d 1068, 2004 D.C. App. LEXIS 402 (2004).

One who unintentionally causes the death of another as the result of non-criminal conduct is guilty of involuntary manslaughter only where that conduct both creates extreme danger to life or serious bodily injury, and amounts to a gross deviation from a reasonable standard of care. *Garcia v. United States*, 848 A.2d 600, 2004 D.C. App. LEXIS 204 (2004).

In prosecution for involuntary manslaughter, government had to prove beyond reasonable doubt that defendant's conduct created extreme danger to life or serious bodily injury and amounted to gross deviation from reasonable standard of care. D.C. Code 1981, § 22-2405. *Powell v. United States*, 684 A.2d 373, 1996 D.C. App. LEXIS 227 (1996).

Involuntary manslaughter is an unintentional or accidental killing committed in absence of circumstances of justification or excuse. D.C. Code 1981, § 22-2405. *Morris v. United States*, 648 A.2d 958, 1994 D.C. App. LEXIS 193 (1994).

Involuntary manslaughter includes two categories of unintentional killing: criminal negligence involuntary manslaughter and misdemeanor involuntary manslaughter. D.C. Code 1981, § 22-2405. *Morris v. United States*, 648 A.2d 958, 1994 D.C. App. LEXIS 193 (1994).

Criminal negligence involuntary manslaughter applies to one who unintentionally causes death of another as the result of noncriminal conduct, where that conduct both creates extreme danger to life or of serious bodily injury, and amounts to a gross deviation from reasonable standard of care. D.C. Code 1981, § 22-2405. *Morris v. United States*, 648 A.2d 958, 1994 D.C. App. LEXIS 193 (1994).

Touchstone of gross negligence, as element of involuntary manslaughter, is recklessness. D.C. Code § 22-2405. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

"Involuntary manslaughter" is unlawful killing which is unintentionally committed, that is, there is no intent to kill or to do bodily injury, and the crime may occur as result of an unlawful act which is a misdemeanor involving danger of injury, as result of a lawful act performed in an unlawful way, or as result of omission to perform a legal duty. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

Requisite intent in involuntary manslaughter is supplied by intent to commit the misdemeanor or by gross or criminal negligence. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

When person engages in conduct which results in extreme danger to life or serious bodily injury and that person should be aware of danger but is not, a resultant death will be involuntary manslaughter. D.C. Code § 22-

2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

State of mind in involuntary manslaughter is characterized, on the one hand, by a lack of intent to cause death or injury and, on the other, by lack of awareness of consequences of act amounting to an unreasonable failure of perception, criminal negligence, or intent to do an act which is a misdemeanor and is in some way dangerous. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

Elements of involuntary manslaughter are an unlawful killing of a human being with either the intent to commit a misdemeanor dangerous in itself or an unreasonable failure to perceive the risk of harm to others. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

If actor is aware of risk to life in his conduct which results in death, the crime is murder and not involuntary manslaughter, but if he is not aware, implied malice is not a factor, and he should have been aware, crime is involuntary manslaughter and if he was not aware of risk and he should not have been aware of it, there is no criminal liability and only pure accident. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

"Involuntary manslaughter" is a killing without justification or excuse. D.C. Code § 22-2405. *United States v. Pender*, 309 A.2d 492, 1973 D.C. App. LEXIS 356 (1973).

— Negligence in performance of lawful act, nature and elements of offenses.

Reckless conduct resulting in death may constitute manslaughter; the difference between that recklessness which displays depravity and such extreme and wanton disregard for human life as to constitute "malice" (justifying second-degree murder conviction) and that recklessness which amounts only to manslaughter lies in the quality of awareness of the risk. D.C. Code §§ 22-2403, 22-2405. *United States v. Dixon*, 419 F.2d 288, 1969 U.S. App. LEXIS 13086 (C.A.D.C. 1969).

Fact that defendant, who drove at highly unreasonable speeds through downtown streets after dark while consuming beer, lost control of his car, and skidded with such force as to drive parked vehicle over curb and fatally injure a child, did not have driver's license did not constitute evidence that defendant was grossly or criminally negligent. D.C. Code § 22-2405. *Hawkins v. United States*, 395 A.2d 45, 1978 D.C. App. LEXIS 357 (1978).

— Prevention of commission of offense, nature and elements of offenses.

Deadly force cannot be employed to arrest or prevent the escape of a misdemeanant. *United*

States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

— **Provocation, nature and elements of offenses.**

If the killing is committed in a sudden heat of passion, caused by adequate provocation, the crime may be reduced from murder to manslaughter, but a trivial or slight assault is not sufficient provocation for that purpose. U.S. v. Edmonds, 63 F.Supp. 968, 1946 U.S. Dist. LEXIS 2946 (D.D.C.1946).

Jury was warranted in concluding that conduct of deceased in kicking defendant was not adequate provocation for the fatal stabbing of deceased, so as to reduce the killing to manslaughter. U.S. v. Edmonds, 63 F.Supp. 968, 1946 U.S. Dist. LEXIS 2946 (D.D.C.1946).

Fact that deceased struck the first blow, fired the first shot or made the first menacing gesture does not legalize a self-defense claim if in fact claimant was the actual provoker. Rorie v. United States, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

Presence of adequate provocation in mitigation analysis to reduce second-degree murder to manslaughter is based solely upon an objective analysis of factual situation. Swann v. United States, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

— **Self-defense and apprehension of danger, nature and elements of offenses.**

Doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help and the settlement of potentially fatal personal conflicts. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One cannot support a claim of self-defense by a self-generated necessity to kill; right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

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One who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation; only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Notwithstanding that deceased provoked the original quarrel, and accused cannot, after that quarrel has ended or deceased has withdrawn, invoke the right of self-defense in a subsequent difficulty which he himself causes or brings on. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Right of self-defense arises only when the necessity begins and equally ends with the necessity; never must the necessity be greater than when the force employed defensively is deadly; the necessity must bear all semblance of reality and appear to admit no other alternative. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Under District of Columbia law, one seeking to justify homicide on ground of self-defense must have retreated to the wall before using deadly force. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Self-defense doctrine of retreat to the wall was not intended to enhance risk to the innocent; its proper application does not require a faultless victim to increase his assailant's safety at the expense of his own; the faultless victim can stand his ground and use deadly force otherwise appropriate if the alternative were perilous or if to him it reasonably appeared to be. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

The self-defense doctrine of retreat to the wall recognizes the principle that there is no duty to retreat from an assault producing an imminent danger of death or grievous bodily harm. United States v. Peterson, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One who through no fault of his own is attacked in his home is under no duty to retreat

therefrom before he may use deadly force in his self-defense. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Any rule of no retreat which may protect an innocent victim of affray would, like other incidents of the forfeited right of self-defense, be unavailable to the party who provokes or stimulates the conflict; the "castle" doctrine of no retreat from attack in one's home can be invoked only by one who is without fault in bringing the conflict on. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Where homicide defendant could not be found without fault in bringing conflict on, in that following prior verbal exchange he had obtained pistol from his house and, while displaying weapon by back fence, dared victim to come in and threatened to kill victim if he did, defendant, who asserted that fatal shooting was in self-defense but who did not retreat when victim came at him with lug wrench, was not so blameless that he was entitled to fall back on the "castle" doctrine of no retreat before resorting to use of deadly force in repelling attack on one in his home. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One may deliberately arm himself for purposes of self-defense against a pernicious assault which he has good reason to expect. *United States v. Peterson*, 483 F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

One who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation; only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

It would be error to deny an otherwise established claim of self-defense solely because the defendant had previously taken aggressive action toward the decedent. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

A defendant cannot claim self-defense if the defendant was the aggressor, or if he provoked the conflict upon himself. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

To be entitled to defense of self-defense, record must reflect that: (1) there was an actual or apparent threat to defendant; (2) threat was unlawful and immediate; (3) defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm; and (4) defendant's response was necessary to save himself from danger. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

Law of self-defense is a law of necessity; the right of self-defense arises only when the necessity begins, and equally ends with the necessity. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

To be acquitted for self-defense in homicide case, defendant must have had actual belief both that he or she was in imminent danger of serious bodily harm or death, and that use of deadly force was needed in order to save himself or herself, and both of those beliefs must be objectively reasonable. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant cannot claim self-defense in homicide case, where defendant was the aggressor, or if he or she provoked the conflict. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant's actual belief both in presence of danger and need to resort to force, even if one or both beliefs be objectively unreasonable, constitutes a legally sufficient mitigating factor to warrant finding of voluntary manslaughter rather than second-degree murder. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Mitigation to reduce second-degree murder to voluntary manslaughter may arise when excessive force is used in self-defense or in defense of another, where defendant has an actual if erroneous belief that amount of force used was necessary to preserve endangered life. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant in homicide case is not precluded from asserting imperfect self-defense even if defendant placed himself in position likely to provoke the trouble. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

Defendant must have honestly and reasonably believed that he was in imminent danger of death or serious bodily harm in light of surrounding circumstances to be entitled to self-defense instruction in homicide prosecution. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

To invoke legitimate claim of self-defense, defendant must satisfy the following conditions: there was actual or apparent threat; threat was unlawful and immediate; defendant honestly and reasonably believed that he was

in imminent danger of death or serious bodily harm; and defendant's response was necessary to save himself from danger. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Defendant cannot successfully claim self-defense when he left apparently safe haven to arm himself and return to the scene. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Defendant cannot raise legitimate self-defense claim when he went out of his way to look for trouble. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

— **Vehicular homicide, nature and elements of offenses.**

Negligent homicide statute was unambiguously designed to protect individual victims; gravamen of crime is not act of operating motor vehicle negligently, but rather, killing of human being. D.C. Code § 40-606. *Murray v. United States*, 358 A.2d 314, 1976 D.C. App. LEXIS 282 (1976).

— **Voluntary manslaughter, nature and elements of offenses.**

Voluntary manslaughter is the intentional killing of another, but under circumstances in which existence of malice is somehow mitigated as, for example, by heat of passion or mistaken belief that self-defense is justified. D.C. Code 1981, § 22-2405. *Reed v. United States*, 584 A.2d 585, 1990 D.C. App. LEXIS 328 (1990).

Specific intent to kill is not a prerequisite to voluntary manslaughter conviction; nevertheless, voluntary manslaughter frequently involves a killing accomplished with specific intent, accompanied by adequate provocation, justification or excuse. D.C. Code 1981, § 22-2405. *Logan v. United States*, 483 A.2d 664, 1984 D.C. App. LEXIS 531 (1984).

Elements of voluntary manslaughter are an unlawful killing of a human being with malice which has been mitigated by presence of circumstances judicially recognized as reducing the degree of criminality. D.C. Code § 22-2405. *United States v. Bradford*, 344 A.2d 208, 1975 D.C. App. LEXIS 236 (1975).

Persons liable.

Government need not prove identity of principal to support conviction for aiding and abetting in voluntary manslaughter. D.C. Code 1981, § 22-2405. *Hammon v. United States*, 695 A.2d 97, 1997 D.C. App. LEXIS 95 (1997).

Defendant's conviction as an aider and abettor of voluntary manslaughter while armed was proper even though codefendant was convicted of second-degree murder in that voluntary manslaughter while armed is lesser included offense within second-degree murder while armed and jury necessarily found codefendant's conduct included voluntary manslaughter

while armed. D.C. Code §§ 22-2405, 22-3202. *Branch v. United States*, 382 A.2d 1033, 1978 D.C. App. LEXIS 423 (1978).

Presumptions and burden of proof.

In prosecution for second-degree murder and manslaughter, government is not required to disprove provocation in its case in chief, unless its own evidence would support a finding of adequate provocation and, if defense introduces some evidence of provocation, government will have an opportunity to rebut. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Where defendant asserts a defense of self-defense, if there is sufficient evidence to justify a self-defense instruction, the burden is on the government to disprove self-defense, by meeting its burden of proof negating defendant's subjective actual belief or objective reasonableness. *Rorie v. United States*, 882 A.2d 763, 2005 D.C. App. LEXIS 392 (2005).

Once self-defense issue was introduced, Government was required to prove beyond reasonable doubt that defendant had not acted in self-defense. *Allen v. United States*, 603 A.2d 1219, 1992 D.C. App. LEXIS 58 (1992), writ of certiorari denied by 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916, 1992 U.S. LEXIS 4713, 60 U.S.L.W. 3879 (1992).

The element of malice required to prove second-degree murder and manslaughter may be established by showing that the accused had: (1) a specific intent to kill; (2) a specific intent to inflict serious bodily injury; or (3) acted in conscious disregard of an extreme risk of death or serious bodily injury to the decedent. *Williams v. United States*, 858 A.2d 984, 2004 D.C. App. LEXIS 451 (2004), writ of certiorari denied by 545 U.S. 1122, 125 S. Ct. 2924, 162 L. Ed. 2d 308, 2005 U.S. LEXIS 4787, 73 U.S.L.W. 3719 (2005).

Questions of law and fact.

Evidence generated jury question whether conduct of homicide defendant, who engaged in exchange of verbal aspersions on discovering victim attempting to remove windshield wipers from defendant's inoperative automobile while it was parked in alley behind defendant's house, who reentered house and immediately appeared with pistol, which he loaded in yard, and who walked to rear gate and, while displaying pistol, dared victim to come in and threatened to kill victim if he did, despite fact that victim had made preparations to depart, and who assertedly intended only to scare victim when he discharged weapon as victim came at him with lug wrench, was such an invitation to provocation of encounter as to overcome claim of self-defense. *United States v. Peterson*, 483

F.2d 1222, 1973 U.S. App. LEXIS 9082 (C.A.D.C. 1973), writ of certiorari denied by 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244, 1973 U.S. LEXIS 1290 (1973).

Generally, whether defendant lost right to claim self-defense in homicide case by acting as aggressor is for jury. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

When self-defense claim is raised, trial judge must first decide, as matter of law, if evidence in record supports defendant's theory of self-defense. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

Review.

— Determination and disposition, review.

Where prisoner's sentence for aggravated assault and for manslaughter growing out of same act was vacated and case remanded for resentencing on manslaughter only, district court on remand might, in its discretion, impose any sentence within statutory maximum of 15 years, to be computed from date when prisoner was first sentenced for assault with a dangerous weapon. D.C. Code 1961, § 22-2405; Fed. Rules Crim. Proc. rule 35, 18 U.S.C. *Davenport v. United States*, 353 F.2d 882, 1965 U.S. App. LEXIS 4448 (C.A.D.C. 1965).

Trial judge's comments, prior to imposing maximum possible sentence for armed voluntary manslaughter, regarding the pain that his grandfather's murder had caused his mother and the fact that nobody had been punished because the "life of a black man was thought to be not worth anything," created an appearance of bias sufficient to require judge's recusal at sentencing. *Gibson v. United States*, 792 A.2d 1059, 2002 D.C. App. LEXIS 46 (2002), writ of certiorari denied by 536 U.S. 972, 122 S. Ct. 2692, 153 L. Ed. 2d 861, 2002 U.S. LEXIS 5137, 70 U.S.L.W. 3799 (2002).

Trial judge's reference to homicide statistics among young black males, at time of imposing maximum possible sentence for armed voluntary manslaughter involving black male victim, did not create an appearance of bias so as to require judge's recusal, where that reference was made primarily in response to defense counsel's request for a probationary sentence. *Gibson v. United States*, 792 A.2d 1059, 2002 D.C. App. LEXIS 46 (2002), writ of certiorari denied by 536 U.S. 972, 122 S. Ct. 2692, 153 L. Ed. 2d 861, 2002 U.S. LEXIS 5137, 70 U.S.L.W. 3799 (2002).

— Harmless or reversible error, review.

Failure in second-degree murder prosecution to strike victim's mother's testimony that upon her becoming angry with defendant for beating victim "[defendant] strangled me and he slapped me and about that time I was pregnant with his child," or to declare a mistrial sua

sponte because of such testimony was not plain error. D.C. Code §§ 22-2403, 22-2405. *United States v. Thomas*, 459 F.2d 1172, 1972 U.S. App. LEXIS 11077 (C.A.D.C. 1972).

Trial court's error in not allowing testimony from defense witness that shortly after shooting occurred, defendant told witness that someone tried to rob him, was not harmless in murder trial; defendant's defense was that he shot victim in self-defense, and to support such theory, defendant sought to show that victim and another man tried to rob him in the alley at gunpoint, and that shortly after the incident he told this to two witnesses. *Brisbon v. United States*, 894 A.2d 1121, 2006 D.C. App. LEXIS 144 (2006).

Even assuming that trial court abused its discretion in refusing to allow defense counsel to read to jury from firearms treatise on subject of stippling, any error in producing additional evidence of the absence of stippling was harmless, in prosecution for involuntary manslaughter while armed and other offenses; both forensic pathology expert and firearms expert testified that absence of stippling on victim's body could be attributable not only to distance, but also to other factors, defendant admitted that he fired his weapon, forensic and ballistic studies indicated that trajectory would have been consistent with his position in car, bullet at issue was described by experts as having a "tight spin," meaning that it did not hit an intervening target, and, thus, additional evidence about stippling that defendant sought to offer was unlikely to influence outcome of trial. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS 259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct. 1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Any error of the trial court in not taking corrective action with respect to prosecutor's comments during closing argument calling jury's attention to defendant's actions that placed witness and her infant son in harm's way was harmless, in prosecution for involuntary manslaughter while armed and other offenses; comments tended to arouse passions of jury, but they were brief, viewed in context, reference to witness' apartment was fleeting, even if an unnecessary, effort to explain concept of transferred intent, and government's case against defendant was strong. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS 259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct. 1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Trial court's refusal to admit evidence that victim had a folded pocketknife on his person at time of shooting to show that defendant had reasonable fear of victim did not constitute plain error in murder trial; no evidence existed

that victim had armed himself with the knife for use of it as a weapon, and thus it could not have been obvious to trial judge that the probative value of the knife to corroborate defendant's fear that victim was armed outweighed the risk of unfair prejudice from the jury learning about an unopened knife in the victim's possession, and defendant had other means at his disposal to confirm his belief that victim, as a day laborer, routinely carried knives or cutting instruments. *Williams v. United States*, 877 A.2d 125, 2005 D.C. App. LEXIS 322 (2005).

Even assuming two photographs of dead victim, which had not been admitted into evidence, reached the jury room, they did not substantially sway jury's verdict; photographs were consistent with defendant's self-defense claim, jury acquitted defendant of first-degree murder and second-degree murder and instead convicted him of voluntary manslaughter, photographs were cumulative of other evidence regarding bullet's path of travel through victim's head, jury had already heard gruesome evidence of victim's death, and evidence supporting voluntary manslaughter conviction was strong. *Edwards v. United States*, 785 A.2d 292, 2001 D.C. App. LEXIS 241 (2001).

Even assuming the prosecutor improperly commented during opening statement that the testimony by two defendants could be used as evidence against all four defendants, in joint trial for voluntary manslaughter, defendant did not suffer substantial prejudice, so as to warrant reversal, where during jury selection the court explained that evidence against one defendant could not be used against another, the court explained in its preliminary instructions that opening statements were not evidence, the trial judge offered three separate curative instructions, and the evidence against the defendant was very strong. D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

Any error was harmless in introducing redacted statements from non-testifying codefendants in prosecution for voluntary manslaughter, where there was overwhelming independent evidence of defendant's guilt. D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

Defendant was not prejudiced in presenting his theory of self-defense that homicide victim was first aggressor based on trial court's decision precluding defendant from presenting additional evidence of violent character of assault victim who was also present in room when defendant and friend attempted to sell victims soap rather than cocaine; there could be no legal imputation of assault victim's intent to homicide victim because, although victims may have been cohorts, they were victims, not par-

ties charged as aiders and abettors. D.C. Code 1981, §§ 22-502, 22-2405, 22-3202. *Edwards v. United States*, 721 A.2d 938, 1998 D.C. App. LEXIS 223 (1998).

Erroneous admission of redirect testimony by witness in prosecution for assault with dangerous weapon and involuntary manslaughter while armed, coupled with superior court's failure to censure prosecutor's closing arguments, all of which related to assault suffered by witness approximately six weeks before trial, did not constitute harmless error. *Carpenter v. United States*, 635 A.2d 1289, 1993 D.C. App. LEXIS 326 (1993).

In prosecution for manslaughter while armed in which defendant claimed self-defense, it was harmless error to refuse to permit proffered impeachment and extrinsic evidence of government witness' prior inconsistent statement of victim's purpose in entering apartment in which he was killed; any impeachment discrediting witness' "benign visitor" testimony, while reinforcing defendant's statements, was only marginally relevant to right of self-defense later, when defendant choked victim over substantial period of time, during which period defendant was clearly in control of situation and appeared not to be in imminent danger. D.C. Code 1981, §§ 22-2405, 22-3202. *Gray v. United States*, 589 A.2d 912, 1991 D.C. App. LEXIS 80 (1991).

Admission of improper evidence regarding defendant's personal habits and character warranted reversal of his conviction of manslaughter while armed, in that it could not be said with fair assurance that judgment was not substantially swayed by admission of evidence, issue affected by error, the determination of who had been the aggressor, was the central issue of case, and trial court took no steps to mitigate effects of its error such as instructing jury to disregard evidence that had been improperly admitted. *Burrell v. United States*, 455 A.2d 1373, 1983 D.C. App. LEXIS 321 (1983).

It was not error, in prosecution for second-degree murder, to admit hearsay testimony recounting earlier statements by decedent that she intended to leave defendant, with whom she had been living, as he fought with her and abused her, where issue was what caused fatal fall down steps as it was either an accident or was caused by defendant, who was standing at head of the steps, instruction limiting such evidence to state of mind exception was given and Government's evidence included three admissions by defendant that he caused the fall; in any event, any prejudice was minimal in view of voluntary manslaughter conviction. D.C. Code §§ 22-2403, 22-2405. *Jones v. United States*, 398 A.2d 11, 1979 D.C. App. LEXIS 331 (1979).

Questioning by prosecutor, who asked defendant whether defense counsel's opening statement concerning cause of automobile accident had been inaccurate but did not go further into defense counsel's opening statement, did not constitute prosecutorial misconduct requiring reversal of involuntary manslaughter conviction. D.C. Code § 22-2405. *Hawkins v. United States*, 395 A.2d 45, 1978 D.C. App. LEXIS 357 (1978).

Prejudice in admission of evidence indicating that defendant was not licensed driver outweighed probative value in prosecution for manslaughter; however, error was harmless in view of overwhelming nature of Government's case which demonstrated that defendant, while drinking, drove at highly unreasonable speeds through downtown streets after dark despite a warning to slow down, lost control of his car, and then stopped suddenly and skidded with such force as to drive a parked vehicle over the curb and fatally injure a child. D.C. Code § 22-2405. *Hawkins v. United States*, 395 A.2d 45, 1978 D.C. App. LEXIS 357 (1978).

— In general.

Because the decision whether a statement is admissible under spontaneous utterance exception to hearsay rule depends on the particular facts of each case and is thus a discretionary matter, an appellate court reviews such matters only for abuse of discretion. *Brisbon v. United States*, 894 A.2d 1121, 2006 D.C. App. LEXIS 144 (2006).

Court of Appeals would review for plain error issue of whether prosecutor had improperly expressed his personal opinion by using the word "guarantee" during portion of his closing argument that focused on conflicting versions of whether vehicle's rearview mirror had been moved, as defendant did not raise any objection at trial to words prosecutor used, and objection he did raise focused specifically upon argument related to position of rear view mirror, in prosecution for involuntary manslaughter while armed and other offenses. *Washington v. United States*, 884 A.2d 1080, 2005 D.C. App. LEXIS 259 (2005), writ of certiorari denied by 547 U.S. 1013, 126 S. Ct. 1490, 164 L. Ed. 2d 265, 2006 U.S. LEXIS 2180, 74 U.S.L.W. 3504 (2006).

Murder defendant waived for appellate review any error that resulted from repeated references made during trial by prosecutor, who had won exclusion of fact that victim had pocketknife on him at time of shooting, that victim was unarmed, where defendant objected to only a single reference to victim being unarmed and did so without specifying a reason for the objection, asked for no curative measures designed to neutralize any false impressions the jury may have acquired from the remarks, and did not argue the references as a separate ground

for reversal on appeal. *Williams v. United States*, 877 A.2d 125, 2005 D.C. App. LEXIS 322 (2005).

Prosecutor's comment during opening statement that the testimony of two defendants could be used as evidence against all four defendants, in joint trial for voluntary manslaughter, would be assumed to be improper, where the prosecutor was reprimanded by the trial judge for his comments. D.C. Code 1981, §§ 22-2405, 22-3202. *Plater v. United States*, 745 A.2d 953, 2000 D.C. App. LEXIS 38 (2000).

Trial court's written pretrial order denying government's request to introduce Drew evidence in prosecution for second-degree murder and voluntary manslaughter was appealable, though judge indicated at oral ruling that her ruling was only advisory and that trial judge would have freedom to reconsider ruling in context of trial. D.C. Code 1981, §§ 22-2403, 22-2405, 22-3202, 23-104(a)(1). *United States v. Williams*, 697 A.2d 1244, 1997 D.C. App. LEXIS 165 (1997).

Court of appeals examines evidence in light most favorable to defendant when reviewing denial of requested defense instruction. *Swann v. United States*, 648 A.2d 928, 1994 D.C. App. LEXIS 182 (1994).

In determining whether self-defense instruction was properly denied, evidence must be reviewed in light most favorable to defendant. *Brown v. United States*, 619 A.2d 1180, 1992 D.C. App. LEXIS 354 (1992).

— Presentation and reservation of grounds for review.

Defendant would not be heard on appeal to complain of deficiencies in instructions given by trial judge in manslaughter prosecution where none of alleged shortcomings were brought to attention of trial court by appropriate objection or request. D.C. Code §§ 22-2405, 22-3204; Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *United States v. Carter*, 420 F.2d 150, 1969 U.S. App. LEXIS 10441 (C.A.D.C. 1969), writ of certiorari denied by 397 U.S. 1017, 90 S. Ct. 1253, 25 L. Ed. 2d 432, 1970 U.S. LEXIS 2440 (1970).

Murder defendant failed to preserve for appeal claim that trial court violated his constitutional rights by ruling that he could not explain his failure to report the crime and inconsistent statements to the police without "opening the door" to evidence of prior police contacts, where trial court never made a final ruling on the admissibility of prior police contacts with defendant. *Brisbon v. United States*, 894 A.2d 1121, 2006 D.C. App. LEXIS 144 (2006).

Murder defendant did not preserve for appellate review his claim that trial court erred by refusing to admit evidence that victim had a folded pocketknife on his person at the time of

the shooting to show that defendant reasonable fear of victim, where at time defendant sought admission of such evidence, no evidence had been presented that suggested that defendant believed victim had a knife on his person, defendant did not proffer that he would adduce such evidence later, and defendant did not seek reconsideration of ruling excluding the knife. *Williams v. United States*, 877 A.2d 125, 2005 D.C. App. LEXIS 322 (2005).

Timely exceptions must be made to final jury instructions in order to provide the trial court with an opportunity to correct errors and omissions and, in the absence of such exceptions, the defendant bears a heavy burden when, on appeal, he challenges the instructions in which he acquiesced at trial; reversal is appropriate only where there is plain error affecting substantial rights. D.C. Code 1981, § 22-2405; Criminal Rule 30. *Morris v. United States*, 469 A.2d 432, 1983 D.C. App. LEXIS 520 (1983).

Where defense counsel did not object to trial judge's decision to instruct only on involuntary manslaughter and not on voluntary manslaughter, and where there was no plain error, and defendant could not on appeal question instructions given. *Carmichael v. United States*, 363 A.2d 302, 1976 D.C. App. LEXIS 356 (1976).

Verdict.

Written statement, in which juror alleged that his failure during polling of jurors to dissent from or object to guilty verdict on voluntary manslaughter charge was influenced by the "intimidating presence throughout trial" of a certain individual, did not entitle defendant to evidentiary hearing on motion to set aside verdict, even if statement was true. *Gibson v. United States*, 792 A.2d 1059, 2002 D.C. App. LEXIS 46 (2002), writ of certiorari denied by 536 U.S. 972, 122 S. Ct. 2692, 153 L. Ed. 2d 861, 2002 U.S. LEXIS 5137, 70 U.S.L.W. 3799 (2002).

Medical examiner's testimony that death was caused either by shotgun or by strangulation did not allow jury verdict that was not unanimous; in view of verdict finding defendant guilty of manslaughter while armed, and defendant's concession that he shot victim, there was no possibility that some members of jury would have found that defendant had strangled victim without also agreeing that he had shot victim. D.C. Code 1981, §§ 22-2405, 22-3202. *Smith v. United States*, 554 A.2d 1155, 1989 D.C. App. LEXIS 33 (1989).

Verdict finding defendant, who allegedly shot victim with pistol, guilty of manslaughter and not guilty of carrying pistol without license was not fatally inconsistent and did not require reversal. D.C. Code §§ 22-2405, 22-3204.

Steadman v. United States, 358 A.2d 329, 1976 D.C. App. LEXIS 276 (1976).

Weight and sufficiency of evidence.

Evidence, including testimony of defendant that during a heated argument with her brother she went to kitchen for a knife in order to "scare him" and that she struck her brother with her fist as she was holding knife in her hand, was sufficient to support conviction of manslaughter. *United States v. Dent*, 477 F.2d 447, 1973 U.S. App. LEXIS 10804 (C.A.D.C. 1973).

When defendant is charged with second-degree murder and manslaughter and defendant, or government has introduced evidence of provocation, government must prove absence or inadequacy of provocation beyond a reasonable doubt and it should be explained to jury that provocation is not element of manslaughter, whether voluntary or involuntary, but a defense to second-degree murder. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Evidence justified finding of malice warranting conviction of second-degree murder rather than manslaughter, in case arising out of shooting following one victim's racial remark, in view of testimony of surviving victims that all victims were standing motionless staring at codefendant's gun when defendant came in, drew his gun, and began firing. *United States v. Alexander*, 471 F.2d 923, 1972 U.S. App. LEXIS 9972 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494, 1972 U.S. LEXIS 457 (1972).

Inebriant atmosphere, heated arguments, and bantering back and forth clearly established sufficient evidence for jury to be able to find defendant, who fired fatal shot in attempting to break up argument between two others, guilty of manslaughter. D.C. Code § 22-2405. *United States v. Dixon*, 419 F.2d 288, 1969 U.S. App. LEXIS 13086 (C.A.D.C. 1969).

Evidence supported finding that defendant accused of manslaughter and assault with deadly weapon had not acted in self-defense. D.C. Code 1961, §§ 22-502, 22-2405. *Rowe v. United States*, 370 F.2d 240, 1966 U.S. App. LEXIS 4197 (C.A.D.C. 1966).

Evidence held to sustain finding of criminal carelessness of automobile owner. *Story v. U.S.*, 16 F.2d 342, 1926 U.S. App. LEXIS 3842 (1926).

Evidence was sufficient to establish that defendant shot and killed the victim, in trial for first-degree murder while armed, possession of a firearm during a crime of violence and carrying a pistol without a license; passenger in car in which the victim was shot identified defendant as the shooter without any hesitation or

equivocation, close friend of defendant corroborated in-court identification of defendant as the shooter, defendant fled the scene of the shooting, and in cell phone calls he made from police interview room defendant stated that the police knew everything and that a witness had snitched. *Napper v. United States*, 22 A.3d 758, 2011 D.C. App. LEXIS 294 (2011), writ of certiorari denied by 132 S. Ct. 435, 181 L. Ed. 2d 283, 2011 U.S. LEXIS 7156, 80 U.S.L.W. 3218 (U.S. 2011).

Conviction for armed voluntary manslaughter was supported by evidence that two groups who had been escorted out of night club by security officers after a brawl began fighting again outside, that defendant chased some of the men involved in fight, including victim, down the street, that defendant stabbed victim in back as victim attempted to hurdle car and then discarded knife, which was later found to have his fingerprint, and that victim eventually died from loss of blood as result of stabbing. *Gibson v. United States*, 792 A.2d 1059, 2002 D.C. App. LEXIS 46 (2002), writ of certiorari denied by 536 U.S. 972, 122 S. Ct. 2692, 153 L. Ed. 2d 861, 2002 U.S. LEXIS 5137, 70 U.S.L.W. 3799 (2002).

Evidence supported defendants' convictions for aiding and abetting in voluntary manslaughter, despite claimed lack of proof that either defendant was proximate cause of victim's death or that there was principal whom either defendant aided and abetted; government's expert testified that victim died from head trauma consistent with either blow to

head or fall on concrete stairs, either of which was consistent with government's theory and would be direct, foreseeable result of defendants' fight with victim, and testimony of juvenile established juvenile as principal, even assuming that proof of principal's identity was required. D.C. Code 1981, § 22-2405. *Hammon v. United States*, 695 A.2d 97, 1997 D.C. App. LEXIS 95 (1997).

In prosecution wherein defendants were convicted of involuntary manslaughter of their infant son, evidence permitted jury to find beyond reasonable doubt that death was proximately caused by lack of food and medical care. D.C. Code §§ 22-902, 22-2405. *Faunteroy v. United States*, 413 A.2d 1294, 1980 D.C. App. LEXIS 275 (1980).

Evidence was sufficient to sustain conviction of manslaughter. D.C. Code § 22-2405. *Sellers v. United States*, 401 A.2d 974, 1979 D.C. App. LEXIS 357 (1979).

In prosecution for voluntary manslaughter while armed, there was sufficient basis for jury to find beyond a reasonable doubt that (1) offense was committed by someone, (2) defendant participated or assisted in its commission, and (3) she did so with guilty knowledge. D.C. Code §§ 22-2405, 22-3202. *Branch v. United States*, 382 A.2d 1033, 1978 D.C. App. LEXIS 423 (1978).

Eyewitness testimony of three persons that defendant had shot victim was sufficient to support defendant's conviction for manslaughter. D.C. Code § 22-2405. *Steadman v. United States*, 358 A.2d 329, 1976 D.C. App. LEXIS 276 (1976).

§ 22-2106. Murder of law enforcement officer.

(a) Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person.

(b) For the purposes of subsection (a) of this section, the term:

(1) "Law enforcement officer" means:

(A) A sworn member of the Metropolitan Police Department;

(B) A sworn member of the District of Columbia Protective Services;

(C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections;

(D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency;

(E) Metro Transit police officers; and

(F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.

(2) “Public safety employee” means:

(A) A District of Columbia firefighter, emergency medical technician/paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and

(B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.

(Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802a, as added May 23, 1995, D.C. Law 10-256, § 2(d), 42 DCR 20; Oct. 17, 2002, D.C. Law 14-194, § 154, 49 DCR 5306.)

Prior Codifications. — 1981 Ed., § 22-2406.

Effect of amendments. — D.C. Law 14-194 rewrote the section.

Legislative history of Law 10-256. — For

legislative history of D.C. Law 10-256, see Historical and Statutory Notes following § 22-2104.

Legislative history of Law 14-194. — For Law 14-194, see notes following § 22-1319.

CASE NOTES

ANALYSIS

Presumptions and burden of proof.
Validity.

Presumptions and burden of proof.

Murder of a law enforcement officer is not a strict liability offense; the government must prove, and the jury must find beyond a reasonable doubt, that the defendant either knew, or had reason to know, that his victim was a law enforcement officer. *Dean v. United States*, 938 A.2d 751, 2007 D.C. App. LEXIS 701 (2007), writ of certiorari denied by 557 U.S. 938, 129 S. Ct. 2862, 174 L. Ed. 2d 581, 2009 U.S. LEXIS 4875, 77 U.S.L.W. 3708 (2009).

Validity.

Mandatory sentence of life imprisonment without the possibility of parole for the murder of a law enforcement officer is not so disproportionate to the offense as to violate the Eighth

Amendment. *Dean v. United States*, 938 A.2d 751, 2007 D.C. App. LEXIS 701 (2007), writ of certiorari denied by 557 U.S. 938, 129 S. Ct. 2862, 174 L. Ed. 2d 581, 2009 U.S. LEXIS 4875, 77 U.S.L.W. 3708 (2009).

Statute providing for mandatory life imprisonment without the possibility of parole for the murder of a law enforcement officer does not offend principles of equal protection; statute does not impinge upon the exercise of a fundamental right, nor is it directed against a suspect class, and it is beyond peradventure that the legislature has a legitimate interest in separately criminalizing the murder of a police officer, and in mandating a harsher sentence for such an act that directly threatens law enforcement. *Dean v. United States*, 938 A.2d 751, 2007 D.C. App. LEXIS 701 (2007), writ of certiorari denied by 557 U.S. 938, 129 S. Ct. 2862, 174 L. Ed. 2d 581, 2009 U.S. LEXIS 4875, 77 U.S.L.W. 3708 (2009).

§ 22-2107. Penalty for solicitation of murder or other crime of violence.

(a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine of \$20,000, or both.

(b) Whoever is guilty of soliciting a crime of violence as defined by § 23-

1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine of \$10,000, or both.

(Mar. 3, 1901, ch. 854, § 802b, as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) addition, see § 209 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 209 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 209 of

Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 209 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CHAPTER 22. OBSCENITY.

Sec.
22-2201. Certain obscene activities and conduct declared unlawful; defini-

tions; penalties; affirmative defenses; exception.

§ 22-2201. Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception.

(a)(1) It shall be unlawful in the District of Columbia for a person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(B) To present, direct, act in, or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance;

(C) To pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale, any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(D) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute or provide any article, thing, or device which is intended for or represented as being for indecent or immoral use;

(E) To create, buy, procure, or possess any matter described in the preceding subparagraphs of this paragraph with intent to disseminate such matter in violation of this subsection;

(F) To advertise or otherwise promote the sale of any matter described in the preceding subparagraphs of this paragraph; or

(G) To advertise or otherwise promote the sale of material represented or held out by such person to be obscene.

(2)(A) For purposes of subparagraph (E) of paragraph (1) of this subsection, the creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies or the possession of more than 3 copies, of obscene, indecent, or filthy material shall be prima facie evidence of an intent to disseminate such material in violation of this subsection.

(B) For purposes of paragraph (1) of this subsection, the term "knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.

(3) When any person is convicted of a violation of this subsection, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of any materials described in paragraph (1) of this subsection, which were named in the charge against such person and

which were found in the possession or under the control of such person at the time of such person's arrest.

(b)(1) It shall be unlawful in the District of Columbia for any person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide to a minor:

(i) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(ii) Any book, magazine, or other printed matter however reproduced or sound recording, which depicts nudity, sexual conduct, or sado-masochistic abuse or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(B) To exhibit to a minor, or to sell or provide to a minor an admission ticket to, or pass to, or to admit a minor to, premises whereon there is exhibited, a motion picture, show, or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

(2) For purposes of paragraph (1) of this subsection:

(A) The term "minor" means any person under the age of 17 years.

(B) The term "nudity" includes the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(C) The term "sexual conduct" includes acts of sodomy, masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

(D) The term "sexual excitement" includes the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(E) The term "sado-masochistic abuse" includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(F) The term "knowingly" means having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both of:

(i) The character and content of any material described in paragraph

(1) of this subsection which is reasonably susceptible of examination by the defendant; and

(ii) The age of the minor.

(c) It shall be an affirmative defense to a charge of violating subsection (a) or (b) of this section that the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material.

(d) Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act.

(e) A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than \$1,000 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than \$1,000 nor more than \$5,000 or imprisoned not less than 6 months or more than 3 years, or both.

(Mar. 3, 1901, 31 Stat. 1332, ch. 854, § 872; Dec. 27, 1967, 81 Stat. 738, Pub. L. 90-226, title VI, § 606; May 21, 1994, D.C. Law 10-119, § 2(p), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(m), 41 DCR 2608.)

Cross references. — Age of majority, see note following § 21-101.

Cable television programming, application of obscenity laws, see § 34-1247.

Lewd, indecent or obscene acts, see § 22-1312.

Prior Codifications. — 1981 Ed., § 22-2001.

1973 Ed., § 22-2001.

Emergency legislation. — For temporary amendment of section, see § 105(m) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to

both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Delegation of Authority. — Delegation of authority under D.C. Law 5-88, see Mayor’s Order 85-28, March 11, 1985.

Editor’s notes. — Video arcade regulations amended: Section 2 of D.C. Law 5-88 amends the regulations governing video arcades and mechanical amusement machines which prohibit the use or display of machines displaying specified sexual activities or anatomical areas on premises open to persons under 18.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Arrest.

Constitutional rights.

—Due process of law, constitutional rights.

—Equal protection of laws, constitutional rights.

—Freedom of speech and of the press, constitutional rights.

—In general.

—Retrospective and ex post facto laws, constitutional rights.

Construction and application.

Defenses.

Indictment and information.

Instructions.

Nature and elements of offenses.

Persons liable.

Presumptions and burden of proof.

Punishment and sanctions.

Questions of law and fact.

Review.

—In general.

—Record, review.

—Scope of review.

Searches and seizures.

Standard of obscenity.

Validity.

Weight and sufficiency of evidence.

Admissibility of evidence.

District court in obscenity cases has wide discretion in its determination to admit and exclude evidence, and this is particularly true in case of expert testimony; although Government is not required to introduce expert testimony on community standards, defense should be free to introduce appropriate expert testimony, and summary exclusion of all testimony on community standards would thus be inappropriate. 18 U.S.C. §§ 1462, 1465; D.C. Code § 22-2001. *United States v. Sherpax, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

Refusal to permit jury to compare 26 magazines, which had been previously declared nonobscene with publications at issue, for purpose of determining whether contemporary community standards were offended, was not abuse of discretion where magazine sought to be compared related only to "singles" and publications at issue contained pictures of two or more models. D.C. Code § 22-2001. *Huffman v. United States*, 470 F.2d 386, 1971 U.S. App. LEXIS 7721 (C.A.D.C. 1971).

Once the judge declines to dismiss obscenity prosecution on legal grounds, it becomes a matter of sound discretion, that takes into account relatedness and remoteness, whether it was more likely to be helpful or confusing for the jury to make comparisons with the publications passed on in previous cases. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Huffman v. United States*, 470 F.2d 386, 1971 U.S. App. LEXIS 7721 (C.A.D.C. 1971).

Offer of evidence that prior to time they stocked seized items book dealers had advice of counsel that items were not obscene was properly excluded in obscenity prosecution under District of Columbia obscenity statute, since statute only requires awareness of the contents of those materials, and does not require that a defendant have legal knowledge that the magazine contents permit an obscenity finding; inference of awareness of contents was not negated by lawyer's advice. D.C. Code § 22-2001. *Huffman v. United States*, 470 F.2d 386, 1971 U.S. App. LEXIS 7721 (C.A.D.C. 1971).

Photographs and films depicting nude males and females engaged in sexual intercourse, fellatio, cunnilingus, and masturbation constituted hard-core pornography and as such government was not required to produce expert testimony about appeal to prurient interest and contemporary community standards, in prosecution for violation of statute making it crime to knowingly sell or possess with intent to sell obscene material. D.C. Code § 22-2001(a)(1)(A, E); U.S. Const. Amend. 1. *United States v. Gower*, 316 F. Supp. 1390, 1970 U.S. Dist. LEXIS 10219 (1970), modified by 503 F.2d 189, 164 U.S. App. D.C. 98, 1974 U.S. App. LEXIS 7485 (1974).

In prosecution for knowingly exhibiting an obscene motion picture, the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman nor would the proffer of the witness have aided the jury's understanding of the fact issue, and since the witness, while professing experience with and exposure to sexually explicit films, failed to exhibit "sufficient skill, knowledge, or expertise" in the area of contemporary community standards relating to obscenity to make it appear that his opinion or inference would properly aid the trier of fact in its search for the truth. D.C. Code § 22-2001. *Fennekohl v. United States*, 354 A.2d 238, 1976 D.C. App. LEXIS 488 (1976).

Exhibits which consisted of magazines containing photographs of nudes and which had been declared nonobscene in per curiam opinions by United States Supreme Court were not admissible as proof of contemporary community standards, even if they were sold all over United States, where tendered exhibits were not comparable to material possessed and sold by defendants. D.C. Code § 22-2001. *Huffman v. United States*, 259 A.2d 342, 1969 D.C. App. LEXIS 348 (App. 1969), affirmed by 470 F.2d 386, 152 U.S. App. D.C. 238, 1971 U.S. App. LEXIS 7721 (1971).

Where statute required proof that defendants had knowledge of character and contents of material, which constituted sufficient proof of scienter in prosecution for knowingly selling certain obscene, indecent and filthy article, trial judge properly excluded testimony that defendant had received advice of competent counsel that material could be legally sold. D.C. Code § 22-2001. *Huffman v. United States*, 259 A.2d 342, 1969 D.C. App. LEXIS 348 (App. 1969), affirmed by 470 F.2d 386, 152 U.S. App. D.C. 238, 1971 U.S. App. LEXIS 7721 (1971).

Where there is ruling of obscenity per se, defense is entitled to offer evidence of national community standards to prove that material or performance is not obscene; such proof, if established, would be good defense. D.C. Code § 22-2001. *Huffman v. United States*, 259 A.2d 342,

1969 D.C. App. LEXIS 348 (App. 1969), affirmed by 470 F.2d 386, 152 U.S. App. D.C. 238, 1971 U.S. App. LEXIS 7721 (1971).

Arrest.

Ex parte hearing on application for arrest warrant which is supported by affidavit describing in detail contents of purchased material, with or without review of that material by court suffices, on finding of probable cause, to authorize issuance of arrest warrant. D.C. Code § 22-2001(a)(1)(A, B, D, E); U.S. Const. Amend. 1. *United States v. Green*, 284 A.2d 879, 1971 D.C. App. LEXIS 251 (1971).

Constitutional rights.

— Due process of law, constitutional rights.

Where, at time defendants distributed and exhibited film, they could expect not to be convicted of obscenity unless film was "utterly without redeeming social value," due process prohibited their conviction under subsequent standard, adopted by judicial decision before defendants' trial, under which same activities would be criminal if film merely "lacked serious literary, artistic, political, or scientific value." 18 U.S.C. §§ 371, 1462, 1465; D.C. Code § 22-2001; U.S. Const. art. 1, § 10. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

The statute prohibiting possessing for sale and selling obscene, lewd and indecent pictures, construed as prohibiting sale of pictures that go beyond extremes of tolerance in particular community, does not violate the First and Fifth amendments. D.C. Code 1940, § 22-2001; U.S. Const. Amends. 1, 5. *Benjamin v. U.S.*, 74 A.2d 64, 1950 D.C. App. LEXIS 152 (Cr.App. 1950).

— Equal protection of laws, constitutional rights.

Statute making it unlawful for person knowingly to sell, deliver, distribute or provide any obscene, indecent, or filthy writing, picture, sound recording or other article or representation or to create, buy, procure or possess any such matter with intent to disseminate it in violation of statute is not so unconstitutionally vague as to deprive a defendant of equal protection or due process. D.C. Code § 22-2001(a)(1)(A, E); U.S. Const. Amend. 14. *United States v. Gower*, 316 F. Supp. 1390, 1970 U.S. Dist. LEXIS 10219 (1970), modified by 503 F.2d 189, 164 U.S. App. D.C. 98, 1974 U.S. App. LEXIS 7485 (1974).

— Freedom of speech and of the press, constitutional rights.

Dance performed on premises of retail liquor licensee by dancer who wore bikini-type panties and who wrapped her legs around shoulders of

male customers who were leaning over rim of stage did not overstep constitutional protections and was not ground for suspension of liquor license. U.S. Const. Amend. 1; D.C. Code §§ 22-2001(a)(1)(B), 22-2701, 25-118. 4934, Inc. v. Washington, 375 A.2d 20, 1977 D.C. App. LEXIS 453 (1977).

In absence of prior adversary determination of obscenity, massive confiscatory seizures of alleged obscene publications or motion picture films run afoul of First Amendment by threatening abridgement of public's right to free circulation of nonobscene publications. D.C. Code § 22-2001(a)(1)(A, B, D, E); U.S. Const. Amend. 1. *United States v. Green*, 284 A.2d 879, 1971 D.C. App. LEXIS 251 (1971).

— In general.

Where judgment in defendants' case had not become final, any constitutional principle enunciated in *Miller* decision which would serve to benefit defendants must be applied in their case. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Huffman v. United States*, 502 F.2d 419, 1974 U.S. App. LEXIS 7899 (C.A.D.C. 1974).

Magazines, in which ladies were shown nude except for stockings, which contained photographs of one lady either kissing or about to kiss the pubic area of another, depicting ladies embracing while one's breast snuggles into the other's body, depicting ladies lying together on bed or a couch embracing and occasionally fondling each other's breasts and other similar poses, were not constitutionally protected in that they represented explicit portrayals of lesbian sexual activity, either ongoing or imminent, notwithstanding statement that they were meant solely for serious artists. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Huffman v. United States*, 470 F.2d 386, 1971 U.S. App. LEXIS 7721 (C.A.D.C. 1971).

In prosecution for possessing obscene pictures with intent to exhibit them, defendant's right to a public trial was not denied because when the alleged obscene film was shown in court the public, except newspaper reporters, were excluded. 18 U.S.C. § 2421; D.C. Code 1951, § 22-2001. *Lancaster v. U.S.*, 293 F.2d 519, 1961 U.S. App. LEXIS 4200 (C.A.D.C. 1961).

— Retrospective and ex post facto laws, constitutional rights.

Constitutional prohibition on ex post facto laws did not directly prohibit defendants' conviction on charges of obscenity under new test of obscenity, adopted following their activities for which they were charged, though new test was an extension of area of activity which could potentially result in criminal liability. 18 U.S.C. §§ 371, 1462, 1465; D.C. Code § 22-2001; U.S. Const. art. 1, § 10. *United States v. Sherpix*,

Inc., 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

Retroactive application of the Miller obscenity guidelines to pre-Miller conduct did not deprive defendants of due process right to notice and did not violate constitutional prohibition against ex post facto laws; latter prohibition does not apply to modification by judicial construction and no due process violation occurred since applying Miller standards to pre-Miller conduct was not an attempt to make criminal conduct which had not previously been thought criminal, purpose of the Miller case was merely to add a clarifying gloss to the statute, and conduct at issue was criminal under pre-Miller standards. D.C. Code § 22-2001(a); U.S. Const. art. 1, § 9, cl. 3; Amends. 1, 5. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Construction and application.

As used in statutory language, the word "obscene" is intended to have a meaning that varies from time to time as general notions of decency in attire and conduct of exhibitions for public entertainment tend to change. D.C. Code § 22-2001. *Hudson v. United States*, 234 A.2d 903, 1967 D.C. App. LEXIS 202 (App. 1967).

Defenses.

Defendant enjoyed no immunity from prosecution for violation of District of Columbia statute outlawing possession of obscene matter with intent to disseminate by virtue of fact that only dissemination planned was a gift of copies of films to another. D.C. Code § 22-2001. *United States v. Pryba*, 502 F.2d 391, 1974 U.S. App. LEXIS 7442 (C.A.D.C. 1974), writ of certiorari denied by 419 U.S. 1127, 95 S. Ct. 815, 42 L. Ed. 2d 828, 1975 U.S. LEXIS 407 (1975).

Defendant, who was manager of theater and who was actually present, knew or had reasonable opportunity to know character and content of performer's act, and had burden under obscenity statute of ascertaining whether performer's performance might have been obscene, and neglect to do so was not adequate defense. D.C. Code § 22-2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

Indictment and information.

Refusal to grant bill of particulars was not abuse of discretion where informations referred with specificity to times and places of performances claimed to violate obscene exhibitions statute, and defendant revealed complete familiarity with acts charged. D.C. Code 1961, § 22-2001. *Yankovitz v. U.S.*, 182 A.2d 889, 1962 D.C. App. LEXIS 367 (Cr.App. 1962).

Defendant could be charged with three offenses of violating obscene exhibitions statute and was not entitled to proceed to trial on but one information, and the three separate infor-

mations were properly combined for trial, where there were three separate shows each involving elements essential to support violation of the statute. D.C. Code 1961, § 22-2001. *Yankovitz v. U.S.*, 182 A.2d 889, 1962 D.C. App. LEXIS 367 (Cr.App. 1962).

Instructions.

In prosecution for distribution and exhibition of allegedly obscene film, repeated recitation of new test of obscenity so diluted test which was in effect at time of activities for which defendants were charged that conviction would be possible even if film was of some slight value, and such error in instructions required reversal of conviction. 18 U.S.C. §§ 371, 1462, 1465; D.C. Code § 22-2001; U.S. Const. art. 1, § 10. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

In view of grave doubt as to whether "lesbian" pictures, which did not show ultimate sexual acts were violative of narrow and specific prohibitions that mark limit of constitutionality, elementary constitutional considerations precluded affirmance of conviction for violating indecent publication statute, where jury was not instructed that it was its task, as surrogate for community, to determine whether there was depiction of sexual conduct to a point of patent offensiveness. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Huffman v. United States*, 502 F.2d 419, 1974 U.S. App. LEXIS 7899 (C.A.D.C. 1974).

Statement in charge to jury that material charged in indictment was, in court's opinion, actually obscene in eyes of law did not require reversal of obscenity conviction, considering whole charge which left issue of obscenity for jury and stated that judge's comments on evidence were not binding on jury. 18 U.S.C. §§ 371, 1461; D.C. Code 1951, § 22-2001. *Heinecke v. U.S.*, 294 F.2d 727, 1961 U.S. App. LEXIS 3817 (C.A.D.C. 1961).

Error, if any, in instructing that president of corporation operating restaurant with stage show consisting of three female impersonators could be convicted of violation of obscene exhibitions statute if he knew or should have known nature and character of the "premises" was harmless where jury was explicitly charged that intent was essential element of the crime. D.C. Code 1961, § 22-2001. *Yankovitz v. U.S.*, 182 A.2d 889, 1962 D.C. App. LEXIS 367 (Cr.App. 1962).

Nature and elements of offenses.

Application of the Roth-Memoirs test following United States Supreme Court's decision in the Miller obscenity case was not improper, on ground that the Supreme Court abandoned such standard in the Miller case, since in Miller the court merely reformulated and clarified a definition of obscenity which had proved diffi-

cult to apply and although court indicated dissatisfaction with the Roth-Memoirs standard because it imposed a greater burden on the regulation of obscene materials than was constitutionally required the court at no point rejected the Roth-Memoirs test as constitutionally infirm or cast doubt on validity of convictions based thereon. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Specific knowledge that matter is obscene is not constitutionally required in order to convict under the obscenity statute; if the defendant has knowledge of the character and contents of the material, the Constitution and statute are satisfied. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Word "knowingly" as defined in obscenity statute to mean having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection of the character and contents of the subject matter was judicially defined as comprising knowledge of both the contents and nature of the character of the matter at issue. D.C. Code § 22-2001(a)(2)(B). *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Statute making it unlawful for a person knowingly to present, direct, act in, or otherwise participate in preparation or presentation of obscene, indecent, or filthy play, dance, motion picture or other performance requires no more than that defendants have sufficient knowledge of performance such that they should have suspected its impropriety and inspected or inquired as to its character and content. D.C. Code § 22-2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

Statute proscribing knowing presentation, direction or participation in presentation or preparation of any obscene, indecent, or filthy play, dance, motion picture or other performance allows defendants to remain ignorant of illegality of performance only at their peril, once they know or have reason to know they might be violating statute. D.C. Code § 22-2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

To be found to be hard-core pornography, material, performances, etc., need not involve depiction of sexual activity. D.C. Code § 22-2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

Where performer knew or should have known that her performance might violate obscenity statute since she was performer, she had enough knowledge about performance to hold her responsible for further inquiry or inspection into act's character and content, and that was all that was needed to satisfy requirement of scienter under statute. D.C. Code § 22-

2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

Female performer's act, which reasonable men could only conclude simulated fellatio and intentional exposure of vaginal area, and which was performed on stage and runway while lying on stage and repeating act to other side of stage while at same time yelling "Let's see it all" was obscene per se. D.C. Code § 22-2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

Persons liable.

Under District of Columbia statute authorizing charging of aiders and abettors as principals, particular defendants who distributed allegedly obscene motion picture film could be convicted of knowingly presenting the film in the District of Columbia where such defendants supplied film to exhibitor therein in return for share of proceeds from the exhibition. D.C. Code §§ 22-105, 22-2001; 18 U.S.C. § 2. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

Interstate shipment of obscene material is a continuing offense, involving both the consignor and his willing consignee, and FBI was at liberty to pursue consignee of films by allowing shipment to be completed. 18 U.S.C. § 1462; D.C. Code § 22-2001. *United States v. Pryba*, 502 F.2d 391, 1974 U.S. App. LEXIS 7442 (C.A.D.C. 1974), writ of certiorari denied by 419 U.S. 1127, 95 S. Ct. 815, 42 L. Ed. 2d 828, 1975 U.S. LEXIS 407 (1975).

Presumptions and burden of proof.

Question of national standards of obscenity is matter of proof at trial. D.C. Code § 22-2001. *Hermann v. United States*, 304 A.2d 22, 1973 D.C. App. LEXIS 266 (1973).

Where Government rested after court viewed allegedly obscene film exhibited by defendants, and expert witness for defense then expressed opinion film did not violate contemporary national community standards, burden of proceeding shifted back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Hermann v. United States*, 304 A.2d 22, 1973 D.C. App. LEXIS 266 (1973).

Where rebutting evidence has been introduced by defendant as to obscenity of films, a ruling by court of obscenity per se does not relieve Government of its burden of going forward nor of its burden of proof beyond a reasonable doubt on all elements of the obscenity test. D.C. Code § 22-2001(a)(1)(A). *Parks v. United States*, 294 A.2d 858, 1972 D.C. App. LEXIS 253 (1972).

For a salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowl-

edge of the contents of the particular film sold. D.C. Code § 22-2001(a)(1)(A), (2)(B), (b)(1)(A, B). *Kramer v. United States*, 293 A.2d 272, 1972 D.C. App. LEXIS 219 (1972).

Statute proscribing knowing sale, delivery, distribution or offer to do same of any obscene, indecent, or filthy writing, picture or article or representation required proof that defendants had knowledge of character and content of material, and that constituted sufficient proof of scienter; if defendants knew what they were doing, their personal belief that they were not violating law was no defense. D.C. Code § 22-2001. *Huffman v. United States*, 259 A.2d 342, 1969 D.C. App. LEXIS 348 (App. 1969), affirmed by 470 F.2d 386, 152 U.S. App. D.C. 238, 1971 U.S. App. LEXIS 7721 (1971).

Punishment and sanctions.

In sentencing defendant for possession and transportation of child pornography, the district court provided sufficient explanation for the imposition of a 40-year term of supervised release as part of the sentence; court explained that conduct underlying defendant's offenses was "of grave concern" because there was very aggressive sexual activity in the images defendant possessed when compared to other images that the court had seen in other cases, and court noted that defendant claimed he had sexual contact with a six-year-old, and noted his apparent willingness to take his conduct beyond looking at images, and court explained that rehabilitative treatment was not a cure and was something that defendant would have to deal with for the rest of his life. *United States v. Accardi*, 669 F.3d 340, 2012 U.S. App. LEXIS 4017 (C.A.D.C. 2012), writ of certiorari denied by 133 S. Ct. 198, 184 L. Ed. 2d 101, 2012 U.S. LEXIS 6310 (U.S. 2012).

Inasmuch as Alcoholic Beverage Control Board grounded its suspension of retail liquor license upon asserted violation of statute forbidding presentation of obscene exhibitions, the suspension order would stand or fall upon question whether dance performed by go-go dancer was the kind of performance forbidden by the statute and order could not be sustained on theory of broader power to regulate liquor licenses. U.S. Const. Amend. 1; D.C. Code §§ 22-2001(a)(1)(B), 22-2701, 25-118. 4934, Inc. v. Washington, 375 A.2d 20, 1977 D.C. App. LEXIS 453 (1977).

Although decision of Board of Appeals and Review, sustaining proposal to revoke corporation's licenses to operate coin-operated motion picture machines in book stores, contained findings and conclusions, there was nothing to explain conclusion that conviction of corporation's former president of selling an obscene book at book shop operated by corporation required that corporation's license for the machines be revoked in interest of public decency;

significantly, there was no finding of fact as to what interest, if any, former president held at time of the revocation proceedings, nor was there any finding with respect to character of pictures exhibited on the machines. D.C. Code §§ 1-1509(e), 22-2001, 47-2345. *Village Books, Inc. v. District of Columbia Board of Appeals & Review*, 296 A.2d 613, 1972 D.C. App. LEXIS 279 (1972).

Questions of law and fact.

Where defendant introduces testimony that allegedly obscene films do not violate national community standards and Government introduces evidence that films do violate such standards, it is for trier of fact to weigh the conflicting evidence. D.C. Code § 22-2001(a)(1)(A). *Parks v. United States*, 294 A.2d 858, 1972 D.C. App. LEXIS 253 (1972).

Evidence in prosecution for knowingly selling certain obscene, indecent and filthy articles was sufficient for jury to conclude that defendants were aware of content and character of materials. D.C. Code § 22-2001. *Huffman v. United States*, 259 A.2d 342, 1969 D.C. App. LEXIS 348 (App. 1969), affirmed by 470 F.2d 386, 152 U.S. App. D.C. 238, 1971 U.S. App. LEXIS 7721 (1971).

Review.

— In general.

Conviction of book sellers for violating District of Columbia obscenity statute by possession and sale of obscene photographs and films, which showed nude males and females engaged in explicit sexual intercourse, fellatio, cunnilingus and masturbation, was not required to be overturned in face of the Miller decision, that is, that obscenity prosecution is limited to hard core sexual conduct specifically defined by the regulating state law, since reviewing court was convinced that the court-tried case would have reached exactly the same result if the case had been tried after Miller and had been conducted strictly in accordance with its instructions. D.C. Code § 22-2001(a)(1); U.S. Const. Amends. 1, 4. *United States v. Gower*, 503 F.2d 189, 1974 U.S. App. LEXIS 7485 (C.A.D.C. 1974).

Although Court of Appeals was not presented with an authoritative construction of District of Columbia obscenity statute in view of the Miller decision, that is, that obscenity prosecution is limited to hard core sexual conduct specifically defined by the regulating state law, as written or construed, the Court would not undertake a definitive interpretation of the statute since it was convinced that the statute would receive a limiting construction that would maintain its application to the facts of the instant case. D.C. Code § 22-2001(a)(1). *United States v. Gower*, 503 F.2d 189, 1974 U.S. App. LEXIS 7485 (C.A.D.C. 1974).

District of Columbia Court of Appeals reviewed evidence de novo in prosecution for knowingly presenting, directing and participating in presentation of obscene, indecent and filthy performance. D.C. Code § 22-2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

Where defendant, who had been sentenced by Municipal Court for District of Columbia to one year and a fine of \$300, and in default of payment to be imprisoned for an additional year, for possessing and selling obscene literature and pictures, contended only that sentence imposed in default of payment of the fine was too severe, Municipal Court of Appeals could not reduce sentence in absence of showing of abuse of discretion on part of lower court. D.C. Code 1951, §§ 11-606, 11-616, 22-2001. *Hankins v. U.S.*, 120 A.2d 590, 1956 D.C. App. LEXIS 185 (Cr.App. 1956).

— Record, review.

Record required characterization of motion picture films as hardcore pornography and obscenity per se. D.C. Code § 22-2001(a)(1)(B, E). *Retzer v. United States*, 363 A.2d 307, 1976 D.C. App. LEXIS 353 (1976).

— Scope of review.

Since obscenity cases involve constitutional facts, reviewing courts are to independently review the material in question and make their own judgment as to whether it is obscene as a matter of law and, hence, beyond the scope of the First Amendment protection. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Retzer v. United States*, 363 A.2d 307, 1976 D.C. App. LEXIS 353 (1976).

In obscenity cases, reviewing court is required to make independent judgment as to whether material brought into question is, as matter of law, obscene and beyond perimeter of constitutional protection. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Wilhoit v. United States*, 279 A.2d 505, 1971 D.C. App. LEXIS 177 (1971), writ of certiorari denied by 404 U.S. 994, 92 S. Ct. 538, 30 L. Ed. 2d 546, 1971 U.S. LEXIS 285 (1971).

Searches and seizures.

Proper affidavit can convey enough information to magistrate to enable him to make determination of alleged obscenity of film sufficient to issue warrant for its seizure. 18 U.S.C. §§ 1462, 1465; D.C. Code § 22-2001; U.S. Const. Amends. 1, 4. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

Magistrate's determination of probable cause to seize allegedly obscene film was entitled to "great deference"; affidavit which was lengthy account of film, describing each scene in detail and with explicit language, furnished substantial basis for his decision, and seizure of film

pursuant to the warrant was valid though magistrate did not personally view the film. 18 U.S.C. §§ 1462, 1465; D.C. Code § 22-2001; U.S. Const. Amends. 1, 4. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

Ex parte hearings may be properly used to grant warrants authorizing seizure of limited amounts of alleged obscene materials. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Huffman v. United States*, 502 F.2d 419, 1974 U.S. App. LEXIS 7899 (C.A.D.C. 1974).

Since the First Amendment requirement of adversary hearing prior to issuance of warrant authorizing seizure of allegedly obscene publications involves primarily the public's right of access rather than the defendant's Fourth Amendment immunity from unreasonable search and seizure, failure to hold such hearing did not require exclusion of the publications from evidence in a prosecution for possession of obscene publications for sale. D.C. Code § 22-2001; U.S. Const. Amends. 1, 4. *Huffman v. United States*, 470 F.2d 386, 1971 U.S. App. LEXIS 7721 (C.A.D.C. 1971).

Where undercover police officer asked defendant bookstore owner about purchasing films similar to ones he had already purchased and policeman accompanied bookstore owner to his automobile where defendant opened trunk and selected films from bag in trunk, there was no need for prior adversary hearing to determine obscenity before seizing films pursuant to search warrant. D.C. Code § 22-2001(a)(1)(A, E); U.S. Const. Amend. 1. *United States v. Gower*, 316 F. Supp. 1390, 1970 U.S. Dist. LEXIS 10219 (1970), modified by 503 F.2d 189, 164 U.S. App. D.C. 98, 1974 U.S. App. LEXIS 7485 (1974).

Fact that defendant bookstore owner kept photographs and films under the counter or in trunk of his automobile could properly be considered in determining whether there must be an adversary hearing prior to issuance of search warrant authorizing seizure of the alleged obscene materials. D.C. Code § 22-2001(a)(1)(A, E); U.S. Const. Amend. 1. *United States v. Gower*, 316 F. Supp. 1390, 1970 U.S. Dist. LEXIS 10219 (1970), modified by 503 F.2d 189, 164 U.S. App. D.C. 98, 1974 U.S. App. LEXIS 7485 (1974).

Based on ex parte hearing, court may issue order authorizing seizure of limited number of publications for use as evidence in criminal prosecution. D.C. Code § 22-2001(a)(1)(A, B, D, E); U.S. Const. Amend. 1. *United States v. Green*, 284 A.2d 879, 1971 D.C. App. LEXIS 251 (1971).

Where search warrant for film contained in peep-show machine located in downtown arcade was issued upon detailed affidavit, only one machine out of a number was seized and it contained single 12-minute peep-show reel, and

arcade owner was offered hearing on propriety of the seizure the day after the seizure, defendant-arcade owner was not entitled to hearing prior to issuance of the warrant. D.C. Code § 22-2001. *Kaplan v. United States*, 277 A.2d 477, 1971 D.C. App. LEXIS 316 (1971), vacated by 413 U.S. 913, 93 S. Ct. 3030, 37 L. Ed. 2d 1022 (1973).

Affidavit, which revealed that informer, who had learned that pornographic material was being sold, saw third party pass through entrance which might have led to two stores and possibly to apartments above, and that third party returned with pornographic material purchased for informer, affidavit was not sufficient to show probable cause for issuance of search warrant, and resulting search of one of the stores was illegal, and the evidence procured should have been suppressed in subsequent prosecution of store operator for possessing, with intent to sell, lewd and obscene photographs, films, and literature. D.C. Code 1951, § 22-2001. *Lerner v. U.S.*, 151 A.2d 184, 1959 D.C. App. LEXIS 257 (Cr.App. 1959).

Standard of obscenity.

Where at time of distribution and exhibition of allegedly obscene film by defendants a judicially declared test of obscenity was whether material was utterly without redeeming social value but, at time of trial, court had revised test so as to require, for obscenity, only that the material lack serious literary, artistic, political or scientific value, defendants could be convicted only if material could be found to be obscene under both tests. 18 U.S.C. §§ 371, 1462, 1465; D.C. Code § 22-2001; U.S. Const. art. 1, § 10. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

Trial court's suspending final judgment in obscenity prosecution until determination of United States Supreme Court in pending obscenity cases and then applying both obscenity tests was both wise and proper; purpose of employing such procedure was to give defendants the benefit of every advantageous constitutional principle rather than to prejudice them by permitting prosecution under the most expedient standard. D.C. Code § 22-2001(a). *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Where subject magazine was made available to general public over age of majority but was directed particularly to male homosexual community, the court's review of the publication to determine whether it was obscene was premised on its prurient appeal primarily to the latter group, as well as to the adult community at large. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Neither the Constitution nor obscenity statute requires that one be on notice of contemporary standards since it is sufficient that a defendant be on notice of the character and contents of the material; to compel the government to show their actual knowledge of the legal status of the materials would permit defendants to avoid prosecution by simply claiming that they had not brushed up on the law; the Constitution does not mandate proof of knowledge of contemporary community standards and neither the wording nor intent of the obscenity statute justifies such a holding. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Congress did not intend that question of obscenity of performance should depend on opinion or belief of person who, with knowledge or notice of his acts, assumes responsibility for putting on performance. D.C. Code § 22-2001. *Morris v. United States*, 259 A.2d 337, 1969 D.C. App. LEXIS 352 (App. 1969).

In the District of Columbia, community standards in obscenity cases shall be determined by reference to contemporary community standards in the nation as a whole. D.C. Code § 22-2001. *Hudson v. United States*, 234 A.2d 903, 1967 D.C. App. LEXIS 202 (App. 1967).

Validity.

District of Columbia obscenity statute, using language similar to that used in federal statutes, is to be given same construction as the federal statute and is constitutional. 18 U.S.C. § 1465; D.C. Code § 22-2001. *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1975 U.S. App. LEXIS 14674 (C.A.D.C. 1975).

Statute making it unlawful to knowingly sell, etc., any obscene, indecent or filthy writing, etc., or possess such with intent to disseminate is not unconstitutionally vague under the governing Miller test, on ground that it does not specifically define the sexual conduct the depiction or description of which is proscribed, since the proscribed conduct is limited to the examples of "hard core" conduct enumerated in the Miller case. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Obscenity statute, as applied to motion picture films, was not invalid for vagueness, even though it did not expressly limit the scope of what is covered by the words "obscene, indecent, or filthy," since such asserted defect could be cured by judicial construction that the kind of pictures at which statute was directed was limited only to those described in Miller decision which enumerated three criteria for a finding of obscenity. D.C. Code § 22-2001(a)(1)(B, E); U.S. Const. Amend. 1. *Lakin v.*

United States, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Weight and sufficiency of evidence.

Evidence on issue whether salesman in bookstore and bookstore president, who had been seen working in store and whose name appeared on corporation's certificate of occupancy, had general knowledge of, or reason to know, or belief or ground for belief warranting further inspection or inquiry, of character and content of magazines, which had been found obscene, supported conviction under District of Columbia statute of possessing obscene publications for sale. D.C. Code § 22-2001. *Huffman v. United States*, 470 F.2d 386, 1971 U.S. App. LEXIS 7721 (C.A.D.C. 1971).

Awareness of contents and nature of alleged obscene material need not be proven by direct evidence; circumstantial evidence is satisfactory, providing its quality and quantity are sufficient to meet the government's burden of proving scienter beyond a reasonable doubt. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Evidence that bookstore clerk sold police officer a magazine, price of which was exhibited on front cover and front cover of which displayed a six by eight-inch photograph of three full-length nude males, two of whom were having their genitals fondled by the third, and back of which was similarly emblazoned with photograph of three men, each of whom was engaged in manual genital stimulation of the other, and that clerk was present four days after sale, when arrest and search were made, warranted finding that clerk had requisite knowledge of the character and contents of the magazine to support obscenity conviction. D.C. Code §§ 22-2001, 22-2001(a)(1)(A, E); U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Evidence, including evidence that adult bookstore manager was present at time of arrest and search, that manager had been seen in vicinity of cash register on at least six occasions, that search uncovered a device used to encase publications in cellophane along with empty wrappings of the type covering magazines then on rack, including subject magazine, cover of which depicted three nude males, two of whom were having their genitals fondled by the third, was sufficient to warrant inference that manager, charged with possession of obscene matter with intent to disseminate, was on general notice of character of the publication and should have inquired further as to its contents. D.C. Code §§ 22-2001, 22-2001(a)(1)(E); U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Magazine, which was titled "Three in the Dark," cover of which depicted three nude males, two of them having their genitals fondled by the third, which included over 70 photographs depicting the three engaged in numerous homosexual acts, including anal intercourse, fellatio, masturbation and oral-anal activity, all in a variety of positions, and text of which was nothing more than a salacious and rather crude sequential account of aberrant homosexual acts and which was made available to general public over age of majority but directed particularly to male homosexual community, was obscene. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Lakin v. United States*, 363 A.2d 990, 1976 D.C. App. LEXIS 380 (1976).

Defendant in an obscenity prosecution is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried, but expert testimony is not necessary to enable the jury to judge the obscenity of material which has been placed into evidence. D.C. Code § 22-2001. *Fennekohl v. United States*, 354 A.2d 238, 1976 D.C. App. LEXIS 488 (1976).

Where court, sitting without jury viewed films and declared them obscene per se and defendants introduced countervailing expert testimony that films did not appeal to prurient interest in sex, did not violate national community standards relating to representation of sexual matters and were not utterly without redeeming social value and Government did not introduce any countervailing evidence on these points, Government did not prove beyond reasonable doubt that films were obscene. D.C. Code § 22-2001(a)(1)(A). *Parks v. United States*, 294 A.2d 858, 1972 D.C. App. LEXIS 253 (1972).

Salesman's conviction of knowingly selling an obscene film was supported by sufficient evidence, regardless of whether the date the film was purchased was the first day of his employment, since it will not be presumed that even a new salesman is completely unfamiliar with goods he is hired to sell in an adult book and magazine store, and since the salesman, in effect, indicated he had actual knowledge of the nature of the particular merchandise when he recommended it to the police officer and told him it was the "better film." D.C. Code § 22-2001(a)(1)(A), (2)(B), (b)(1)(A, B). *Kramer v. United States*, 293 A.2d 272, 1972 D.C. App. LEXIS 219 (1972).

In prosecution for selling obscene material, finding that codefendant was the owner or operator of the store where police officer purchased obscene film was supported by sufficient evidence, including fact that the application for a certificate of occupancy and the certificate itself were issued to the codefendant. D.C. Code § 22-2001(a)(1)(A), (2)(B), (b)(1)(A, B). *Kramer*

v. United States, 293 A.2d 272, 1972 D.C. App. LEXIS 219 (1972).

Book containing 47 photographs, some in color, depicting male and female genitalia as they are involved in deviant sexual practices, and 7 chapters of text consisting of series of narratives of debauchery running perhaps entire gamut of perversion was pornographic without modicum of redeeming social value. D.C. Code § 22-2001; U.S. Const. Amend. 1. *Wilhoit v. United States*, 279 A.2d 505, 1971 D.C. App. LEXIS 177 (1971), writ of certiorari denied by 404 U.S. 994, 92 S. Ct. 538, 30 L. Ed. 2d 546, 1971 U.S. LEXIS 285 (1971).

Defendant, who was working at downtown arcade on more than one occasion when obscene film was being displayed and had ownership interest in the arcade, had requisite knowledge that film being exhibited in particular machine was obscene. D.C. Code § 22-2001. *Kaplan v. United States*, 277 A.2d 477, 1971 D.C. App. LEXIS 316 (1971), vacated by 413 U.S. 913, 93 S. Ct. 3030, 37 L. Ed. 2d 1022 (1973).

Film which was sexually morbid, grossly perverse and bizarre, and wholly without any artistic or scientific justification was properly found to be obscene per se. D.C. Code § 22-2001. *Kaplan v. United States*, 277 A.2d 477, 1971 D.C. App. LEXIS 316 (1971), vacated by 413 U.S. 913, 93 S. Ct. 3030, 37 L. Ed. 2d 1022 (1973).

In obscenity case involving question of whether local burlesque show was obscene, Government was required to offer competent evidence to prove relevant community standards prevailing in nation generally, and by failing to do so, Government failed to establish an essential element of the crime charged. D.C. Code § 22-2001. *Hudson v. United States*, 234 A.2d 903, 1967 D.C. App. LEXIS 202 (App. 1967).

Evidence sustained conviction of charge of giving or participating, on three separate occasions, in public exhibitions containing obscene, indecent, or lascivious language, postures, or suggestions, or otherwise offending public decency. D.C. Code 1961, § 22-2001. *Yankovitz v. U.S.*, 182 A.2d 889, 1962 D.C. App. LEXIS 367 (Cr.App. 1962).

Evidence sustained conviction of female dancers for participating in obscene, indecent and lascivious performances. D.C. Code 1951, §§ 11-776(b), 22-2001. *Clarke v. U.S.*, 160 A.2d 97, 1960 D.C. App. LEXIS 189 (Cr.App. 1960).

Evidence sustained conviction of possessing for sale and selling obscene photographs, on ground that photographs were obscene by any recognized standard, including that of tolerance in particular community. D.C. Code 1940, § 22-2001. *Benjamin v. U.S.*, 74 A.2d 64, 1950 D.C. App. LEXIS 152 (Cr.App. 1950).

CHAPTER 23. PANHANDLING.

Sec.

22-2301. Definitions.

22-2302. Prohibited acts.

22-2303. Permitted activity.

Sec.

22-2304. Penalties.

22-2305. Conduct of prosecutions.

22-2306. Disclosure.

§ 22-2301. Definitions.

For the purposes of this chapter, the term:

(1) "Aggressive manner" means:

(A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession;

(B) Touching another person without that person's consent in the course of asking for alms;

(C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or

(D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact.

(2) "Ask, beg, or solicit alms" includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value.

(Nov. 17, 1993, D.C. Law 10-54, § 2, 40 DCR 5450.)

Prior Codifications. — 1981 Ed., § 22-3311.

Legislative history of Law 10-54. — Law 10-54, the "Panhandling Control Act of 1993," was introduced in Council and assigned Bill No. 10-72, which was referred to the Committee on the Judiciary. The Bill was adopted on first

and second readings on June 1, 1993, and June 29, 1993, respectively. Signed by the Mayor on July 16, 1993, it was assigned Act No. 10-48 and transmitted to both Houses of Congress for its review. D.C. Law 10-54 became effective on November 17, 1993.

§ 22-2302. Prohibited acts.

(a) No person may ask, beg, or solicit alms, including money and other things of value, in an aggressive manner in any place open to the general public, including sidewalks, streets, alleys, driveways, parking lots, parks, plazas, buildings, doorways and entrances to buildings, and gasoline service stations, and the grounds enclosing buildings.

(b) No person may ask, beg, or solicit alms in any public transportation vehicle; or at any bus, train, or subway station or stop.

(c) No person may ask, beg, or solicit alms within 10 feet of any automatic teller machine (ATM).

(d) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle that is in traffic on a public street.

(e) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or

reserving a public parking space, or directing the operator or occupant to a public parking space.

(f) No person may ask, beg, or solicit alms in exchange for cleaning motor vehicle windows while the vehicle is in traffic on a public street.

(g) No person may ask, beg, or solicit alms in exchange for protecting, watching, washing, cleaning, repairing, or painting a motor vehicle or bicycle while it is parked on a public street.

(h) No person may ask, beg, or solicit alms on private property or residential property, without permission from the owner or occupant.

(Nov. 17, 1993, D.C. Law 10-54, § 3, 40 DCR 5450.)

Section references. — This section is referred to in § 22-2304.

Prior Codifications. — 1981 Ed., § 22-3312.

Legislative history of Law 10-54. — For legislative history of D.C. Law 10-54, see Historical and Statutory Notes following § 22-2301.

CASE NOTES

ANALYSIS

Nature and elements of offenses.

Review.

Validity.

Weight and sufficiency of evidence.

Nature and elements of offenses.

Phrase “subway station or stop,” as used in section of Panhandling Act prohibiting any person from asking, begging or soliciting alms at any subway station or stop, refers to area within 15 feet of top of subway escalator, so as to be consistent with transit authority regulation permitting free speech activities in subway station if they took place at distance greater than 15 feet from any escalator. D.C. Code 1981, § 22-3312(b). *McFarlin v. District of Columbia*, 681 A.2d 440, 1996 D.C. App. LEXIS 154 (1996).

Phrase “subway station or stop,” as used in section of Panhandling Act prohibiting any person from asking, begging or soliciting alms at any subway station or stop, is not unconstitutionally vague, when interpreted in light of transit authority regulation permitting free speech activities in subway station as long as they take place at distance greater than 15 feet from any escalator. U.S. Const. Amends. 1, 5; D.C. Code 1981, § 22-3312(b). *McFarlin v. District of Columbia*, 681 A.2d 440, 1996 D.C. App. LEXIS 154 (1996).

Defendants’ actions in playing music in above-ground area in subway station and putting bucket on ground to collect money constituted panhandling prohibited by Panhandling Act, even though defendants never asked for

any money. D.C. Code 1981, § 22-3312(b). *McFarlin v. District of Columbia*, 681 A.2d 440, 1996 D.C. App. LEXIS 154 (1996).

Review.

Court of Appeals would review de novo defendant’s contention that his First and Fifth Amendment rights were violated by his criminal conviction for violation of Panhandling Act. U.S. Const. Amends. 1, 5; D.C. Code 1981, § 22-3312(b). *McFarlin v. District of Columbia*, 681 A.2d 440, 1996 D.C. App. LEXIS 154 (1996).

Validity.

Section of Panhandling Act prohibiting any person from asking, begging or soliciting alms at any subway station or stop is reasonable regulation of begging which does not violate First Amendment; such section is designed to ensure public safety in nonpublic forum area. U.S. Const. Amend. 1; D.C. Code 1981, § 22-3312(b). *McFarlin v. District of Columbia*, 681 A.2d 440, 1996 D.C. App. LEXIS 154 (1996).

Weight and sufficiency of evidence.

There was insufficient evidence that defendants solicited money within 15 feet of top of escalator in subway station to support convictions for violating section of Panhandling Act prohibiting any person from asking, begging or soliciting alms at any subway station or stop, where only evidence that either defendant was within 15-foot zone was arresting officer’s testimony to such effect, and hearing commissioner did not find arresting officer’s testimony regarding distance to be credible. D.C. Code, § 22-3312(b). *McFarlin v. District of Columbia*, 681 A.2d 440, 1996 D.C. App. LEXIS 154 (1996).

§ 22-2303. Permitted activity.

Acts authorized as an exercise of a person's constitutional right to picket, protest, or speak, and acts authorized by a permit issued by the District of Columbia government shall not constitute unlawful activity under this chapter.

(Nov. 17, 1993, D.C. Law 10-54, § 4, 40 DCR 5450.)

Prior Codifications. — 1981 Ed., § 22-3313. legislative history of D.C. Law 10-54, see Historical and Statutory Notes following § 22-2301.

Legislative history of Law 10-54. — For

2301.

§ 22-2304. Penalties.

(a) Any person convicted of violating any provision of § 22-2302 shall be fined not more than \$300 or be imprisoned not more than 90 days or both.

(b) In lieu of or in addition to the penalty provided in subsection (a) of this section, a person convicted of violating any provision of § 22-2302 may be required to perform community service as provided in § 16-712.

(Nov. 17, 1993, D.C. Law 10-54, § 5, 40 DCR 5450.)

Prior Codifications. — 1981 Ed., § 22-3313. legislative history of D.C. Law 10-54, see Historical and Statutory Notes following § 22-2301.

Legislative history of Law 10-54. — For

2301.

§ 22-2305. Conduct of prosecutions.

Prosecutions for violations of this chapter shall be conducted in the name of the District of Columbia by the Corporation Counsel.

(Nov. 17, 1993, D.C. Law 10-54, § 6, 40 DCR 5450.)

Prior Codifications. — 1981 Ed., § 22-3315. legislative history of D.C. Law 10-54, see Historical and Statutory Notes following § 22-2301.

Legislative history of Law 10-54. — For

2301.

§ 22-2306. Disclosure.

Any arrest or conviction under this chapter shall be disclosed to public and private social service agencies that request the Metropolitan Police Department or the court to be notified of such events.

(Nov. 17, 1993, D.C. Law 10-54, § 7, 40 DCR 5450.)

Prior Codifications. — 1981 Ed., § 22-3316. legislative history of D.C. Law 10-54, see Historical and Statutory Notes following § 22-2301.

Legislative history of Law 10-54. — For

2301.

CHAPTER 24. PERJURY; RELATED OFFENSES.

Sec.
22-2401. [Repealed].
22-2402. Perjury.
22-2403. Subornation of perjury.

Sec.
22-2404. False swearing.
22-2405. False statements.

§ 22-2401. Perjury; subornation of perjury. [Repealed].

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(nn), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-2501.

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-2402. Perjury.

(a) A person commits the offense of perjury if:

(1) Having taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered, that he or she will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by that person subscribed is true, wilfully and contrary to an oath or affirmation states or subscribes any material matter which he or she does not believe to be true and which in fact is not true;

(2) As a notary public or other officer authorized to take proof of certification, wilfully certifies falsely that an instrument was acknowledged by any party thereto or wilfully certifies falsely as to another material matter in an acknowledgement; or

(3) In any declaration, certificate, verification, or statement made under penalty of perjury in the form specified in § 16-5306 or 28 U.S.C. § 1746(2), the person wilfully states or subscribes as true any material matter that the person does not believe to be true and that in fact is not true.

(b) Any person convicted of perjury shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 401, 29 DCR 3976; July 23, 2010, D.C. Law 18-191, § 3, 57 DCR 3400.)

Cross references. — Alcoholic beverage license, false statement in application, see § 25-401.

Allowance authorized for decedent's family, false affidavit concerning, see § 19-101.

Closing-out sale license, false statement in application for, see § 47-2102.

District of Columbia Civilian Complaint Re-

view Board, willful false swearing before, see § 5-1135.

Firearms control law, use of information as evidence in criminal proceedings, see §§ 7-2502.11 and 7-2504.09.

Homestead deduction application, false statements in, see § 47-850.

Hospitalization of mentally ill, offenses and

penalties, see § 21-591.

Interrogatories to garnishee, willful false statement, see § 16-552.

Life insurance companies or agents, false statement by, see § 31-4308.

Medicaid provider fraud prosecutions, false swearing, see § 4-804.

Metropolitan Police or Fire Department trial boards, willful false swearing before, see § 5-1002.

Nonprofit housing development water and sewer rate deductions, false statements concerning eligibility, see §§ 34-2413.05 and 34-2105.04.

Prior Codifications. — 1981 Ed., § 22-2511.

Effect of amendments. — D.C. Law 18-191, in subsec. (a), deleted “or” from the end of

par. (1); substituted “; or” for a period at the end of par. (2), and added par. (3).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-2401.

Legislative history of Law 18-191. — Law 18-191, the “Uniform Unsworn Foreign Declarations Amendment Act of 2010”, was introduced in Council and assigned Bill No. 18-427, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on March 2, 2010, and March 16, 2010, respectively. Signed by the Mayor on April 7, 2010, it was assigned Act No. 18-380 and transmitted to both Houses of Congress for its review. D.C. Law 18-191 became effective on July 23, 2010.

CASE NOTES

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Instructions.

Nature and elements of offense.

—Competent tribunal, nature and elements of offense.

—Corroboration, nature and elements of offense.

—Falsity of testimony and knowledge thereof, nature and elements of offense.

—In general.

—Intent, nature and elements of offense.

—Materiality of testimony or assertion, nature and elements of offense.

—Nature of proceeding in which oath was administered, nature and elements of offense.

Parties and standing.

Presumptions and burden of proof.

Questions of law and fact.

Review.

Right to representation by counsel.

Verdict.

Weight and sufficiency of evidence.

Admissibility of evidence.

Submission of illegally obtained evidence to a previous Grand Jury, which did not indict defendant, would not necessarily raise an inference that the same or similar unlawful evidence was presented to a Grand Jury which was impaneled two years later and returned an indictment charging defendant with perjury. D.C. Code 1951, § 22-2501. *U.S. v. Weinberg*, 108 F.Supp. 567, 1952 U.S. Dist. LEXIS 2318 (D.D.C.1952).

Accomplice's confession that he was one of two shooters was testimonial statement, for

purpose of determining whether admission of confession in perjury trial violated Confrontation Clause prohibition against admission of testimonial statements of witness not subject to cross-examination, where confession was made during police interrogation. *Davis v. United States*, 848 A.2d 596, 2004 D.C. App. LEXIS 200 (2004).

Trial court's admission of accomplice's confession that he was one of two shooters violated defendant's constitutional right to confrontation in trial for perjury arising out of his testimony at accomplice's murder trial that accomplice was not one of the shooters, where confession was not subject to cross-examination. *Davis v. United States*, 848 A.2d 596, 2004 D.C. App. LEXIS 200 (2004).

Witness was unavailable within meaning of hearsay exception for prior cross-examined testimony where witness had no memory of events surrounding alleged perjury. D.C. Code 1973, § 22-2501. *United States v. Hsu*, 439 A.2d 469, 1981 D.C. App. LEXIS 396 (1981).

In determining whether appellant had knowingly and intelligently waived right to counsel in perjury prosecution, Court of Appeals would not take judicial notice of existence of appellant's other judicial proceedings and their details. D.C. Code § 22-2501; U.S. Const. Amend. 6. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

In prosecution for perjury based on landlord's denial of receiving temporary restraining order, portions of transcript of contempt hearing supplying context of perjured statement and measure of evidence about defendant's activities as landlord were admissible, where they had proper bearing on motive, intent and wilfulness. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

In prosecution for perjury, portions of contempt hearing transcript supplying context of perjured statement were relevant and admissible. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Attorney and client.

Giving untruthful testimony before Securities and Exchange Commission and disclosing material nonpublic information relating to tender offer, resulting in misdemeanor conviction, warrants one-year suspension from practice of law; overruling *In re Keiler*, 380 A.2d 119 (D.C.); *District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (D.C.). Code of Prof. Resp., DR 1-102(A), (A)(3-5); Securities Exchange Act of 1934, § 32(a), 15 U.S.C. § 78ff(a). *In re Hutchinson*, 534 A.2d 919, 1987 D.C. App. LEXIS 530 (1987).

Defenses.

Criminal nature of perjury is not removed by fact that perjurer later in proceedings states the truth. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

The principle that recantation following perjury does not destroy its criminality applies with even greater force when perjury follows truthful testimony and thus constitutes the last and unrecanted choice of its author. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Defense to charge of perjury may not be established by isolating a statement and thereby giving it a meaning wholly different from the clear significance of the testimony considered as a whole. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Indictment and information.

Indictment charging defendant generally in statutory language with three counts of perjury, would be deemed sufficient, especially where record indicated that defendant had not been misled or prejudiced in his defense, and had not moved for a bill of particulars. D.C. Code 1951, §§ 22-2501, 35-425. *Nelson v. U.S.*, 288 F.2d 376, 1961 U.S. App. LEXIS 5601 (C.A.D.C. 1961).

In prosecution for perjury allegedly committed by witness before Subcommittee of the Senate Judiciary Committee, count of indictment charging that witness testified falsely when he gave a negative answer to question whether it was necessary, before he went beyond line of demarcation between Nationalist China and Communist China, to have permission of Communist authorities and when he testified that neither he nor any one in his party made any prearrangement with the Communist Party in order to get into Communist

China was invalid because of a fatal variance in its terms. D.C. Code 1951, § 22-2501; U.S. Const. Amend. 6. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

In prosecution for perjury allegedly committed by witness before Subcommittee of the Senate Judiciary Committee, count of indictment charging that witness lied in denying that he had ever been a sympathizer or promoter of Communism or Communist interests was too vague to be cured by a bill of particulars. D.C. Code 1951, § 22-2501; U.S. Const. Amend. 6. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

In passing on motion to dismiss indictment charging that witness perjured himself before Subcommittee of the Senate Judiciary Committee, it was proper to draw from Subcommittee's hearings explanatory material necessary to an understanding of the terms and parts of the indictment, but it was not permissible to refer to the hearings for facts which might become issues on the pleas and which might be subject to dispute. D.C. Code 1951, § 22-2501. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

In prosecution for perjury allegedly committed by witness before Subcommittee of the Senate Judiciary Committee, count of indictment charging that witness lied in denying that he had ever been a sympathizer or promoter of Communism or Communist interests was void for vagueness. D.C. Code 1951, § 22-2501; U.S. Const. Amend. 6. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

In prosecution for perjury allegedly committed by witness before Subcommittee of the Senate Judiciary Committee, count of indictment charging that witness lied when he testified that he did not "know" that certain contributor to magazine edited by witness was a Communist was not, because of the use of the word "know", invalid, on ground of vagueness. D.C. Code 1951, § 22-2501; U.S. Const. Amend. 6. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

In prosecution for perjury allegedly committed by witness before Subcommittee of the Senate Judiciary Committee, count of indictment charging that witness lied in denying that he knew that contributor to magazine, which was edited by witness, was a "Communist" was not invalid, on ground of vagueness, because of the use of the word "Communist." D.C. Code 1951, § 22-2501; U.S. Const. Amend. 6. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

In prosecution for perjury allegedly committed by witness before Subcommittee of the Senate Judiciary Committee, count of indictment charging that witness lied when he testi-

fied that, apart from Russian contributions; he never published, while editor of magazine, an article by a person whom he knew to be a Communist was sufficiently certain and involved a valid and proper inquiry. D.C. Code 1951, § 22-2501; U.S. Const. Amend. 6. U.S. v. Lattimore, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

Failure to set forth person before whom oath was taken together with his authority to administer same was not fatal to perjury indictment. D.C. Code 1951, §§ 22-2501, 23-204; 18 U.S.C. §§ 1621, 3771; Fed.Rules Crim.Proc., rules 1, 7(c), 18 U.S.C. Young v. U.S., 212 F.2d 236, 1954 U.S. App. LEXIS 3353 (C.A.D.C. 1954).

Indictment for perjury allegedly committed by witness before congressional committee could properly be drawn and sentence could properly be imposed under perjury statute of the District of Columbia, as against contention that perjury before a congressional committee is punishable only under federal perjury statute. D.C. Code 1940, § 22-2501; 18 U.S.C. § 1621. Christoffel v. U.S., 171 F.2d 1004, 1948 U.S. App. LEXIS 2933 (C.A.D.C. 1948).

Indictment charging alleged perjury by witness before Senate Internal Security Subcommittee was not invalid because it failed to allege name of senator administering oath to witness. D.C. Code 1951, §§ 14-102, 22-2501, 23-204; Fed.Rules Crim.Proc. rules 1 et seq., 2, 52(a), 18 U.S.C. U.S. v. Lattimore, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count of indictment charging that witness lied in denying that he had ever been a sympathizer or promoter of Communism or Communist interests, was fatally defective because it did not meet requirements of Federal Rule of Criminal Procedure requiring that indictment shall be plain, concise and definite written statement of essential acts constituting offense charged. Internal Security Act of 1950, 50 U.S.C. § 781 et seq.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204; Fed.Rules Crim.Proc. rule 7(c), 18 U.S.C. U.S. v. Lattimore, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count of indictment charging that witness lied in denying that he had ever been a sympathizer or promoter of Communism or Communist interests, was fatally defective because in violation of the Sixth Amendment to the federal Constitution protecting accused in right to be informed of nature and cause of such accusation against him. Internal Security Act of 1950, 50 U.S.C. § 781 et seq.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204; U.S. Const.

Amend. 6. U.S. v. Lattimore, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count of indictment charging that witness was lying when he stated that neither he nor anyone in his party made any prearrangements with the Communist Party in order to get into Yenan, China was invalid for failure to meet requirements of the Sixth Amendment to the federal Constitution which protects an accused in right to be informed of the nature and cause of the accusation against him and Federal Rule of Criminal Procedure which requires that indictment shall be a plain, concise, and definite written statement of essential facts constituting offense charged. Internal Security Act of 1950, 50 U.S.C. § 781 et seq.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204; Fed.Rules Crim.Proc. rule 7(c), 18 U.S.C.; U.S. Const. Amend. 6. U.S. v. Lattimore, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count of indictment charging that witness testified falsely when he testified that he did not at request of Administrative Assistant to the President of the United States take care of correspondence of Administrative Assistant while he was away was so indefinite that witness was entitled to bill of particulars stating overt acts on which the government relied in proving that witness perjured himself in testifying that he had not taken care of Administrative Assistant's mail while he was away. Fed.Rules Crim.Proc. rule 7(f), 18 U.S.C.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204. U.S. v. Lattimore, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count of indictment that witness testified falsely when he stated that prior to certain date he did not know that certain person was a Communist was so indefinite that witness was entitled to bill of particulars stating overt acts on which the government relied to show that witness had been told that such person was a Communist, and defining the word "Communist", and informing witness as to identity of persons who told witness that such person was a Communist, and time, place, and circumstances under which witness was told this. Fed.Rules Crim.Proc. rule 7(f), 18 U.S.C.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204. U.S. v. Lattimore, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count of indictment charging that witness testified falsely when he testified that his conference with Soviet Ambassador to

the United States had taken place after the Hitler invasion of the Soviet Union was so indefinite that witness was entitled to bill of particulars stating overt acts on which the government intended to rely to show that the meeting with Ambassador was after the Hitler invasion. Fed.Rules Crim.Proc. rule 7(f), 18 U.S.C.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204. *U.S. v. Lattimore*, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

Indictment charging witness with perjury allegedly committed before Senate Internal Security Subcommittee was not invalid in its entirety because it failed to plead the particulars of materiality of testimony given by witness before committee. D.C. Code 1951, §§ 14-102, 22-2501, 23-204. *U.S. v. Lattimore*, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count of indictment charging that witness lied in denying that he had ever been a sympathizer or promoter of Communism or Communist interests, was fatally defective because it restricted freedom of belief and expression in violation of the First Amendment to the Federal Constitution providing that Congress shall make no law abridging freedom of speech, or of the press. Internal Security Act of 1950, 50 U.S.C. § 781 et seq.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204; U.S. Const. Amend. 1. *U.S. v. Lattimore*, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

In prosecution for perjury allegedly committed by witness before Senate Internal Security Subcommittee, count charging that witness perjured himself when he said that he did not know that certain person was a Communist, was invalid because violative of First Amendment to the Federal Constitution providing that Congress shall make no law abridging freedom of speech or of the press and the Sixth Amendment protecting an accused in the right to be informed of the nature and cause of the accusation against him. Internal Security Act of 1950, 50 U.S.C. § 781 et seq.; D.C. Code 1951, §§ 14-102, 22-2501, 23-204; U.S. Const. Amends. 1, 6. *U.S. v. Lattimore*, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

Perjury indictment setting out in each count a statement allegedly made by defendant in course of testimony before congressional subcommittee, alleging that such statement was false and setting forth what the true facts were and alleging generally that testimony sought to be elicited from defendant was material to the inquiry, was sufficient as against motion to dismiss. D.C. Code 1940, § 22-2501; Fed.Rules. Crim.Proc. rule 7(c), 18 U.S.C. *U.S. v. Meyers*, 75 F.Supp. 486, 1948 U.S. Dist. LEXIS 3379 (D.D.C.1948).

Simple allegation of materiality did not render perjury indictment deficient for lack of specificity as to materiality alleged. D.C. Code §§ 22-2501, 23-323; D.C. Code SCR, Criminal Rule 7(c). *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Falsity was alleged with sufficient particularity in perjury indictment which repeated statutory language and referred to defendant's oath before named judge on stated date in specific action and further specified question and offending answer defendant allegedly gave. D.C. Code §§ 22-2501, 23-323; D.C. Code SCR, Criminal Rule 7(c). *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Perjury indictment which tracks the statute will be defective unless it also includes particulars so as to enable defendant to prepare to meet the charge. D.C. Code §§ 22-2501, 23-323; D.C. Code SCR, Criminal Rule 7(c). *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Face of indictment did not belie materiality of defendant's denial that he had been personally served temporary restraining order, since defendant's response, quoted in indictment, that he had learned about order from judge's clerk before hearing on order to show cause was not admission of receipt of restraining order, but even if it were such an admission, it would not necessarily negate materiality of denial of service of temporary restraining order. D.C. Code §§ 22-2501, 23-323; D.C. Code SCR, Criminal Rule 7(c). *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Actual falsity is necessary to conviction of perjury; thus perjury indictment must allege it. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Perjury indictment sufficiently alleged falsity by charging that defendant, having taken an oath that he would testify truly, unlawfully, wilfully, knowingly and contrary to such oath, stated material matters which he did not believe to be true. D.C. Code §§ 22-2501, 23-323; D.C. Code SCR, Criminal Rule 7(c). *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Instructions.

In prosecution for perjury allegedly committed before standing committee on Education and Labor of House of Representatives, court properly charged that to convict the jury were required to be satisfied beyond a reasonable doubt that there were actually physically present a majority of the committee, but further instruction that such requirement was satisfied by presence of quorum only when the oath was administered was prejudicial error in view of evidence that members were coming and going and that when allegedly perjurious testimony was given a quorum was not present. D.C. Code

1940, § 22-2501; Legislative Reorganization Act of 1946, § 121, Rules of House of Representatives, rule 10, 60 Stat. 822, rule 11(2)(f), 60 Stat. 830; § 133(d), 60 Stat. 831; U.S. Const. art. 1, § 5. *Christoffel v. U.S.*, 69 S.Ct. 1447, 1949 U.S. LEXIS 2984 (U.S. Dist. Col. 1949).

Instruction that "perjury" is simply the giving of false testimony under oath, testimony that a party does not believe to be true, and that if he testified before a competent tribunal as to a fact which is false, and he does not believe it to be true, then that is "perjury," was sufficient, though court did not in terms define the word "wilfully." D.C. Code 1940, § 22-2501. *Maragon v. U.S.*, 187 F.2d 79, 1950 U.S. App. LEXIS 2343 (C.A.D.C. 1950).

Nature and elements of offense.

— Competent tribunal, nature and elements of offense.

In a prosecution for perjury, the presence of a competent tribunal was an essential element of the crime charged. D.C. Code 1940, § 22-2501; Legislative Reorganization Act of 1946, § 121; Rules of House of Representatives, rule 10, 60 Stat. 822, rule 11(2)(f), 60 Stat. 830; § 133(d), 60 Stat. 831; U.S. Const. art. 1, § 5. *Christoffel v. U.S.*, 69 S.Ct. 1447, 1949 U.S. LEXIS 2984 (U.S. Dist. Col. 1949).

A tribunal that is not competent is no tribunal, and such a body cannot be the instrument of a perjury conviction. D.C. Code 1940, § 22-2501. *Christoffel v. U.S.*, 69 S.Ct. 1447, 1949 U.S. LEXIS 2984 (U.S. Dist. Col. 1949).

Subcommittee created by chairman of senate committee investigating national defense program, in accordance with unvarying practice of Senate under which chairman announced to full committee the names of senators whom he had appointed as members, was not invalid because allegedly not created by a resolution of full committee, but was a "competent tribunal" within provision of District of Columbia perjury statute referring to an oath or affirmation before a "competent tribunal". D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Minority of subcommittee of senate committee investigating national defense program could not legally function except to adjourn, and testimony of witness before minority could not be considered as perjury, nor could defendant be convicted of suborning it. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Quorum of subcommittee was not lacking on day that alleged perjurious statements were made because only one of three senators then present had been among the five originally appointed. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

An official without power to make regulations cannot require an oath so as to bring it within scope of perjury statute. D.C. Code 1940, § 22-2501. *Shelton v. U.S.*, 165 F.2d 241, 1947 U.S. App. LEXIS 2058 (1947).

An administrative officer cannot add to the content of an oath prescribed by statute so as to make falsification of the additional information, perjury. D.C. Code 1940, § 22-2501. *Shelton v. U.S.*, 165 F.2d 241, 1947 U.S. App. LEXIS 2058 (1947).

The word "tribunal", as used in District of Columbia perjury statute, implies an officer or body having authority to adjudicate matters. D.C. Code 1940, § 22-2501. *U.S. v. Meyers*, 75 F.Supp. 486, 1948 U.S. Dist. LEXIS 3379 (D.D.C. 1948).

The District of Columbia perjury statute is broad enough to cover false testimony given under oath before any tribunal or any officer or person authorized to administer oaths. D.C. Code 1940, §§ 22-2501, 23-204. *U.S. v. Meyers*, 75 F.Supp. 486, 1948 U.S. Dist. LEXIS 3379 (D.D.C. 1948).

A United States senator as chairman of a subcommittee was an "officer or person authorized to administer oaths" within meaning of District of Columbia perjury statute. D.C. Code 1940 § 22-2501. *U.S. v. Meyers*, 75 F.Supp. 486, 1948 U.S. Dist. LEXIS 3379 (D.D.C. 1948).

— Corroboration, nature and elements of offense.

Perjury cannot be proved by uncorroborated testimony of one witness, since falsity of one person's oath cannot be established by another person's oath alone. D.C. Code 1951, § 22-2501. *Dotto v. U.S.*, 223 F.2d 309, 1955 U.S. App. LEXIS 3955 (C.A.D.C. 1955).

In a perjury prosecution the rule is that the uncorroborated oath of one witness is not enough to establish, for purposes of conviction of perjury, the falsity of sworn testimony, and it is not the rule that no person may be convicted of perjury unless the falsity of the statement made under oath is established by the testimony of two independent witnesses or by one witness and the corroborating facts and circumstances. D.C. Code 1940, § 22-2501. *Maragon v. U.S.*, 187 F.2d 79, 1950 U.S. App. LEXIS 2343 (C.A.D.C. 1950).

Testimony of a witness that contradicted two statements made by defendant to a grand jury was not corroborated by any independent witness and, thus, under the two-witness rule, could not show the falsity of the statements, as required for a conviction for perjury; the only other witness upon whom the government relied to prove the falsity of the statements was not present when defendant spoke to the first witness, and the second witness specifically denied that defendant said anything to her about the subject of the statements. *Gaffney v.*

United States, 980 A.2d 1190, 2009 D.C. App. LEXIS 464 (2009).

Generally, in prosecution for perjury, uncorroborated oath of one witness is not enough to establish falsity of testimony set forth in indictment, but two witnesses or one witness plus independent corroborative evidence will suffice. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

In perjury case, independent, corroborative evidence need not be sufficient, by itself, to demonstrate guilt, rather, it need only tend to establish accused's guilt and be inconsistent with innocence when joined with one direct witness' testimony. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Witness' testimony that he noted word "order" on paper and saw attorney give it to defendant at approximately time attorney alleged he had delivered temporary restraining order to defendant sufficiently corroborated falsity of defendant's denial of receiving the order as contemplated by modern two-witness rule. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Circumstantial evidence can suffice to corroborate direct witness' testimony in perjury case. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

— **Falsity of testimony and knowledge thereof, nature and elements of offense.**

To return a verdict of guilty on a charge of perjury, jury must be convinced beyond reasonable doubt not only that accused testified falsely but that he did not, at the time, believe his testimony to be true. D.C. Code 1951, § 22-2501. *Young v. U.S.*, 212 F.2d 236, 1954 U.S. App. LEXIS 3353 (C.A.D.C. 1954).

To be convicted of perjury, defendant must have taken an oath to be truthful and violated that oath. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

— **In general.**

One making two false statements, one violating the general perjury statute and the other violating specific provision of the motor vehicle lien law commits two offenses, though both statements are under one oath. D.C. Code 1940, §§ 22-2501, 40-701 to 715. *Shelton v. U.S.*, 165 F.2d 241, 1947 U.S. App. LEXIS 2058 (1947).

Perjury is committed when one states, contrary to his oath, any material matter which he does not believe to be true. D.C. Code 1940, § 22-2501. *Pyle v. U.S.*, 156 F.2d 852, 1946 U.S. App. LEXIS 2650 (1946).

Gist of perjury offense is false oath before a competent tribunal. D.C. Code 1951, §§ 22-2501, 23-204; 18 U.S.C. §§ 1621, 3771. *U.S. v.*

Young, 113 F.Supp. 20, 1953 U.S. Dist. LEXIS 2506 (D.D.C.1953).

Elements of perjury are: an oath, before a competent person or tribunal; a statement of false, material facts, and knowledge of the falsity. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

— **Intent, nature and elements of offense.**

The word "wilfully" in perjury statute means "knowingly" or "intentionally." D.C. Code 1940, § 22-2501. *Maragon v. U.S.*, 187 F.2d 79, 1950 U.S. App. LEXIS 2343 (C.A.D.C. 1950).

— **Materiality of testimony or assertion, nature and elements of offense.**

Where perjury prosecution was based upon alleged perjurious statement, which was made by defendant while testifying before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, that defendant was a United States' citizen, question as to defendant's citizenship was material to inquiry which committee was authorized to make. D.C. Code 1951, § 22-2501. *Doto v. U.S.*, 223 F.2d 309, 1955 U.S. App. LEXIS 3955 (C.A.D.C. 1955).

In prosecution for perjury allegedly committed by witness before Subcommittee of the Senate Judiciary Committee, count of indictment charging that witness lied in denying that he knew that contributor to magazine, which was edited by witness, was a Communist was not defective, as a matter of law, on ground that question was not material to study being made by Subcommittee with reference to subversive activities of Communist agents. D.C. Code, 1951, § 22-2501; U.S. Const. Amend. 6. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

Although perjury must relate to a matter which was material to the issue, the materiality need not be immediate, but it is sufficient if the false testimony gives weight to or detracts from testimony as to material facts in issue. D.C. Code 1940, § 22-2501. *Pyle v. U.S.*, 156 F.2d 852, 1946 U.S. App. LEXIS 2650 (1946).

Where defendant's testimony in prosecution of another for unlawful transportation of a girl for immoral purposes did not vary on issue of transportation from defendant's prior written statement, variations between statement and testimony on question of whether statement was given voluntarily, as to who paid rent on her apartment and other details, related to immaterial matters and furnished no basis for perjury charge. D.C. Code 1940, § 22-2501. *Pyle v. U.S.*, 156 F.2d 852, 1946 U.S. App. LEXIS 2650 (1946).

In a perjury case arising out of a congressional investigation, which concededly may be broad in its scope as far as determining neces-

sity for corrective legislation is concerned, element of materiality must be present or charges fall. D.C. Code 1951, §§ 14-102, 22-2501, 23-204. *U.S. v. Lattimore*, 112 F.Supp. 507, 1953 U.S. Dist. LEXIS 2802 (D.D.C.1953).

— Nature of proceeding in which oath was administered, nature and elements of offense.

Falsely taking oath of admission pursuant to Municipal Court Civil Rule, which states what persons the bar of the Municipal Court should consist of and prescribes oath or affirmation to be taken by such person, violated statute proscribing perjury and subornation of perjury. Municipal Court Rules, § 1 rule 75(a); D.C. Code 1961, §§ 11-748a, 22-2501. *Morgan v. U.S.*, 309 F.2d 234, 1962 U.S. App. LEXIS 4011 (C.A.D.C. 1962).

A perjury indictment could not be grounded upon a knowingly false answer to a question placed by superintendent of insurance, in an application for a license to act as an insurance solicitor. D.C. Code 1951, §§ 22-2501, 35-425. *Nelson v. U.S.*, 288 F.2d 376, 1961 U.S. App. LEXIS 5601 (C.A.D.C. 1961).

Information called for by regulations under Traffic Act in an application for certificate of title is not required to be under oath so as to constitute a false statement perjury, though lien statement which Motor Vehicle Lien Law requires that application contain, must be under oath. D.C. Code 1940, §§ 22-2501, 40-601 to 617, 40-701 to 715. *Shelton v. U.S.*, 165 F.2d 241, 1947 U.S. App. LEXIS 2058 (1947).

An oath to portion of application for duplicate certificate of title for a motor vehicle, requiring a statement of reason for the application, was not "authorized by law" within meaning of perjury statute. D.C. Code 1940, §§ 22-2501, 40-601 to 617, 40-603. *Shelton v. U.S.*, 165 F.2d 241, 1947 U.S. App. LEXIS 2058 (1947).

The District of Columbia perjury statute applies to false testimony given before congressional committees, and is not limited to false testimony given before a judicial tribunal. D.C. Code 1940, §§ 22-2501, 23-204. *U.S. v. Meyers*, 75 F.Supp. 486, 1948 U.S. Dist. LEXIS 3379 (D.D.C.1948).

Parties and standing.

The making of false statement of lien under oath in application for certificate or duplicate certificate of title for motor vehicle in the District of Columbia must be prosecuted by corporation counsel in the name of the District of Columbia, under the Motor Vehicle Lien Law, rather than by the United States attorney in the name of the United States under the general perjury statute. D.C. Code 1940, §§ 22-2501, 40-701 to 715, 40-702, 40-714. *Shelton v. U.S.*, 165 F.2d 241, 1947 U.S. App. LEXIS 2058 (1947).

Presumptions and burden of proof.

In order to obtain a conviction for perjury of

witness who allegedly testified falsely before a Subcommittee of the Senate Judiciary Committee, the government was required to prove that question, which witness allegedly answered untruthfully, was material to the investigation being carried on by the Subcommittee. D.C. Code 1951, § 22-2501. *U.S. v. Lattimore*, 215 F.2d 847, 1954 U.S. App. LEXIS 2905 (C.A.D.C. 1954).

Generally, a belief as to falsity of testimony may be inferred by jury in perjury prosecution from proof of falsity itself, although in some cases this may not be so, as, for instance, where testimony concerns a triviality or an occurrence of long before. D.C. Code 1951, § 22-2501. *Young v. U.S.*, 212 F.2d 236, 1954 U.S. App. LEXIS 3353 (C.A.D.C. 1954).

Questions of law and fact.

Jury determines trustworthiness of corroborative evidence, be it direct or circumstantial, in perjury case. D.C. Code § 22-2501. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Review.

Where, upon prior appeal, Court of Appeals had disposed of question as to whether perjury indictment could properly be drawn under perjury statute of District of Columbia rather than under federal perjury statute, and its ruling had been left undisturbed by Supreme Court when it reversed, Court of Appeals would not reopen question on appeal after second trial under same indictment. 18 U.S.C. § 1621; D.C. Code 1951, § 22-2501. *Christoffel v. U.S.*, 200 F.2d 734, 1952 U.S. App. LEXIS 2357 (C.A.D.C. 1952).

On appeal from conviction for perjury before congressional committee, record established that offer actually made by defendant had been of remaining portions of his own testimony before committee rather than, as contended, that of proceedings immediately preceding his own testimony, and therefore claim of error in rejecting offer of proceedings immediately preceding defendant's testimony before committee could not be upheld. D.C. Code 1951, § 22-2501. *Christoffel v. U.S.*, 200 F.2d 734, 1952 U.S. App. LEXIS 2357 (C.A.D.C. 1952).

Defendant preserved for appellate review his claim that his conviction for perjury was obtained in violation of the two-witness rule, which provides that the uncorroborated oath of one witness is not enough to establish the falsity of the statement at issue, even though defendant failed to invoke the rule by name in trial court; it was enough that defendant moved for a judgment of acquittal on the ground, among others, that the government had not presented sufficient evidence that his statements were false. *Gaffney v. United States*, 980 A.2d 1190, 2009 D.C. App. LEXIS 464 (2009).

Error in trial court's admission of accomplice's confession that he committed murder armed with rifle was not harmless, in trial for perjury arising out of defendant's testimony at accomplice's murder trial that accomplice was not one of two shooters, even though there was testimony that bullet casings found at scene came from same rifle recovered from building in which accomplice was arrested; confession was only evidence apart from defendant's statement to police that accomplice was shooter, and connection between accomplice and rifle was tenuous at best, in that building was not identified as accomplice's residence, and defendant and accomplice were not in room where rifle was found. *Davis v. United States*, 848 A.2d 596, 2004 D.C. App. LEXIS 200 (2004).

Right to representation by counsel.

Understanding of likely consequences, in perjury-felony case, of attempting self representation could not be inferred from court's questioning defendant about familiarity with jury trials in general, reading indictment to defendant at arraignment, referring on occasion to perjury as felony, explaining necessity of fingerprinting, imposing sizable bond, and specifically apprising defendant of his right to counsel. D.C. Code § 22-2501; U.S. Const. Amend. 6. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

Fact that accused had Ph.D. in engineering did not establish that he knowingly and intelligently waived counsel when charged with felony perjury. D.C. Code § 22-2501; U.S. Const. Amend. 6. *Hsu v. United States*, 392 A.2d 972, 1978 D.C. App. LEXIS 321 (1978).

It was not denial of effective assistance of counsel for defendant's trial counsel to make a

conscientious decision not to put on alibi testimony which, after investigation, he became convinced would be perjured. D.C. Code § 22-2501. *Herbert v. United States*, 340 A.2d 802, 1975 D.C. App. LEXIS 416 (1975).

Verdict.

Where counts charging perjury were merged and it could not be determined upon which false statement in application for certificate of title the jury rested its general verdict, but verdict if upon statement as to liens would not support sentence, judgment of conviction was subject to reversal. D.C. Code 1940, §§ 22-2501, 40-701 to 715, 40-702, 40-714. *Shelton v. U.S.*, 165 F.2d 241, 1947 U.S. App. LEXIS 2058 (1947).

Weight and sufficiency of evidence.

Evidence was sufficient to sustain conviction for perjury. D.C. Code 1951, § 22-2501. *Doto v. U.S.*, 223 F.2d 309, 1955 U.S. App. LEXIS 3955 (C.A.D.C. 1955).

Perjury conviction can be sustained only if jury could reasonably believe that there was no reasonable doubt as to defendant's guilt. D.C. Code 1951, § 22-2501. *Young v. U.S.*, 212 F.2d 236, 1954 U.S. App. LEXIS 3353 (C.A.D.C. 1954).

Perjury conviction was sustained by evidence. D.C. Code 1951, § 22-2501. *Young v. U.S.*, 212 F.2d 236, 1954 U.S. App. LEXIS 3353 (C.A.D.C. 1954).

Evidence sustained conviction of defendant for perjury for testifying under oath before Investigating Subcommittee of the Senate Committee on Expenditures in the Executive Departments that he had only one bank account. D.C. Code 1940, § 22-2501. *Maragon v. U.S.*, 187 F.2d 79, 1950 U.S. App. LEXIS 2343 (C.A.D.C. 1950).

§ 22-2403. Subornation of perjury.

A person commits the offense of subornation of perjury if that person wilfully procures another to commit perjury. Any person convicted of subornation of perjury shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 402, 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-2512.

Legislative history of Law 4-164. — For

legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-2401.

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Admissibility of evidence.

In prosecution for subornation of perjured testimony given before subcommittee of Senate committee investigating national defense program, transcript made from shorthand notes of the testimony was evidence of what witness had said, but was not the only admissible evidence concerning it, and testimony by chief counsel who had examined witness before subcommittee as to what witness had sworn to was equally competent, and was admissible whether given before or after the transcript was received in evidence. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

In prosecution for subornation of perjured testimony given before subcommittee of Senate committee investigating national defense program, testimony by chief counsel of senatorial committee as to what witness had sworn to was not barred under the best evidence rule, and it was not unfair or prejudicial to permit transcript of testimony given before the subcommittee to be introduced after chief counsel had testified though counsel testified early in protracted trial and transcript was introduced near its close, since both methods of proving the perjury were permissible, and prosecution could present its proof in any order it chose. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Attorney and client.

Counsel are not exempt from prosecution under statutes denouncing crimes of obstruction of justice and subornation of perjury. D.C. Code § 22-2501. *Herbert v. United States*, 340 A.2d 802, 1975 D.C. App. LEXIS 416 (1975).

Habeas corpus relief.

Error, if any, in District Court's holding that three Senators present when a witness, alleged to have been suborned to commit perjury, made alleged false statements to Senate subcommittee of special committee, were qualified members of such committee, was mere error of law, not subject to attack by habeas corpus or motion to vacate judgment and sentence on conviction for suborning perjury before such committee. 18 U.S.C. § 2255; D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 181 F.2d 802, 1950 U.S. App. LEXIS 2706 (C.A.D.C. 1950).

Indictment and information.

Conviction under count charging subornation of perjury by witness in testimony before subcommittee of Senate committee investigating national defense program could not stand if witness did not in fact testify as count charged that he did, no matter how unorthodox, unpatriotic, reprehensible or criminal defendant's

conduct might have been. D.C. Code, 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Indictment for subornation of perjury committed in connection with inquiry by subcommittee of Senate committee investigating national defense program could properly be laid under District of Columbia perjury statute, and it was not necessary that the indictment be brought under federal perjury statute. D.C. Code 1940, § 22-2501; 18 U.S.C. §§ 1621, 1622. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Nature and elements of crime.

One cannot be convicted of suborning a perjury if there was no perjury or if the alleged perjurious statement actually was not made by alleged perjurer. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

In prosecution under count charging subornation of perjury by witness in testimony before subcommittee of Senate committee investigating national defense program, whether witness represented to subcommittee that defendant was not financially interested in or connected with certain company was to be determined by finding the meaning or significance which was fairly attributable to all testimony of witness before subcommittee. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Offenses of subornation of perjury and obstruction of justice each required proof of an element the other did not, and thus the offenses did not merge; subornation of perjury dealt with wide variety of statements under oath, covered multitude of instances which would not be reached by obstruction of justice statute, and obstruction of justice covered far more than attempts to seek false testimony. D.C. Code 1981, §§ 22-722, 22-2512. *Riley v. United States*, 647 A.2d 1165, 1994 D.C. App. LEXIS 169 (1994).

Presumptions and burden of proof.

To establish that defendant committed subornation of perjury, prosecution is required to prove that defendant knew or believed that testimony of witness about to be given will be false. D.C. Code 1981, § 22-2512. *Riley v. United States*, 647 A.2d 1165, 1994 D.C. App. LEXIS 169 (1994).

Proof that person allegedly contacted by defendant was witness or potential witness in case pending in superior court was required to support conviction for witness tampering. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

In order to prove subornation of perjury, wilful procurement of another to commit perjury may be proved by one person's testimony, but

perjury must still be proved by two witnesses, or by one witness with corroborating evidence. D.C. Code 1981, § 22-2512. *Jenkins v. United States*, 500 A.2d 1019, 1985 D.C. App. LEXIS 565 (1985).

Sentence and judgment.

Where defendant was convicted on three counts, each of which charged subornation of perjury, but received only one sentence, judgment of conviction would be affirmed if defendant was properly convicted on any one of the three counts. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Weight and sufficiency of evidence.

In prosecution for subornation of perjured testimony given by witness before subcommittee of Senate committee investigating national defense program, evidence sustained conviction under count charging that witness wilfully and falsely told subcommittee that defendant was not financially interested in or connected with aviation corporation, and that defendant suborned the perjury. D.C. Code 1940 § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

In prosecution for subornation of perjured testimony given by witness before subcommittee of Senate committee investigating national defense program, evidence sustained conviction under count charging that witness wilfully testified falsely that cost of redecorating apartment of defendant in Washington, D.C., was a gift from witness. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

In prosecution for subornation of perjured testimony given by witness before subcommittee of Senate committee investigating national defense program, evidence sustained conviction under count charging that witness testified falsely that automobile had been purchased for aviation corporation when in fact the automobile had been purchased for the personal use of defendant, and that defendant suborned the perjury. D.C. Code 1940, § 22-2501. *Meyers v. U.S.*, 171 F.2d 800, 1948 U.S. App. LEXIS 3202 (C.A.D.C. 1948).

Evidence that defendant charged with murder attempted to influence testimony of person

who had accompanied defendant to general area of killing was sufficient to establish that that person was a "witness" within meaning of witness tampering statute; person had knowledge of relevant facts immediately surrounding offense and could reasonably be expected to testify concerning them. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

Testimony of defendant's sister, that she had lied in testifying before grand jury that she had purchased automobile with her own money and that defendant had told her to make such statements to grand jury, was sufficient to sustain defendant's conviction for subornation of perjury, where two other witnesses testified that defendant, rather than his sister, had paid for automobile. D.C. Code 1981, § 22-2512. *Jenkins v. United States*, 500 A.2d 1019, 1985 D.C. App. LEXIS 565 (1985).

Witness tampering.

Person who had no knowledge of murder charges against defendant but who was approached by defendant in attempt to get that person to testify favorably to defendant at murder trial could be considered a "witness" for purposes of witness tampering charges. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

Statute prohibiting subornation of perjury, dealing with wide variety of statements under oath, covers instances which would not be reached by witness tampering statute, and witness tampering statute covers more than attempts to seek false testimony. 18 U.S.C. § 1503; D.C. Code 1981, § 22-722; § 22-703 (repealed). *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

Person who was approached by defendant in attempt by defendant to get him to testify favorably in pending murder prosecution became knowledgeable of facts material to pending litigation, and was a "witness" for purposes of witness tampering statute when defendant contacted him for a second and third time, by becoming aware of defendant's consciousness of guilt in seeking fabricated testimony. D.C. Code 1981, § 22-722. *Smith v. United States*, 591 A.2d 229, 1991 D.C. App. LEXIS 118 (1991).

§ 22-2404. False swearing.

(a) A person commits the offense of false swearing if under oath or affirmation he or she wilfully makes a false statement, in writing, that is in fact material and the statement is one which is required by law to be sworn or affirmed before a notary public or other person authorized to administer oaths.

(b) Any person convicted of false swearing shall be fined not more than \$2,500 or imprisoned for not more than 3 years, or both.

(Dec. 1, 1982, D.C. 4-164, § 403, 29 DCR 3976.)

Cross references. — Compromises and agreements concerning recordation tax on deeds, penalties for certain acts, see § 42-1110.

Prior Codifications. — 1981 Ed., § 22-2513.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-2401.

§ 22-2405. False statements.

(a) A person commits the offense of making false statements if that person wilfully makes a false statement that is in fact material, in writing, directly or indirectly, to any instrumentality of the District of Columbia government, under circumstances in which the statement could reasonably be expected to be relied upon as true; provided, that the writing indicates that the making of a false statement is punishable by criminal penalties or if that person makes an affirmation by signing an entity filing or other document under Title 29 of the District of Columbia Official Code, knowing that the facts stated in the filing are not true in any material respect or if that person makes an affirmation by signing a declaration under § 1-1061.13, knowing that the facts stated in the filing are not true in any material respect;

(b) Any person convicted of making false statements shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both. A violation of this section shall be prosecuted by the Attorney General for the District of Columbia or one of the Attorney General's assistants.

(Dec. 1, 1982, D.C. Law 4-164, § 404, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(e), 41 DCR 2608; July 2, 2011, D.C. Law 18-378, § 3(e), 58 DCR 1720; June 5, 2012, D.C. Law 19-137, § 121(b), 59 DCR 2542.)

Cross references. — Adult protective services, penalties and enforcement, see § 7-1912.

Beneficial owners, directors, or officers of domestic stock insurance companies; statements required by, see § 31-603.

Class 1 or class 2 property certification, false statements, see § 42-1102.

Compulsory school attendance, penalty for failure to provide correct information, see § 361-206.

Financing statement or other filing, false statement, see § 41-204.

Firearms control, false information violating law, see § 7-2507.04.

Lower income homeownership tax abatement and incentives, false statements, see §§ 47-3504, 47-3506.

Medicaid Provider Fraud Prevention Act, civil penalties for violating, see § 4-803.

Medicaid Provider Fraud Prevention Act, penalties for violation, see § 4-802.

Motor vehicle liens, false statements as to liens on motor vehicles, see § 50-1215.

Motor vehicle registration, unlawful acts concerning, see § 50-1501.04.

No fault motor vehicle insurance, false statements relating to, see § 31-2413.

Partnership certificate execution, false statement, see § 33-202.04.

Probate and Administration of Decedent's Estates, verification of writings required by Title 20, see § 20-102.

Professional engineers, unlawful acts, see § 47-2886.14.

Qualified lower income homeownership households, administration and enforcement of provisions, see § 47-3504.

Qualifying nonprofit housing organizations, administration and enforcement of provisions, see § 47-3506.

Real property assessment and tax, deductions from estimated market values of properties owned by single families or cooperative housing associations, false statements, see § 47-850.

Tax deed recordation, penalty for certain acts in relation to compromises and agreements concerning recordation tax on deeds, see § 42-1110.

Tuition required of nonresident attending public school in district, false statements, see § 38-303.

Unemployment compensation, penalty for

false statements or representations, see § 51-119.

Veterinary medicine, prohibited acts concerning practice, see § 3-514.

Vital statistics, false reports, see § 7-225.

Wastewater control, falsifying information, see § 8-105.04.

Water pipes or sewers, false claims for compensation for repair, see § 8-205.

Workers' compensation benefits or payment, penalty for false statement to obtain, see § 32-1533.

Prior Codifications. — 1981 Ed., § 22-2514.

Effect of amendments. — D.C. Law 18-378, in subsec. (a), inserted “or if that person makes an affirmation by signing an entity filing or other document under Title 29 of the District of Columbia Official Code, knowing that the facts stated in the filing are not true in any material respect”; and, in subsec. (b), added the second sentence.

D.C. Law 19-137, in subsec. (a), substituted “or if that person makes an affirmation by signing a declaration under § 1-1061.13, knowing that the facts stated in the filing are not true in any material respect” for “respect”.

Temporary Amendment of Section. — Section 121(b) of D.C. Law 19-88, in subsec. (a), substituted “or if that person makes an affirmation by signing a declaration under section 113 of the Uniform Military and Overseas Voters Temporary Act of 2011, passed on 2nd reading on December 6, 2011 (Enrolled version of Bill 19-547), knowing that the facts stated in the filing are not true in any material respect.” for a period.

Section 302(b) of D.C. Law 19-88 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 113(e) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 121(b) of Comprehensive Military and Overseas Voters Accommodation Emer-

gency Act of 2011 (D.C. Act 19-230, November 16, 2011, 58 DCR 9942).

For temporary (90 day) amendment of section, see § 121(b) of Comprehensive Military and Overseas Voters Accommodation Congressional Review Emergency Amendment Act of 2012 (D.C. Act 19-310, February 22, 2012, 59 DCR 1688).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-2401.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 18-378. — Law 18-378, the “District of Columbia Official Code Title 29 (Business Organizations) Enactment Act of 2009,” was introduced in Council and assigned Bill No. 18-500, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on December 7, 2010, and December 21, 2010, respectively. Signed by the Mayor on February 27, 2011, it was assigned Act No. 18-724 and transmitted to both Houses of Congress for its review. D.C. Law 18-378 became effective on July 2, 2011.

Legislative history of Law 19-137. — Law 19-137, the “Comprehensive Military and Overseas Voters Accommodation Amendment Act of 2012,” was introduced in Council and assigned Bill No. 19-356, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on February 7, 2012, and March 6, 2012, respectively. Signed by the Mayor on March 27, 2012, it was assigned Act No. 19-334 and transmitted to both Houses of Congress for its review. D.C. Law 19-137 became effective on June 5, 2012.

CHAPTER 25. POSSESSION OF IMPLEMENTS OF CRIME.

Sec.

22-2501. Possession of implements of crime;
penalty.

§ 22-2501. Possession of implements of crime; penalty.

No person shall have in his or her possession in the District any instrument, tool, or implement for picking locks or pockets, with the intent to use such instrument, tool, or implement to commit a crime. Whoever violates this section shall be imprisoned for not more than 180 days and may be fined not more than \$1,000, unless the violation occurs after he or she has been convicted in the District of a violation of this section or of a felony, either in the District or another jurisdiction, in which case he or she shall be imprisoned for not less than one year nor more than 5 years.

(June 29, 1953, 67 Stat. 97, ch. 159, § 209(a); Aug. 5, 1981, D.C. Law 4-29, § 604(a)(2), 28 DCR 3081; Nov. 17, 1981, D.C. Law 4-52, § 3(g), 28 DCR 4348; May 21, 1994, D.C. Law 10-119, § 9(c), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 110(b), 41 DCR 2608; June 3, 1997, D.C. Law 11-275, § 11, 44 DCR 1408.)

Cross references. — District defined, see § 1-201.03.

Minimum sentences, convictions under this section, see § 24-403.

Sentencing, supervised release, and good time credit for felonies under this section committed on or after August 5, 2000, see § 24-403.01.

Prior Codifications. — 1981 Ed., § 22-3601.

1973 Ed., § 22-3601.

Emergency legislation. — For temporary amendment of section, see § 110(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-29. — Law 4-29, the “District of Columbia Uniform Controlled Substances Act of 1981,” was introduced in Council and assigned Bill No. 4-123, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on May 5, 1981, and May 19, 1981, respectively. Signed by the Mayor on June 9, 1981, it was assigned Act No. 4-51 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-52. — Law 4-52, the “Minors Health Consent Regulation, District of Columbia Sexual Assault Reform Act of 1981, District of Columbia Uniform Controlled Substances Act of 1981, Traffic Act Amendments Act of 1981, District of Columbia Traffic Adjudication Act, District of Columbia Law Enforcement Act, and Statehood Constitu-

tional Convention Initiative of 1979 Amendment of 1981” was introduced in Council and assigned Bill No. 4-270, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on July 28, 1981 and September 15, 1981 respectively. Signed by the Mayor on September 25, 1981, it was assigned Act No. 4-89 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 11-275. — Law 11-275, the “Second Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-909, which was referred to the Committee of the Whole. The Bill was adopted on first and second read-

ings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-520 and transmitted to both Houses of Congress for its review. D.C. Law 11-275 became effective on June 3, 1997.

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Admissibility of evidence.

An accused person's prior possession of the physical means of committing the crime is some evidence of the probability of guilt and is therefore admissible. *Sparks v. United States*, 755 A.2d 394, 2000 D.C. App. LEXIS 109 (2000).

Questions by the state, in prosecution of defendant for possession of implements of a crime based on possession of marijuana smoking pipe, with respect to defendant's marijuana smoking habits were proper, as they went both to defendant's motive for having the pipe and his intent to use it as a narcotics implement, and were therefore necessary to establish the requisite criminal intent to sustain a conviction for the offense. D.C. Code § 22-3601. *Williams v. United States*, 427 A.2d 901, 1980 D.C. App. LEXIS 424 (1980), writ of certiorari denied by 450 U.S. 1043, 101 S. Ct. 1763, 68 L. Ed. 2d 241, 1981 U.S. LEXIS 1603, 49 U.S.L.W. 3743 (1981).

In prosecution for robbery and possession of implements of crime in connection with alleged robbery by pickpocket, jury was as competent as police officer to conclude that defendant's activities were or were not consistent with modus operandi of pickpockets as described by the officer, and thus admission of officer's testimony that defendant's activities were part of “a classic team effort” was improper. *Lampkins v. United States*, 401 A.2d 966, 1979 D.C. App. LEXIS 355 (1979).

In view of defendant's failure to move to suppress narcotics paraphernalia before trial, absent showing of plain error, admission of narcotics paraphernalia into evidence and denial of motion for judgment of acquittal of possession of narcotics paraphernalia were not errors. D.C. Code SCR, Criminal Rules 12(b)(3), 41(g); D.C. Code §§ 22-3601, 23-104(a)(2). *Brown v. United States*, 289 A.2d 891, 1972 D.C. App. LEXIS 370 (1972).

Admissions and confessions.

Defendant convicted of possession of implements of crime was entitled to remand to determine whether he had been warned of his constitutional rights by arresting officers before making incriminating statements. D.C. Code §§ 22-3601, 33-402. *Johnson v. United States*, 255 A.2d 494, 1969 D.C. App. LEXIS 279 (App. 1969).

Arrest.

Police officers who were on routine investigation of report that heroin was being “capped” at rooming house and who saw paraphernalia used by narcotics addicts in room from public hallway to which they had been properly admitted had probable cause to enter the room to arrest defendant, and having done so, properly seized heroin found in envelope and the paraphernalia. 26 U.S.C. (I.R.C.1954) § 4704(a); D.C. Code 1951, §§ 4-140, 22-3601, 23-306, 33-416. *Jennings v. U.S.*, 247 F.2d 784, 1957 U.S. App. LEXIS 5065 (C.A.D.C. 1957).

Where officers making routine check, at hotel owner's invitation, noticed readily apparent and accessible crack in door of guest room, officers' act of looking through crack was not an unreasonable search, and narcotics paraphernalia observed through crack in door and in officers' plain view provided officers with probable cause for ensuing rooftop surveillance and subsequent arrests. D.C. Code § 22-3601; U.S. Const. Amend. 4. *Borum v. U.S.*, 318 A.2d 590, 1974 D.C. App. LEXIS 409 (1974).

Where a concededly reliable informer gave tip based on personal knowledge which described defendant in great detail, and he gave defendant's alias and his present location and before arrest officers were able to corroborate the informant's tip in every detail with the exception of actual possession of narcotics, probable cause was established and narcotics and implements seized from defendant at time

of arrest did not need to be suppressed. D.C. Code §§ 22-3601, 33-402; U.S. Const. Amend. 4. *Banks v. United States*, 305 A.2d 256, 1973 D.C. App. LEXIS 299 (1973).

Where officer who had heard radio broadcast stating that three subjects were using narcotics in automobile parked at rear of warehouse went to the location and saw three persons seated in automobile matching description which had been broadcast, officer had justification for further affirmative action and his determination to identify himself as police officer and open the car's door simultaneously, while directing the occupants to get out, was permissible, and upon observing bottle-top cooker and full syringe on floor of the car, seizure of the evidence and arrest of the subjects became appropriate and there was no violation of constitutional right to be protected against unreasonable search and seizure. D.C. Code §§ 22-3601, 33-402. *United States v. Mitchell*, 299 A.2d 540, 1973 D.C. App. LEXIS 217 (1973).

Officer's observations of defendant, who was standing beside sink in his employer's restroom and appeared startled upon seeing policeman, who had entered in order to use the restroom, of defendant's freezing against the wall and of coin purse located on sink and similar to those in which officer had found narcotics in the past did not constitute probable cause for officer, who admitted that he had no reason to believe a crime was being committed when he looked into coin purse, to arrest defendant prior to the search, and search, which revealed narcotics paraphernalia and heroin, was therefore invalid. D.C. Code §§ 22-3601, 33-402; U.S. Const. Amend. 4. *McWilliams v. United States*, 298 A.2d 38, 1972 D.C. App. LEXIS 301 (1972).

Where police officer was told by another that defendant, whom officer had questioned, had a syringe under wig, officer's momentary stopping of defendant, inquiry about wig, and request to defendant to remove her hat were reasonable, and defendant's denial of wearing a wig and its obvious presence furnished independent observation and corroboration which gave rise to a reasonable basis to arrest defendant and seize contents of her hand, which she had removed from beneath wig and which contained syringe and a bag of methadone, and to seize tin foil pack, which apparently contained heroin, from starch box from which defendant began to eat at police station. D.C. Code §§ 22-3601, 23-581, 33-402; U.S. Const. Amend. 4. *United States v. Oliver*, 297 A.2d 778, 1972 D.C. App. LEXIS 286 (1972).

Where defendant, who had been questioned by officer on another matter, was still in view, three blocks away, when officer, who had been told that defendant had syringe under wig, called for scout car and stopped defendant and asked if she was wearing a wig, defendant had not left officer's presence in such a way as to

make inoperative statute permitting arrest without a warrant if officer has probable cause to believe person has committed or is committing an offense in his presence. D.C. Code §§ 22-3601, 23-581. *United States v. Oliver*, 297 A.2d 778, 1972 D.C. App. LEXIS 286 (1972).

Where arresting officers had knowledge that no one had owner's permission to occupy particular vacant apartment, officers observed broken lock, damaged door panel and the opened door of the apartment, through which defendant and companion could be seen, officers had probable cause to believe that defendant and his companion had made unlawful entry, officers' entry into apartment without warrant to effect arrest was justified and search of the premises was valid as incident to lawful arrest. D.C. Code §§ 22-3102, 22-3601, 23-104(a)(2). *Jones v. United States*, 282 A.2d 561, 1971 D.C. App. LEXIS 211 (1971).

When police detectives saw narcotics paraphernalia in possession of defendants, officers were under statutory duty to arrest the offenders immediately. D.C. Code §§ 22-3102, 22-3601; D.C. Code 1961, §§ 33-402, 33-416a(b)(1)(B). *Keith v. United States*, 232 A.2d 92, 1967 D.C. App. LEXIS 181 (App. 1967).

A small crowbar, three pairs of pliers and two screw drivers, found in automobile at time of its owner's arrest, were not such tools as are usually employed or reasonably may be employed in commission of crime within statute defining as a vagrant one found in possession of such tools without satisfactorily accounting therefor, so that his possession thereof was not a misdemeanor committed in arresting officer's presence, as required to justify arrest without warrant. D.C. Code 1951, § 22-3302(2). *Green v. District of Columbia*, 91 A.2d 712, 1952 D.C. App. LEXIS 217 (Cr.App. 1952).

Bail pending appeal.

Defendant's motion for release on bond pending appeal of his convictions of possession of one ounce of heroin and one count of possession of the implements of crime would be denied where defendant had been previously convicted for possession of heroin and while on probation he committed the offenses for which he was convicted and was charged with selling heroin, in that defendant's release would pose a danger to the community. D.C. Code 1973, §§ 22-3601, 33-402; 18 U.S.C. § 3148; F.R.A.P. Rule 9(b), 18 U.S.C. *United States v. Anderson*, 670 F.2d 328, 1982 U.S. App. LEXIS 22238 (C.A.D.C. 1982).

Construction and application.

Lactose, dextrose, quinine and gelatin capsules, even though possessing special properties for providing bulk to heroin, were not "instruments," "tools" or "implements" within statute prohibiting possession of any instru-

ment, tool or other implement which is usually employed or may reasonably be employed in the commission of any crime, and possession of large quantities of such materials by owners of retail drugstore was not a criminal act under statute. D.C. Code 1940, § 22-3301; D.C. Code § 22-3601. *Rosenberg v. United States*, 297 A.2d 763, 1972 D.C. App. LEXIS 292 (1972).

Defendant could be convicted of possession of narcotics paraphernalia under statute rendering unlawful a possession of instruments of a crime, even though no criminal statute prohibited use or consumption of narcotics, as statute makes it unlawful for any person to manufacture, possess, or have under his control, sell, prescribe, administer, disburse, or compound any narcotic drug. D.C. Code §§ 22-3601, 33-402(a). *Wheeler v. United States*, 276 A.2d 722, 1971 D.C. App. LEXIS 310 (1971).

Fact that only possible use of complete narcotics "kit", which consisted of a syringe, two needles, a "cooker" and three caps containing traces of heroin, found in defendant's possession was to administer heroin, supplied requisite criminal intent to use such implements in a crime; thus, defendant's conduct fell within proscription of statute prohibiting possession of implements of a crime. D.C. Code §§ 22-3601, 33-402. *McKoy v. United States*, 263 A.2d 645, 1970 D.C. App. LEXIS 243 (App. 1970).

Defenses.

Inability to form intent was not defense to possession of narcotics implements, and court properly denied instruction as to defense of intoxication. D.C. Code § 22-3601. *James v. United States*, 350 A.2d 748, 1976 D.C. App. LEXIS 457 (1976), writ of certiorari denied by 429 U.S. 872, 97 S. Ct. 186, 50 L. Ed. 2d 152, 1976 U.S. LEXIS 2999 (1976).

A "satisfactory account" within meaning of statute prohibiting possession of any instrument, tool, or other implement that is usually employed, or reasonably may be employed, in the commission of any crime in the absence of a satisfactory account means a lawful purpose for possessing such implement. D.C. Code § 22-3601. *McKoy v. United States*, 263 A.2d 645, 1970 D.C. App. LEXIS 243 (App. 1970).

Expert witnesses.

In prosecution for robbery and possession of implements of crime in connection with alleged robbery by pickpocket, police officer's expert testimony that defendant's activities were part of "a classic team effort" did not aid jury and its prejudicial impact was great, and thus permitting such testimony was reversible error. *Lampkins v. United States*, 401 A.2d 966, 1979 D.C. App. LEXIS 355 (1979).

Indictment and information.

Where underlying rationale for dismissal of information was an erroneous belief that defen-

dant would be incarcerated because of government's appeal from suppression order and a preoccupying disagreement with government's announced determination to proceed with the appeal, order of dismissal was without authority and void. D.C. Code §§ 22-3601, 23-104(a)(1), (f), 23-581, 33-402. *United States v. Oliver*, 297 A.2d 778, 1972 D.C. App. LEXIS 286 (1972).

Interstate commerce interests.

It is well within police power of District of Columbia to declare as contraband machine guns, sawed-off shotguns, blackjacks and switchblades without offending commerce clause. D.C. Code 1973, §§ 22-3204, 22-3214; D.C. Code 1978 Supp., § 6-1812(d, e); U.S. Const. Art. 1, § 8, cl. 3. *Smith v. District of Columbia*, 436 A.2d 53, 1981 D.C. App. LEXIS 375 (1981).

Joint representation of codefendants.

Where defense counsel, jointly representing defendant and codefendant, elicited testimony that defendant was resident in two room apartment in which narcotic paraphernalia and dangerous drug were found and defense counsel opened door to testimony that defendant had been seen to use heroin at apartment thereby involving defendant with narcotics in very substantial way, since obviously someone must have had such control at apartment as to give rise to presumption of constructive possession of articles seized, defendant was prejudiced by joint representation and was denied effective assistance of counsel. D.C. Code §§ 22-3601, 33-701(1)(A), 33-702(a)(4); 18 U.S.C. § 3006A(b); U.S. Const. Amend. 6. *McIver v. United States*, 280 A.2d 527, 1971 D.C. App. LEXIS 190 (1971).

Police powers.

Mere possession of dangerous or deleterious devices or products may be forbidden by state under its police powers. *Smith v. District of Columbia*, 436 A.2d 53, 1981 D.C. App. LEXIS 375 (1981).

Presumptions and burden of proof.

Validity of presumption created by statute depends on presence of rational connection between facts proved and ultimate fact presumed and presumption cannot be sustained if inference of one from proof of the other is arbitrary because of lack of connection between the two in common experience. D.C. Code 1951, 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

Section of statute providing that no person shall have in his possession any instrument, tool or other equipment or other implement which reasonably may be employed in commission of any crime if he is unable satisfactorily to account for possession of the implement places

burden of proof of intent upon defendant and is unconstitutional as applied to implements which do not in themselves give rise to sinister implications. D.C. Code 1951, § 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

Under statute providing that no person shall have in his possession any instrument, tool, or other implement for picking locks or pockets, or that is usually employed or reasonably may be employed in commission of any crime, if he is unable satisfactorily to account for possession of the implement, proof of intent is essential element of government's case. D.C. Code 1951, §§ 22-3302(2, 8), 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

No rational inference of criminal intent can be drawn from mere possession of tools which reasonably may be employed in crime. D.C. Code 1951, § 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

To convict under statute prohibiting possession of any instrument, tool, or other implement that is usually employed, or reasonably may be employed, in the commission of any crime, in the absence of a satisfactory account, the government must prove that the implements are usually or reasonably may be employed in the commission of crime, and that defendant intended to use implements for crime; proof of intent may be either by inference from possession of sinister items, or otherwise. D.C. Code § 22-3601. *McKoy v. United States*, 263 A.2d 649, 1970 D.C. App. LEXIS 241 (App. 1970).

In prosecution for possession of implements of crime, wherein possession of large quantity of narcotic paraphernalia was proved, it was not incumbent on prosecution to show that defendant possessor was unable to satisfactorily account for its possession and it was a matter for defense. D.C. Code § 22-3601. *Johnson v. United States*, 255 A.2d 494, 1969 D.C. App. LEXIS 279 (App. 1969).

Questions of law and fact.

Defendant's possession of syringe, needle, and soda bottle top containing traces of heroin was sufficient for a jury as to remaining elements of charged offense of possession of narcotics paraphernalia, i.e., whether implements are usually employed in commission of a crime and whether defendant intended to use such implements in a crime. D.C. Code § 22-3601; D.C. Code General Sessions Court Rules, Criminal Division rule 52(b). *Richardson v. United States*, 276 A.2d 237, 1971 D.C. App. LEXIS 304 (1971).

In prosecution for possession of narcotics paraphernalia, allowing case to go to jury on evidence presented was not manifest error.

D.C. Code § 22-3601. *Richardson v. United States*, 276 A.2d 237, 1971 D.C. App. LEXIS 304 (1971).

Review.

Where defendant was convicted under first count of unlawful entry and his conviction under second count of possession of implements of crime consisting of crowbars was under statute which is unconstitutional in its application to crowbars, case was remanded with directions either to modify judgment by setting aside verdict on second count and dismissing that count or in the alternative to vacate judgment entirely, set aside verdict on second count, dismiss that count and resentence defendant for unlawful entry, notwithstanding that general sentence was for period less than maximum for unlawful entry. D.C. Code 1951, §§ 22-1801, 22-3601. *Washington v. U.S.*, 232 F.2d 357, 1956 U.S. App. LEXIS 3032 (C.A.D.C. 1956).

Disposition of cases of three individuals, who were arrested with defendant and charged with possession of implements of crime, was irrelevant to consideration of defendant's appeal from conviction for carrying pistol without a license, despite contention that fact that government dropped charges against other three individuals who were in hotel room with defendant indicated that police officer's entry into the room, in which defendant was found holding gun, was illegal. D.C. Code §§ 22-3204, 22-3601. *Matthews v. United States*, 335 A.2d 251, 1975 D.C. App. LEXIS 351 (1975).

Where defendants received concurrent sentences in prosecution for possession of narcotics, possession of implements of crime, unlawful entry and narcotics vagrancy and evidence was sufficient to support conviction of possession of narcotics and possession of implements of crime, District of Columbia Court of Appeals would not pass upon sufficiency of evidence to support other convictions. D.C. Code §§ 22-3102, 22-3601; D.C. Code 1961, §§ 33-402, 33-416a(b)(1)(B). *Keith v. United States*, 232 A.2d 92, 1967 D.C. App. LEXIS 181 (App. 1967).

Search and seizure.

Officer's action in stopping car by sidewalk where suspects were walking, exiting, identifying himself to suspects as a policeman, and showing badge and identification amounted to a "seizure" within meaning of the Fourth Amendment, so that it had to be justified by specific and articulable facts and rational inferences from those facts which led the officers reasonably to conclude that criminal activity was afoot. U.S. Const. Amend. 4. *In re J.G.J.*, 388 A.2d 472, 1978 D.C. App. LEXIS 531 (1978).

Following investigative stop, officer's command, "Drop it!", in response to defendant's

reaching into his pocket for what appeared to be a weapon was a reasonable response, and if it were to be termed a "search," it was reasonable either as a functional equivalent of a frisk based on articulable suspicion or as a full search based on probable cause plus exigent circumstances. In re J.G.J., 388 A.2d 472, 1978 D.C. App. LEXIS 531 (1978).

Where officers making routine check, at hotel owner's invitation, noticed readily apparent and accessible crack in door of guest room and looked through crack and observed narcotics paraphernalia and defendant and others, officers' warrantless entry into room was justified by exigencies of situation. D.C. Code § 22-3601; U.S. Const. Amend. 4. *Borum v. U.S.*, 318 A.2d 590, 1974 D.C. App. LEXIS 409 (1974).

If narcotics paraphernalia was visible from doorway which was open when officers knocked, officer had right to seize it under the plain view doctrine. D.C. Code § 22-3601. *Wheeler v. United States*, 300 A.2d 713, 1973 D.C. App. LEXIS 230 (1973).

Even though search warrant and supporting affidavit did not comply with the specific provisions of the District of Columbia Code relating to nighttime searches, search warrant, which was issued pursuant to Comprehensive Drug Abuse Prevention and Control Act on basis that there was reason to believe premises contained contraband and which permitted day or nighttime execution was valid. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 509(a), 21 U.S.C. § 879(a); D.C. Code §§ 22-1515(a), 22-3601, 23-501(1), 23-521 to 23-523, 23-521(f) (5), 23-522(c)(1), 33-402, 33-414(h), 33-416; Fed.Rules Crim.Proc. rule 41(c), 18 U.S.C. *United States v. Thomas*, 294 A.2d 164, 1972 D.C. App. LEXIS 404 (1972), writ of certiorari denied by 409 U.S. 992, 93 S. Ct. 341, 93 S. Ct. 448, 34 L. Ed. 2d 258, 34 L. Ed. 2d 296, 1972 U.S. LEXIS 895 (1972).

Where defendant did not move to suppress narcotics paraphernalia, defendant urged no justification for his failure to move to suppress and he did not attempt to show lack of opportunity to raise motion before trial or lack of awareness of grounds for motion before trial, defendant's contention that paraphernalia was obtained as result of illegal search and seizure would not be considered on appeal. D.C. Code SCR, Criminal Rules 12(b)(3), 41(g); D.C. Code General Sessions Court Rules, Criminal Division rule 28(e); D.C. Code §§ 22-3601, 23-104(a)(2); Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.; U.S. Const. Amend. 4. *Brown v. United States*, 289 A.2d 891, 1972 D.C. App. LEXIS 370 (1972).

Where affidavit stated that a police informant had purchased on several occasions from defendant on defendant's premises a substance which later proved to be hashish, magistrate could reasonably infer that alleged transfers

were not made in pursuance of proper order forms, and affidavit supporting government's application for search warrant was not insufficient for failure to allege that informant-purchaser lacked written order forms required of a transferee of marijuana. D.C. Code §§ 22-3601, 33-402; 26 U.S.C. (I.R.C.1954) § 4742(a). *Rutledge v. United States*, 283 A.2d 213, 1971 D.C. App. LEXIS 229 (1971).

Where officers failed to segregate contents of match box on which defendant's hand allegedly was resting at time of search from other narcotic paraphernalia found on dresser next to defendant and tenant or lessee of apartment was present at time of raid, it could not be inferred that defendant ever possessed material subsequently identified as narcotic implements. D.C. Code § 22-3601. *Cook v. United States*, 272 A.2d 444, 1971 D.C. App. LEXIS 260 (App. 1971).

It was not unreasonable for officers to seize pistol which, as convicted felon, defendant was forbidden to possess, incidental to authorized search of his apartment for narcotics, in absence of showing that presence of pistol on premises was attributable to eight-day delay in execution of search warrant. D.C. Code §§ 22-3203, 22-3601, 33-414(e), i). *Curtis v. United States*, 263 A.2d 653, 1970 D.C. App. LEXIS 256 (App. 1970).

Where defendants' arrest for narcotics violations was legal, narcotics paraphernalia seized at time of the arrest was properly admitted in defendants' joint trial for narcotics violations. D.C. Code §§ 22-3102, 22-3601; D.C. Code 1961, §§ 33-402, 33-416a(b)(1)(B). *Keith v. United States*, 232 A.2d 92, 1967 D.C. App. LEXIS 181 (App. 1967).

In prosecution for vagrancy in possessing instruments or tools usually employed or reasonably employable in commission of crime without satisfactorily accounting therefor, instruments found under seat of defendant's automobile by arresting officer after defendant reached police station were improperly received in evidence against him. D.C. Code 1951, § 22-3302(2). *Green v. District of Columbia*, 91 A.2d 712, 1952 D.C. App. LEXIS 217 (Cr.App. 1952).

Sentence and punishment.

Fact that prosecutor recommended that defendant, who was convicted of possession of implements of a crime, based on possession of a marijuana smoking pipe following acquittal of possession of marijuana charge, be imprisoned in light of two controlled sales which led to defendant's arrest did not deny defendant due process, especially in light of fact that defendant's one-year sentence was suspended in favor of conditional probation and a \$1,000 fine. D.C. Code §§ 22-3601, 33-402; U.S. Const. Amends. 5, 14. *Williams v. United States*, 427 A.2d 901, 1980 D.C. App. LEXIS 424 (1980),

writ of certiorari denied by 450 U.S. 1043, 101 S. Ct. 1763, 68 L. Ed. 2d 241, 1981 U.S. LEXIS 1603, 49 U.S.L.W. 3743 (1981).

Validity.

The statute of prohibiting possession of implements of crime is unconstitutional in its application to crowbars. D.C. Code 1951, § 22-3601. *Washington v. U.S.*, 232 F.2d 357, 1956 U.S. App. LEXIS 3032 (C.A.D.C. 1956).

In view of narrowing interpretation to which statute had been subjected by the courts, statute under which defendant was convicted of possession of narcotics implements was not, as applied to his case, vague and overbroad. D.C. Code § 22-3601. *James v. United States*, 350 A.2d 748, 1976 D.C. App. LEXIS 457 (1976), writ of certiorari denied by 429 U.S. 872, 97 S. Ct. 186, 50 L. Ed. 2d 152, 1976 U.S. LEXIS 2999 (1976).

Where burden of proof beyond reasonable doubt of every element of crime was still on prosecution, statute placing upon defendant burden of showing innocent nature of his possession of narcotics paraphernalia did not violate due process. D.C. Code § 22-3601. *James v. United States*, 350 A.2d 748, 1976 D.C. App. LEXIS 457 (1976), writ of certiorari denied by 429 U.S. 872, 97 S. Ct. 186, 50 L. Ed. 2d 152, 1976 U.S. LEXIS 2999 (1976).

Statute which makes it a crime to have in possession any implement that is usually employed in commission of crime without being able to give satisfactory account is not unconstitutional for vagueness. D.C. Code § 22-3601. *Tompkins v. United States*, 272 A.2d 100, 1970 D.C. App. LEXIS 376 (App. 1970).

Where defendant did not introduce evidence to show that he was addicted to heroin at time of arrest and defendant had stated in application for pretrial release that he was not physically addicted to narcotics at that time, question whether statute on possession of implements usually employed in commission of crime was unconstitutional as it applies to possession of items needed by narcotics addict was not reached. D.C. Code § 22-3601. *Tompkins v. United States*, 272 A.2d 100, 1970 D.C. App. LEXIS 376 (App. 1970).

Statute prohibiting possession of any instrument, tool, or other implement that is usually employed, or reasonably may be employed in commission of any crime, in the absence of a satisfactory account, was constitutional as applied to nonmedical person, who, on arrest, was found to be in possession of a case containing a wet needle, needle holder and syringe, but without the cooker, and whose statements of intent to use hypodermic and needle for injection of heroin were sufficiently corroborated. D.C. Code § 22-3601. *McKoy v. United States*, 263 A.2d 649, 1970 D.C. App. LEXIS 241 (App. 1970).

Statute prohibiting possession of any instrument, tool or other implement that is usually employed, or reasonably may be employed, in the commission of any crime, in the absence of a satisfactory account, provides sufficient notice so that persons of ordinary intelligence can ascertain the line separating guilty from innocent acts and therefore is not unconstitutionally vague. D.C. Code § 22-3601. *McKoy v. United States*, 263 A.2d 649, 1970 D.C. App. LEXIS 241 (App. 1970).

The "satisfactory account" clause of statute prohibiting possession of any instrument that is usually employed, or reasonably may be employed in the commission of any crime in the absence of a satisfactory account does not violate the privilege against self-incrimination because of its availability as an affirmative defense. D.C. Code § 22-3601. *McKoy v. United States*, 263 A.2d 649, 1970 D.C. App. LEXIS 241 (App. 1970).

Validity of related laws.

Defendants who were not charged with use of radar jammer, expressly forbidden by police regulation, lacked standing to assert unconstitutionality of that portion of police regulation. *Smith v. District of Columbia*, 436 A.2d 53, 1981 D.C. App. LEXIS 375 (1981).

Defendants had no standing to assert unconstitutionality of police regulation prohibiting possession of police radar detector in motor vehicle, in so far as regulation might be applied to possession by shipper or private person carrying device in trunk of his auto, where defendants were not convicted for either of those modes of possession. *Smith v. District of Columbia*, 436 A.2d 53, 1981 D.C. App. LEXIS 375 (1981).

Police regulation prohibiting possession or use of "any device designed to detect. . . police radar was not unduly vague or arbitrary and did not violate due process by establishing irrebuttable presumption. U.S. Const. Amend. 14. *Smith v. District of Columbia*, 436 A.2d 53, 1981 D.C. App. LEXIS 375 (1981).

Weight and sufficiency of evidence.

Under statute providing that no person shall have in his possession any instrument, tool, or other implement for picking locks or pockets, or that is usually employed or reasonably may be employed in commission of any crime, if he is unable satisfactorily to account for possession of implement, if order or demand was necessary, requirement was satisfied by evidence in prosecution thereunder. D.C. Code 1951, § 22-3601. *Benton v. U.S.*, 232 F.2d 341, 1956 U.S. App. LEXIS 3028 (C.A.D.C. 1956).

In prosecution for possession of implements of crime, evidence that three syringes and three glassine envelopes containing traces of heroin were found in plain view on front seat of vehicle

driven by defendant, next to and almost underneath where defendant was seated, together with evidence of defendant's consciousness of guilt, supported conviction. *United States v. Covington*, 459 A.2d 1067, 1983 D.C. App. LEXIS 368 (1983).

Evidence in prosecution of defendant for possession of implements of a crime, based on possession of a marijuana smoking pipe, including expert testimony as to the physical characteristics of the pipe, the fact that it was equipped with an air vent to facilitate the smoking of marijuana, and testimony as to the nature and significance of the residue in the pipe was sufficient to allow a jury to find defendant guilty beyond a reasonable doubt. D.C. Code § 22-3601. *Williams v. United States*, 427 A.2d 901, 1980 D.C. App. LEXIS 424 (1980), writ of certiorari denied by 450 U.S. 1043, 101 S. Ct. 1763, 68 L. Ed. 2d 241, 1981 U.S. LEXIS 1603, 49 U.S.L.W. 3743 (1981).

As to the sufficiency of evidence of possession of a narcotic drug, narcotics implements, and a pistol, the instant case was controlled by "Hooker," and this holding applied to the jointly possessed narcotic contraband seized on execution of search warrant, as well as to the joint possession of pistol seized 11 days later. D.C. Code §§ 22-3203, 22-3601, 33-402. *Haltiwanger v. United States*, 377 A.2d 1142, 1977 D.C. App. LEXIS 385 (1977).

In prosecution for possession of a dangerous drug and possession of narcotics paraphernalia, evidence was sufficient to support finding that defendant had knowing dominion and control over dangerous drugs found in bedside stand located a few feet from dresser in bedroom in which police also found defendant's army uniforms and military papers bearing defendant's name, personal papers on which defendant's name appeared, and items of men's clothing. D.C. Code §§ 22-3601, 33-702(a)(4). *Hooker v. United States*, 372 A.2d 996, 1977 D.C. App. LEXIS 457 (1977).

Evidence sustained conviction of possession of narcotics paraphernalia, even though no traces of heroin were found in defendant's apartment, in which substances shown to be used in "cutting" and injecting heroin were found. D.C. Code § 22-3601. *Rosser v. United States*, 313 A.2d 876, 1974 D.C. App. LEXIS 341 (1974).

Proof of intent to possess narcotics paraphernalia may be inferred from possession of "sinister" items. D.C. Code § 22-3601. *Rosser v. United States*, 313 A.2d 876, 1974 D.C. App. LEXIS 341 (1974).

Defendant's possession of a small wooden pipe, without further evidence as to its shape and size and absent evidence as to nature and significance of marijuana residue in pipe, did not have the "sinister" implication that possession of the "implements" and "tools" of a crime

raises and was not sufficient to support conviction of possessing implements of crime, to wit, narcotics paraphernalia. D.C. Code § 22-3601. *Williams v. United States*, 304 A.2d 287, 1973 D.C. App. LEXIS 282 (1973).

Evidence that narcotics paraphernalia was discovered in room in which was found a notebook containing record in defendant's handwriting of narcotics purchases and amounts purchases would sell for after being cut was sufficient to sustain conviction of defendant on charge of possession of implements of crime. D.C. Code § 22-3601. *Mahoney v. United States*, 295 A.2d 895, 1972 D.C. App. LEXIS 271 (1972).

Proof of possession of syringe containing liquid with more than traces of heroin is sufficient to sustain conviction for possession of implements of a crime. D.C. Code § 22-3601. *Jones v. United States*, 282 A.2d 561, 1971 D.C. App. LEXIS 211 (1971).

Single implement of narcotics paraphernalia, when seized separately, need not compel finding that it is instrumentality for illegal use of narcotics. D.C. Code § 22-3601. *Jones v. United States*, 282 A.2d 561, 1971 D.C. App. LEXIS 211 (1971).

Presence of apparently usable quantity of heroin in syringe is sufficient to negate possession of syringe for legitimate use. D.C. Code § 22-3601. *Jones v. United States*, 282 A.2d 561, 1971 D.C. App. LEXIS 211 (1971).

Evidence that defendant was in possession of a syringe which contained apparently usable quantity of heroin was sufficient to support conviction for possession of implements of crime. D.C. Code § 22-3601. *Jones v. United States*, 282 A.2d 561, 1971 D.C. App. LEXIS 211 (1971).

Evidence was sufficient for jury to conclude that defendant possessed hypodermic needle and syringe with intent to use them for a criminal purpose. D.C. Code §§ 22-3204, 22-3601. *Crawford v. United States*, 278 A.2d 125, 1971 D.C. App. LEXIS 337 (1971).

From facts that defendant had been present in car immediately before officer noticed narcotics paraphernalia protruding from under seat where defendant had just been seated, that defendant had been driving car immediately prior to time articles were recovered, that defendant was owner of the car, that a single needle and syringe were within defendant's reach, and that puncture marks were found on defendant's arm, it was reasonable to infer that defendant had dominion and control over needle and syringe under his seat, and, viewing evidence in light most favorable to the government, it was adequate to support jury's finding that defendant had possession of the needle and syringe. D.C. Code § 22-3601. *Crawford v. United States*, 278 A.2d 125, 1971 D.C. App. LEXIS 337 (1971).

CHAPTER 25A. PRESENCE IN A MOTOR VEHICLE CONTAINING A FIREARM.

Sec.

22-2511. Presence in a motor vehicle containing a firearm.

§ 22-2511. Presence in a motor vehicle containing a firearm.

(a) It is unlawful for a person to be voluntarily in a motor vehicle if that person knows that a firearm is in the vehicle, unless the firearm is being lawfully carried or lawfully transported.

(b) It shall be an affirmative defense to this offense, which the defendant must prove by a preponderance of the evidence, that the defendant, upon learning that a firearm was in the vehicle, had the specific intent to immediately leave the vehicle, but did not have a reasonable opportunity under the circumstances to do so.

(c)(1) Except as provided in paragraph (2) of this subsection, a person who violates this section shall be fined not more than \$5,000, imprisoned for not more than 5 years, or both.

(2) If the violation of this section occurs after a person has been convicted in the District of Columbia of a violation of § 22-4504(a), or of a felony, either in the District of Columbia or another jurisdiction, the person shall be fined not more than \$10,000, imprisoned for not more than 10 years, or both.

(3) No person shall be sentenced consecutively for this offense and any other firearms offense arising out of the same incident. Any conviction under this section and any conviction for carrying or possessing the same firearm on the same occasion shall be considered as one conviction for purposes of any application of repeat offender sentencing provisions.

(Dec. 10, 2009, D.C. Law 18-88, § 101, 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 101 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 101 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — Law

18-88, the “Omnibus Public Safety and Justice Amendment Act of 2009”, as introduced in Council and assigned Bill No. 18-151, which was referred to the Committee on Public Safety and the Judiciary. The bill as adopted on first and second readings on June 30, 2009, and July 31, 2009, respectively. Signed by the Mayor on August 26, 2009, it was assigned Act No. 18-189 and transmitted to both Houses of Congress for its review. D.C. Law 18-88 became effective on December 10, 2009.

CHAPTER 26. PRISON BREACH; MISPRISONS.

Subchapter I. Escape

Sec.
22-2601. Escape from institution or officer.

Subchapter II. Misprisions

22-2602. [Repealed].

Subchapter III. Introduction of Contraband into Penal Institution

Sec.
22-2603.01. Definitions.
22-2603.02. Unlawful possession of contraband.
22-2603.03. Penalties.
22-2603.04. Detainment power.

Subchapter I. Escape.

§ 22-2601. Escape from institution or officer.

(a) No person shall escape or attempt to escape from:

(1) Any penal institution or facility in which that person is confined pursuant to an order issued by a court, judge, or commissioner of the District of Columbia;

(2) The lawful custody of an officer or employee of the District of Columbia or of the United States; or

(3) An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed.

(b) Any person who violates subsection (a) of this section shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both, said sentence to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape.

(July 15, 1932, 47 Stat. 698, ch. 492, § 8; June 6, 1940, 54 Stat. 243, ch. 254, § 6(a); July 29, 1970, 84 Stat. 574, Pub. L. 91-358, title I, § 157(b); Aug. 20, 1994, D.C. Law 10-151, § 203, 41 DCR 2608; June 3, 2011, D.C. Law 18-377, § 9, 58 DCR 1174.)

Cross references. — Armed offenses, additional penalty for committing crime when armed, see §§ 22-4501 and 22-4502.

Repealer, acts inconsistent with this section, see § 24-407.

Prior Codifications. — 1981 Ed., § 22-2601.

1973 Ed., § 22-2601.

Effect of amendments. — D.C. Law 18-377, in subsec. (a), deleted “or” from the end of par. (1), substituted “; or” for a period the end of par. (2), and added par. (3); and, in subsec. (b), substituted “original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape” for “original sentence”.

Emergency legislation. — For temporary amendment of section, see § 203 of the Omnibus Criminal Justice Reform Emergency

Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 509 of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 509 of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respec-

tively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

CASE NOTES

ANALYSIS

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Admissibility of evidence.

In prosecution for felony-murder, rape, and prison breach, prejudice to defendant from inference that could flow from evidence of his joint participation with witness in prior robberies far outweighed any enhancement of such witness' credibility from his testimony and its admission denied defendant a fair trial. D.C. Code §§ 22-2401, 22-2601, 22-2801, 22-2901. *Rindgo v. United States*, 411 A.2d 373, 1980 D.C. App. LEXIS 426 (1980).

Construction and application.

Term "escape" not specifically defined is generally agreed to mean absencing oneself from custody without permission. 18 U.S.C. § 751(a); D.C. Code § 22-2601. *U.S. v. Bailey*, 100 S.Ct. 624, 1980 U.S. LEXIS 69 (U.S. Dist. Col. 1980).

Evidence was sufficient to show that defendant knew he had to return to halfway house at designated hour, and that failure to do so without permission would result in sanctions, as required to support conviction for escape from institution; defendant signed document delineating rules and regulations governing placement at halfway house and specifically, sign-out procedures, and defendant had signed out and back in on at least three prior occasions in accordance with rules. *Hines v. United States*, 890 A.2d 686, 2006 D.C. App. LEXIS 12 (2006).

Defendant's convictions for assaulting a police officer and for escape from an officer did not merge, as each required proof of an element which the other did not. *Mack v. United States*, 772 A.2d 813, 2001 D.C. App. LEXIS 111 (2001).

That defendant was not committed to a facility by a judicial order did not preclude convicting him for escape from the "lawful custody of

an officer." *Mack v. United States*, 772 A.2d 813, 2001 D.C. App. LEXIS 111 (2001).

Plain words of statutory provision making it a crime to escape from the "lawful custody of an officer" do not require a commitment to a facility before an individual may be charged with escape. *Mack v. United States*, 772 A.2d 813, 2001 D.C. App. LEXIS 111 (2001).

Evidence that officer physically restrained defendant, for the purpose of effecting his arrest, by grabbing and picking him up after defendant began swinging at officer was sufficient to show that defendant was in "lawful custody" before he fled his jacket and ran away, as required to support conviction for escape from the lawful custody of an officer. *Mack v. United States*, 772 A.2d 813, 2001 D.C. App. LEXIS 111 (2001).

Where an officer physically restrains a person pursuant to a lawful arrest, or where the person has submitted to a lawful arrest, "lawful custody" exists within the meaning of statutory provision making it a crime to escape from the "lawful custody of an officer." *Mack v. United States*, 772 A.2d 813, 2001 D.C. App. LEXIS 111 (2001).

Prison break statute [D.C. Code 1981, § 22-2601] was applicable to petitioners' failure to return to halfway house as required by terms of work-release program. *Gonzalez v. United States*, 498 A.2d 1172, 1985 D.C. App. LEXIS 497 (1985).

Application of prison break statute [D.C. Code 1981, § 22-2601] to escapees from halfway house did not conflict with legislative history or purpose of work-release statute [D.C. Code 1981, § 24-461 et seq.], and, therefore, petitioners' could be convicted under prison break statute of failing to return to place of confinement. D.C. Code 1981, § 24-465(b). *Gonzalez v. United States*, 498 A.2d 1172, 1985 D.C. App. LEXIS 497 (1985).

Prison break statute [D.C. Code 1981, § 22-2601] and work release "failure to return" statute [D.C. Code 1981, § 24-465(b)] do not conflict, but merely provide alternative means of prosecuting escape from halfway house by misdemeanor. *Gonzalez v. United States*, 498 A.2d 1172, 1985 D.C. App. LEXIS 497 (1985).

Prosecution of defendant, who failed to return to halfway house after authorized absence, for prison breach was not precluded by fact that work release statute also provided punishment for failure to return to halfway house. D.C.

Code §§ 22-2601, 22-3427, 24-465. *Days v. United States*, 407 A.2d 702, 1979 D.C. App. LEXIS 540 (1979).

Failure to return to halfway house, which was defendant's designated place of custody, after authorized absence was legal equivalent of escape. D.C. Code§ 22-2601. *Days v. United States*, 407 A.2d 702, 1979 D.C. App. LEXIS 540 (1979).

District of Columbia prison breach statute did not apply outside District of Columbia. D.C. Code § 22-2601. *Rivers v. United States*, 334 A.2d 179, 1975 D.C. App. LEXIS 345 (1975).

Escapes by District of Columbia prisoners which occur outside District may be charged under federal prison breach statute. 18 U.S.C. § 751(a); D.C. Code §§ 22-2601, 24-425. *Rivers v. United States*, 334 A.2d 179, 1975 D.C. App. LEXIS 345 (1975).

Where defendant was released from pretrial custody on personal recognizance and on condition that he live in half-way house and participate in work release program, he was not "committed" within purview of prison breach statute. D.C. Code § 22-2601. *McMillian v. United States*, 326 A.2d 241, 1974 D.C. App. LEXIS 285 (1974).

Defendants, who, in course of serving sentences for felonies, were transferred to a half-way house, were guilty of escape from penal institution when they left the half-way house and did not return. D.C. Code §§ 22-2601, 24-461, 24-462, 24-465, 24-465(b); Organization Order No. 7, pt. 3, subd. B, D.C. Code Tit. 1, Appendix III. *United States v. Venable*, 316 A.2d 857, 1974 D.C. App. LEXIS 393 (1974).

Misdemeanant who was placed in halfway house for participation in work release program due to administrative error rather than by court order required for valid placement, and who left and failed to return to halfway house, was properly prosecuted under statute which prescribes punishment for escape from penal institution rather than statute which prescribes punishment for violation of work release plan. D.C. Code §§ 22-2601, 24-465(b). *Armstead v. United States*, 310 A.2d 255, 1973 D.C. App. LEXIS 359 (1973).

Misdemeanant, who had violated a court ordered work-release program must not be sentenced under this section, but under the more lenient provision of § 24-465(b). *United States v. Payton*, 113 WLR 617 (Super. Ct. 1985).

Defenses.

The failure to possess an "intent to avoid further confinement" is not an independent defense to an escape charge. *Thurston v. United States*, 779 A.2d 260, 2001 D.C. App. LEXIS 170 (2001).

Defense of duress may properly be applied to an escape charge, and no distinction is to be made between cases in which duress was di-

rected at a defendant while in custody from those situations in which he was prevented from returning to custody following a temporary lawful absence. D.C. Code § 22-2601. *Stewart v. United States*, 370 A.2d 1374, 1977 D.C. App. LEXIS 442 (1977).

Defense of duress to a charge of escape may be established by proof of three conditions: first, defendant must show that his flight from custody, or failure to return following a temporary lawful absence, was necessitated by coercion of such a nature as to induce in his mind a well-grounded apprehension of immediate death or serious bodily injury; second, there must be no reasonable opportunity for defendant to avoid the danger except by resorting to escape; and third, defendant must establish that he immediately returned to custody once the threat of harm was no longer imminent. D.C. Code § 22-2601. *Stewart v. United States*, 370 A.2d 1374, 1977 D.C. App. LEXIS 442 (1977).

Defendant, who failed to return to custody after being issued a temporary pass, did not establish that his failure to return was involuntary and induced by duress, since his ambiguous assertion that he was a "sitting duck," when viewed in the context of an alleged threat emanating from outside defendant's halfway house, was not legally sufficient to show a nexus between the source of the coercion and the necessity to "escape" by not returning, since, even assuming he initially acted out of fear of immediate death or serious bodily injury, he did not return to custody for over a month and a half and failed to establish that the threat remained imminent, and since he failed to surrender himself after he was offered protective custody at another institution. D.C. Code § 22-2601. *Stewart v. United States*, 370 A.2d 1374, 1977 D.C. App. LEXIS 442 (1977).

Elements of offense.

Escape from institution statute did not require proof that the defendant acted with intent to avoid confinement. *Hines v. United States*, 890 A.2d 686, 2006 D.C. App. LEXIS 12 (2006).

"Escape," for purposes of escape from institution or officer statute, means knowingly or deliberately leaving physical confinement, or failing to return to it, without permission. *Hines v. United States*, 890 A.2d 686, 2006 D.C. App. LEXIS 12 (2006).

A halfway house is considered a "penal institution" for purposes of the escape statute. *Hines v. United States*, 890 A.2d 686, 2006 D.C. App. LEXIS 12 (2006).

Even if defendant, who had been sentenced to serve weekend sentences for ten consecutive weekends, was on probationary status during weekdays, the probation was tolled during weekends, and thus, defendant was in custody

during weekends, as element of felony escape, relating to defendant's successive failures to report to jail to serve weekend sentences. *Williams v. United States*, 832 A.2d 158, 2003 D.C. App. LEXIS 556 (2003).

The legal restraint imposed at sentencing, requiring defendant to report to jail on weekends to serve his sentence, constituted "custody," as element of felony escape, relating to defendant's successive failures to report to jail to serve weekend sentences, though defendant was not held in halfway house during weekdays. *Williams v. United States*, 832 A.2d 158, 2003 D.C. App. LEXIS 556 (2003).

"Intent to avoid further confinement" is not element of crime of escape, notwithstanding language to contrary in standard Criminal Jury Instruction. *Thurston v. United States*, 779 A.2d 260, 2001 D.C. App. LEXIS 170 (2001).

A person commits the offense of "escape" when he lawfully leaves a halfway house but fails to return on time. *Thurston v. United States*, 779 A.2d 260, 2001 D.C. App. LEXIS 170 (2001).

Indictment.

Even assuming defendant could have been prosecuted for misdemeanor failure to return rather than felony escape, the prosecution had discretion to charge him with the felony offense. *Williams v. United States*, 832 A.2d 158, 2003 D.C. App. LEXIS 556 (2003).

Instructions.

Although it could be inferred that jury understood that an "attempt" required intent to complete the offense, defendant was entitled, in trial for attempted escape, to a more specific instruction that State needed to prove beyond a reasonable doubt that defendant intended to leave the jail on date in question, where the theory of defense was lack of intent. *Brawner v. United States*, 979 A.2d 1191, 2009 D.C. App. LEXIS 377 (2009).

Jurisdiction.

Where defendant, who was incarcerated at a District of Columbia penal institution located in Virginia, and who was placed in a work release program, allowing him to work at a private construction site in the District of Columbia, was told by a corrections supervisor to report immediately to a halfway house in the district when he was late in returning to Virginia facility, with result that at that point, the halfway house became an extension of Virginia facility for purposes of defendant's custody, his failure to report to halfway house, his criminal act of omission, took place in the District of Columbia, and thus superior court had jurisdiction in escape prosecution. D.C. Code § 22-2601. *Mundine v. United States*, 431 A.2d 16, 1981 D.C. App. LEXIS 290 (1981).

Prosecution of prisoner who escaped from custody in District of Columbia, under District of Columbia prison breach statute, in Superior Court of District of Columbia rather than in United States district court did not deny prisoner due process or equal protection. U.S. Const. art. 1, § 1 et seq.; art. 3, § 1 et seq.; D.C. Code § 22-2601. *Rivers v. United States*, 334 A.2d 179, 1975 D.C. App. LEXIS 345 (1975).

Limitation of actions.

Escaped prisoner is, by definition, fugitive from justice, and statute of limitations normally applicable to federal offenses is tolled while he remains at large. 18 U.S.C. §§ 751(a), 3290; D.C. Code § 22-2601. *U.S. v. Bailey*, 100 S.Ct. 624, 1980 U.S. LEXIS 69 (U.S. Dist. Col. 1980).

Pending appeals.

Appellate courts are free to dismiss appeal of fugitive even where an appeal lies as of right by statute or state constitutional provision. In re S.H., 570 A.2d 814, 1990 D.C. App. LEXIS 45 (1990).

Once appellant has absconded, appellate court acts within its discretionary powers in refusing to consider or to reinstate appeal, even if appellant later returns to jurisdiction and comes once again within power of court. In re S.H., 570 A.2d 814, 1990 D.C. App. LEXIS 45 (1990).

Court of Appeals would not dismiss juvenile's appeal from trial court's adjudication of delinquency, even though juvenile twice absconded from custody of juvenile authorities while appeal was pending; proceeding involved juvenile and total time during which juvenile was out of control of juvenile authorities was not of such extended duration that government asserted it would suffer any prejudice in possible retrial of case. In re S.H., 570 A.2d 814, 1990 D.C. App. LEXIS 45 (1990).

Pleas.

Before accepting a guilty plea in a prison breach case, the court should make certain the defendant understands that when sentence is ultimately imposed on the plea the sentence must be consecutive to the sentence then being served. D.C. Code SCR, Criminal Rule 11; D.C. Code § 22-2601. *Hicks v. United States*, 362 A.2d 111, 1976 D.C. App. LEXIS 351 (1976).

Finding that failure to inform defendant of consecutive nature of sentence before accepting guilty plea to charge of prison breach did not constitute "manifest injustice" entitling defendant to withdraw plea was not abuse of discretion where trial court carefully ascertained that defendant entered the plea voluntarily and with an understanding of the nature of the charge, there was no dispute as to guilt and total time which defendant was required to serve did not substantially exceed the maxi-

mum he was aware he might be required to serve. D.C. Code SCR, Criminal Rules 11, 32(e); D.C. Code § 22-2601. *Hicks v. United States*, 362 A.2d 111, 1976 D.C. App. LEXIS 351 (1976).

Presumptions and burden of proof.

In a prosecution for escape from an institution, the government need not prove that the defendant acted with the purpose—that is, the conscious objective—of leaving the penal institution without authorization; all that must be shown is that the defendant knew his actions would result in his leaving physical confinement without permission. *Hines v. United States*, 890 A.2d 686, 2006 D.C. App. LEXIS 12 (2006).

Sentence and punishment.

Trial court's erroneous belief that consecutive

sentence for escape was required was plain error, thus warranting remand for resentencing. D.C. Code 1981, § 22-2601(a)(2), (b). *Veney v. United States*, 738 A.2d 1185, 1999 D.C. App. LEXIS 203 (1999).

Validity.

Availability of two different penalties under prison break statute and statute governing work-release prisoner's failure to return to designated place of confinement for escapes from halfway houses did not violate notice provision of due process clause. D.C. Code 1981, §§ 22-2601, 24-465; U.S. Const. Amends. 5, 14. *Gonzalez v. United States*, 498 A.2d 1172, 1985 D.C. App. LEXIS 497 (1985).

Subchapter II. Misprisions.

§ 22-2602. Misprisions by officers or employees of jail. [Repealed].

Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 602(o), 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-2602.

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Subchapter III. Introduction of Contraband into Penal Institution.

§ 22-2603.01. Definitions.

For the purposes of this subchapter, the term:

(1) “Cellular telephone or other portable communication device and accessories thereto” means any device carried, worn, or stored that is designed, intended, or readily converted to create, receive or transmit oral or written messages or visual images, access or store data, or connect electronically to the Internet, or any other electronic device that enables communication in any form. The term “cellular telephone or other portable communication device and accessories thereto” includes portable 2-way pagers, hand-held radios, cellular telephones, Blackberry-type devices, personal digital assistants or PDAs, computers, cameras, and any components of these devices. The term “cellular telephone or other portable communication device and accessories thereto” also includes any new technology that is developed for communication purposes and includes accessories that enable or facilitate the use of the cellular telephone or other portable communication device.

(2)(A) “Class A Contraband” means:

(i) Any item, the mere possession of which is unlawful under District of Columbia or federal law;

(ii) Any controlled substance listed or described in Unit A of Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01;

(iii) Any dangerous weapon or object which is capable of such use as may endanger the safety or security of a penal institution or secure juvenile residential facility or any person therein, including,:

(I) A firearm or imitation firearm, or any component of a firearm;

(II) Ammunition or ammunition clip;

(III) A stun gun, taser, or other device capable of disrupting a person’s nervous system;

(IV) Flammable liquid or explosive powder;

(V) A knife, screwdriver, ice pick, box cutter, needle, or any other object or tool that can be used for cutting, slicing, stabbing, or puncturing a person;

(VI) A shank or homemade knife; or

(VII) Tear gas, pepper spray, or other substance that can be used to cause temporary blindness or incapacitation;

(iv) Any object designed or intended to facilitate an escape;

(v) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;

(vi) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool that can be used to cut through metal, concrete, or plastic;

(vii) Rope; or

(viii) When possessed by, given to, or intended to be given to an inmate or securely detained juvenile, a correctional officer’s uniform, law enforcement officer’s uniform, medical staff clothing, any other uniform, or civilian clothing.

(B) The term “Class A contraband” does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.

(3)(A) “Class B Contraband” means:

(i) Any alcoholic liquor or beverage;

(ii) A hypodermic needle or syringe or other item that can be used for the administration of unlawful controlled substances; or

(iii) A cellular telephone or other portable communication device and accessories thereto.

(B) The term “Class B contraband” does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.

(4)(A) “Class C Contraband” means any article or thing which a person confined in a penal institution or secure juvenile residential facility is prohibited from obtaining or possessing by rule. The Mayor, pursuant to subchapter I of Chapter 5 of Title 2 [§ 2-501 et seq.], shall promulgate by rulemaking the articles or things that are Class C contraband. The rules shall be posted in the facility to give notice of the prohibited articles or things.

(B) The term “Class C contraband” does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.

(5) “Grounds” means the area of land occupied by the penal institution or secure juvenile residential facility and its yard and outbuildings, with a clearly identified perimeter.

(6) “Penal institution” means any penitentiary, prison, jail, or secure facility owned, operated, or under the control of the Department of Corrections, whether located within the District of Columbia or elsewhere.

(7) “Secure juvenile residential facility” means a locked residential facility providing custody, supervision, and care for one or more juveniles that is owned, operated, or under the control of the Department of Youth Rehabilitation Services, excluding residential treatment facilities and accredited hospitals.

(Dec. 15, 1941, 55 Stat. 800, ch. 572, § 1; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 572, Pub. L. 91-358, title I, § 155(c)(30); redesignated § 2, Dec. 10, 2009, D.C. Law 18-88, § 210, 56 DCR 7413; Nov. 6, 2010, D.C. Law 18-259, § 5, 57 DCR 5591; June 3, 2011, D.C. Law 18-377, § 10(a), 58 DCR 1174.)

Prior Codifications. — 2001 Ed., § 22-2603.

1981 Ed., § 22-2603.

1973 Ed., § 22-2603.

Effect of amendments. — D.C. Law 18-88 rewrote the section, which had read as follows: “Any person, not authorized by law, or by the Mayor of the District of Columbia, or by the Director of the Department of Corrections of the District of Columbia, who introduces or attempts to introduce into or upon the grounds of any penal institution of the District of Columbia, whether located within the District of Columbia or elsewhere, any narcotic drug, weapon, or any other contraband article or thing, or any contraband letter or message intended to be received by an inmate thereof, shall be guilty of a felony, and, upon conviction thereof in the Superior Court of the District of Columbia or in any court of the United States, shall be punished by imprisonment for not more than 10 years.”

D.C. Law 18-259, in par. (3)(A)(iii), substituted “telephone, cell phone accessories,” for “telephone”.

D.C. Law 18-377 rewrote pars. (1) and (3)(A)(iii), which formerly read:

“(1) ‘Cellular telephone or other portable communication device’ means any device carried, worn, or stored that is designed, intended, or readily converted to create, receive, or transmit verbal or written messages or visual images, access or store data, or connect electronically to the Internet or any other electronic device and which allows communications in any form. The term ‘cellular telephone or other portable communication device’ includes portable 2-way pagers, hand-held radios, cellular telephones, Blackberry-type devices, personal digital assistants or PDAs, computers, cameras, or any components of these devices which are intended to be used to assemble such devices. The term ‘cellular telephone or other portable communication device’ also includes any new technology that is developed for similar purposes.”

“(iii) A cellular telephone, cell phone accessories, or other portable communication device.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 210 of

Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 210 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

For temporary (90 day) amendment of section, see § 510(a) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 510(a) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Legislative history of Law 18-259. — For history of Law 18-259, see notes under § 22-2724.

Legislative history of Law 18-377. — For

history of Law 18-377, see notes under § 22-303.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 22-2603.02. Unlawful possession of contraband.

(a) Except as authorized by law, the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services, it is unlawful to:

(1) Knowingly bring Class A, Class B, or Class C contraband into or upon the grounds of a penal institution or a secure juvenile residential facility with the intent that it be given to or received by an inmate or securely detained juvenile;

(2) Knowingly cause another to bring Class A, Class B, or Class C contraband into or upon the grounds of a penal institution or a secure juvenile residential facility with the intent that it be given to or received by an inmate or securely detained juvenile; or

(3) Knowingly place Class A, Class B, or Class C contraband in such proximity to a penal institution or a secure juvenile residential facility with the intent to give an inmate, a securely detained juvenile, a staff member, or a visitor access to the contraband.

(b) It is unlawful for an inmate, or securely detained juvenile, to possess Class A, Class B, or Class C contraband, regardless of the intent with which he or she possesses it.

(c) It is unlawful for an employee of the Department of Corrections or Department of Youth Rehabilitation Services who becomes aware of any violation of this section to fail to report such knowledge as required by department regulations, policies, or procedures.

(d)(1) Any item listed as contraband is not deemed to be contraband when issued by a penal institution or secure juvenile residential facility to an employee and the item is being used in the performance of the employee's duties within the penal institution or secure juvenile residential facility.

(2) Any item listed as contraband is not deemed to be contraband when issued by a law enforcement agency to its sworn officers and the item is being used in the performance of his or her duties.

(e) It is not unlawful for an attorney, or representative or agent of an attorney, during the course of a visit for the purpose of legal representation of the inmate or securely detained juvenile, to:

(1) Possess a cellular telephone or other portable communication device and accessories thereto for the purpose of the legal visit for use by the attorney, representative, or agent, and not for the personal use of any inmate or securely detained juvenile; or

(2) Give or transmit to an inmate or securely detained juvenile legal written or recorded communication pertaining to his or her legal representation.

(f) It is not unlawful for a person to possess or carry a controlled substance that is prescribed to that person and that is medically necessary for that person to carry.

(Dec. 15, 1941, 55 Stat. 800, ch. 572, § 1; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 572, Pub. L. 91-358, title I, § 155(c)(30); redesignated § 3, Dec. 10, 2009, D.C. Law 18-88, § 210, 56 DCR 7413; June 3, 2011, D.C. Law 18-377, § 10(b), 58 DCR 1174.)

Prior Codifications. — 2001 Ed., § 22-2603.

1981 Ed., § 22-2603.

1973 Ed., § 22-2603.

Effect of amendments. — D.C. Law 18-377, in subsec. (e)(1), substituted “portable communication device and accessories thereto” for “portable communication device”.

Emergency legislation. — For temporary (90 day) addition, see § 210 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 210 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

For temporary (90 day) amendment of section, see § 510(b) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 510(b) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

§ 22-2603.03. Penalties.

(a) A person convicted of violating this subchapter with regard to Class A contraband shall be imprisoned for not more than 10 years, fined not more than \$10,000, or both.

(b) A person convicted of violating this subchapter with regard to Class B contraband shall be imprisoned for not more than 2 years, fined not more than \$2,000, or both.

(c) A person convicted of violating § 22-2603.02(c) shall be imprisoned for not more than 1 year, fined not more than \$1,000, or both.

(d) Any term of imprisonment imposed on an inmate or prisoner pursuant to this section shall be:

(1) Consecutive to the term of imprisonment being served at the time this offense was committed; or

(2) If the inmate was confined pending trial or sentencing, consecutive to any term of imprisonment imposed in the case in which the inmate was being detained at the time this offense was committed.

(e) The violation of this subchapter with regard to Class C contraband shall be an administrative penalty prescribed by the Department of Corrections or the Department of Youth Rehabilitation Services.

(Dec. 15, 1941, 55 Stat. 800, ch. 572, § 1; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 572, Pub. L. 91-358, title I, § 155(c)(30); redesignated § 4, Dec. 10, 2009, D.C. Law 18-88, § 210, 56 DCR 7413.)

Prior Codifications. — 2001 Ed., § 22-2603.

1981 Ed., § 22-2603.

1973 Ed., § 22-2603.

Emergency legislation. — For temporary (90 day) addition, see § 210 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 210 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

§ 22-2603.04. Detainment power.

Any person who, being lawfully upon the grounds of the penal institution, introduces or attempts to introduce contraband prohibited by § 2-2603.02(a) may be taken into custody by the warden and detained for not more than 2 hours, pending surrender to a police officer with the Metropolitan Police Department.

(Dec. 15, 1941, 55 Stat. 800, ch. 572, § 1; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 572, Pub. L. 91-358, title I, § 155(c)(30); redesignated § 5, Dec. 10, 2009, D.C. Law 18-88, § 210, 56 DCR 7413.)

Prior Codifications. — 2001 Ed., § 22-2603.

1981 Ed., § 22-2603.

1973 Ed., § 22-2603.

Emergency legislation. — For temporary (90 day) addition, see § 210 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 210 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 7-2508.01.

CHAPTER 27. PROSTITUTION; PANDERING.

Subchapter I. General

- Sec.
 22-2701. Engaging in prostitution or soliciting for prostitution.
 22-2701.01. Definitions.
 22-2702. [Repealed].
 22-2703. Suspension of sentence; conditions; enforcement.
 22-2704. Abducting or enticing child from his or her home for purposes of prostitution; harboring such child.
 22-2705. Pandering; inducing or compelling an individual to engage in prostitution.
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 22-2707. Procuring; receiving money or other valuable thing for arranging assignation.
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Sec.

- 22-2713. Premises occupied for lewdness, assignation, or prostitution declared nuisance.
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Subchapter II. Prostitution Free Zones

- 22-2731. Prostitution free zones; penalty.

*Subchapter I. General.***§ 22-2701. Engaging in prostitution or soliciting for prostitution.**

(a) It is unlawful for any person to engage in prostitution or to solicit for prostitution.

(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be:

(A) Fined not more than \$500, imprisoned for not more than 90 days, or both, for the first offense; and

(B) Fined not more than \$1,000, imprisoned not more than 180 days, or both, for the second offense.

(2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than \$4,000, imprisoned for not more than 2 years, or both.

(c) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for prostitution or soliciting for prostitution if he or she has been convicted on at least 2 occasions of violations of:

(1) This section;

(2) A statute in one or more other jurisdictions prohibiting prostitution or soliciting for prostitution; or

(3) Conduct that would constitute a violation of this section if committed in the District of Columbia.

(Aug. 15, 1935, 49 Stat. 651, ch. 546, § 1; June 9, 1948, 62 Stat. 346, ch. 428, title I, § 102; June 29, 1953, 67 Stat. 93, ch. 159, § 202(b); Dec. 10, 1981, D.C. Law 4-57, § 3, 28 DCR 4652; Nov. 21, 1985, D.C. Law 6-62, § 2, 32 DCR 4581; Dec. 1, 1987, D.C. Law 7-44, § 2, 34 DCR 5310; May 24, 1996, D.C. Law 11-130, § 3(a), 43 DCR 1570; Apr. 24, 2007, D.C. Law 16-306, § 211(a), 53 DCR 8610; Dec. 10, 2009, D.C. Law 18-88, § 211, 56 DCR 7413; Apr. 20, 2012, D.C. Law 19-120, § 202, 58 DCR 11235.)

Cross references. — Alcoholic beverages, licenses transfer or suspension, violation of laws, see §§ 25-316 and 25-823.

Chief of Police, authority and duty in regard to houses of prostitution, see §§ 5-115.06 and 5-115.07.

Conduct of prosecutions under this section, see § 22-1809.

Ownership or possession of a pistol, persons convicted under this section, see § 22-4503.

Section references. — This section is referred to in §§ 22-2703 and 22-4503.

Prior Codifications. — 1981 Ed., § 22-2701.

1973 Ed., § 22-2701.

Effect of amendments. — D.C. Law 16-306 rewrote the section.

D.C. Law 18-88 rewrote the section, which had read as follows: "It is unlawful for any person to engage in prostitution or to solicit for prostitution. The penalties for violation of this section shall be a fine of \$500 or not more than 90 days imprisonment, or both, for the first offense, a fine of \$750 or not more than 135 days imprisonment, or both, for the second offense, and a fine of \$1,000 or not more than 180 days imprisonment, or both, for the third and each subsequent offense."

D.C. Law 19-120, in subsecs. (b) and (c), substituted "prostitution or soliciting for prostitution" for "prostitution".

Emergency legislation. — For temporary amendment of section, see § 2 of the Safe Streets Anti-Prostitution Emergency Amendment Act of 1995 (D.C. Act 11-133, August 11, 1995, 42 DCR 4680) and § 2 of the Safe Streets Anti-Prostitution Legislative Review Emergency Amendment Act of 1995 (D.C. Act 11-153, November 9, 1995, 42 DCR 6567).

For temporary (90 day) amendment of section, see § 211(a) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 211(a) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 211(a) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 211(a) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 203 of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

Legislative history of Law 4-57. — For legislative history of D.C. Law 4-57, see Historical and Statutory Notes following § 22-2701.01.

Legislative history of Law 6-62. — Law 6-62, the "Prostitution Enforcement Amendment Act of 1985," was introduced in Council and assigned Bill No. 6-261, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 25, 1985 and July 9, 1985, respectively. Signed by the Mayor on July 16, 1985, it was assigned Act No. 6-66 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-44. — Law 7-44, the "Penalty for Prostitution Amendment Act of 1987," was introduced in Council and assigned Bill No. 7-74, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 16, 1987 and June 30, 1987, respectively. Signed by the Mayor on July 23, 1987, it was assigned Act No. 7-59 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-77. — Law 11-77, the "Safe Streets Anti-Prostitution Temporary Amendment Act of 1995," was introduced in Council and assigned Bill No. 11-422. The Bill was adopted on first and second readings on July 29, 1995, and October 10, 1995, respectively. Signed by the Mayor on October 26, 1995, it was assigned Act No. 11-147 and transmitted to both Houses of Congress for its review. D.C. Law 11-77 became effective on January 24, 1996.

Legislative history of Law 11-130. — Law 11-130, the “Safe Streets Anti-Prostitution Amendment Act of 1996,” was introduced in Council and Assigned Bill No. 11-439, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 6, 1996, and March 5, 1996, respectively. Signed by the Mayor on March 15, 1996, it was assigned Act No. 11-237 and transmitted to both Houses of Congress for its review. D.C. Law 11-130 became effective on May 24, 1996.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Legislative history of Law 19-120. — Law 19-120, the “Receiving Stolen Property and Public Safety Amendment Act of 2011,” was introduced in Council and assigned Bill No. 19-215, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 2011, and December 6, 2011, respectively. Signed by the Mayor on December 21, 2011, it was assigned Act No. 19-262 and transmitted to both Houses of Congress for its review. D.C. Law 19-120 became effective on April 20, 2012.

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Admissibility of evidence.

In prosecution for statutory offense of unlawfully inviting another to accompany accused for lewd and immoral purpose, evidence of good

character of accused is particularly applicable in that it is usually only defense, except word of accused, and should be considered by court. D.C. Code 1940, § 22-2701. *Kelly v. U.S.*, 194 F.2d 150, 1952 U.S. App. LEXIS 2737 (C.A.D.C. 1952).

Police officer’s testimony recounting prostitute’s statement that she and victim, who was also a prostitute, “were trying to set up — were trying to get the officers to take a bait,” which suggested that victim was the instigator of the sexual encounter with defendant, a police officer, was not admissible as a declaration against penal interest, in prosecution for first-degree sexual abuse of a ward; the statement was ambiguous and was susceptible to more than one interpretation, and one interpretation subjected prostitute to criminal liability while the other would not. *Andrews v. United States*, 981 A.2d 571, 2009 D.C. App. LEXIS 376 (2009).

Expert testimony that male defendant dressed in female clothes was soliciting for immoral purposes was insufficient to support conviction for soliciting for lewd and immoral purpose; police officers who testified as experts did not overhear any conversation relating to sexual acts, see any money exchanged, or see any sexual acts performed. D.C. Code 1981, § 22-2701. *Bates v. United States*, 537 A.2d 1131, 1988 D.C. App. LEXIS 46 (1988).

In prosecution resulting in conviction of “inviting for purposes of prostitution,” trial court abused its discretion in admitting evidence of defendant’s prior convictions for commercial sexual solicitation to prove motive or to show surrounding circumstances, where previous sexual solicitations were not intimately entangled with criminal conduct and motive was not element of offense charged. D.C. Code 1981, § 22-2701. *Graves v. United States*, 515 A.2d 1136, 1986 D.C. App. LEXIS 451 (1986).

No evidence of defendant’s prior acts of inviting for purposes of prostitution is admissible in Government’s case-in-chief to prove specific intent under statute proscribing “inviting for pur-

poses of prostitution." D.C. Code 1981, § 22-2701. *Graves v. United States*, 515 A.2d 1136, 1986 D.C. App. LEXIS 451 (1986).

In prosecution for soliciting for prostitution, even if evidence of conversation between sailor to whom arresting officer had been talking and one of sailors walking behind defendant were hearsay and improperly admitted, error, if any, was not prejudicial where finding of guilt was based upon solicitation which occurred subsequently. D.C. Code 1951, § 22-2701. *Price v. U.S.*, 135 A.2d 854, 1957 D.C. App. LEXIS 312 (Cr.App. 1957).

In prosecution for soliciting a person for immoral or lewd purposes an acquittal is not required to follow whenever evidence of good character of accused is presented. D.C. Code 1940, § 22-2701. *Bicksler v. U.S.*, 90 A.2d 233, 1952 D.C. App. LEXIS 185 (Cr.App. 1952).

In prosecution for addressing a person for immoral purpose an acquittal is not required solely because there is evidence of good character of accused. D.C. Code 1940, § 22-2701. *Bicksler v. U.S.*, 90 A.2d 233, 1952 D.C. App. LEXIS 185 (Cr.App. 1952).

In prosecution for soliciting prostitution, where officer's opinion or assumption as to what consideration the \$5 demanded by defendant would cover was elicited by defense counsel on cross-examination, defendant could not complain that such evidence was inadmissible. D.C. Code 1940, § 22-2701. *Hall v. U.S.*, 34 A.2d 631, 1943 D.C. App. LEXIS 206 (Cr.App. 1943).

Collateral proceedings.

Police report of plaintiff's arrest, coupled with his trial and acquittal and official United States Attorney "reports" on such case, did not, for purposes of plaintiff's claim against District of Columbia for false arrest and malicious prosecution, constitute sufficient compliance with portion of notice of claim statute which provides that "a report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section." D.C. Code §§ 12-309, 22-2701. *Jenkins v. District of Columbia*, 379 A.2d 1177, 1977 D.C. App. LEXIS 274 (1977).

Conduct of trial.

Reopening of prosecution for soliciting for prostitution, after both government and defense had rested and final argument had commenced, to receive corroborating testimony as to defendant's presence at time and place of alleged offense was within sound discretion of trial court. D.C. Code 1951, § 22-2701. *Price v. U.S.*, 135 A.2d 854, 1957 D.C. App. LEXIS 312 (Cr.App. 1957).

Construction and application.

Enforcement of statute making it unlawful for any person to invite another to accompany

him for lewd and immoral purpose must be with design to prevent offense, to prevent unwarranted irreparable destruction of reputations, and to prevent criminal offense of blackmail in connection with charge of verbal invitation, and it must not foster conditions or practices which make easy and encourage such offense. D.C. Code 1940, § 22-2701. *Kelly v. U.S.*, 194 F.2d 150, 1952 U.S. App. LEXIS 2737 (C.A.D.C. 1952).

Although the act of soliciting sex in return for money is a crime, prostitution itself is not. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

Statute prohibiting solicitation for lewd or immoral purposes is not limited in its application to either person soliciting acts for money or person offering to pay for such acts; since either individual may be convicted under statute, forcing government to choose which person to prosecute would be purely arbitrary rule. D.C. Code 1981, § 22-2701(a). *Thompson v. United States*, 618 A.2d 110, 1992 D.C. App. LEXIS 312 (1992).

Statute prohibiting sexual solicitation for a fee does not, by its terms, bar application to conduct that occurs in a private residence. D.C. Code 1981, § 22-2701. *Blyther v. United States*, 577 A.2d 1154, 1990 D.C. App. LEXIS 167 (1990).

Amendment to solicitation statute defining the terms inviting, enticing, or persuading, does not apply to soliciting for lewd or immoral purposes. D.C. Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

Soliciting for lewd or immoral purposes is limited in the District of Columbia to soliciting for sodomy. D.C. Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

Statute proscribing inviting for purposes of prostitution, on its face, does not protect sexual solicitations in private places. D.C. Code 1973, § 22-2701. *Lutz v. United States*, 434 A.2d 442, 1981 D.C. App. LEXIS 346 (1981).

Statute prohibiting solicitation for the purpose of prostitution applies to solicitation for homosexual acts. D.C. Code §§ 22-2701, 22-2704 to 22-2720, 22-2722. *Harris v. United States*, 293 A.2d 851, 1972 D.C. App. LEXIS 421 (1972).

This section, when read alone, appears plainly to require a penalty of a \$300 fine for first offenders; it cannot be read alone, however, for D.C. Code § 22-2703 (1981) also applies to penalties for solicitation. Further, § 16-710 permits the court "in criminal cases" to suspend imposition or execution of sentence, or any part thereof, and place a defendant on probation.

Both of these statutes have been held to authorize the trial court to grant probation upon conviction of solicitation. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Construction with federal law.

The Mann Act penalizing the transportation in the District of Columbia of any woman with the intent or purpose to induce or entice the woman transported to practice prostitution does not conflict with any other legislation applicable to the District. *White Slave Traffic Act* § 2, 18 U.S.C. § 398; D.C. Code 1940, §§ 22-2701, 22-2702, 22-2705 to 22-2712. *U.S. v. Beach*, 65 S.Ct. 602, 1945 U.S. LEXIS 2400 (U.S. Dist. Col. 1945).

The White Slave Act is not applicable in a prostitution case involving transportation solely within the District of Columbia in view of fact that Congress has enacted local laws which cover the entire local field. *White Slave Act*, § 2, 18 U.S.C. § 2421; D.C. Code 1929, T. 6, §§ 177, 179; D.C. Code 1940, §§ 22-2701, 22-2702, 22-2705, 22-2707, 22-2709 to 22-2712. *Beach v. U.S.*, 144 F.2d 533, 1944 U.S. App. LEXIS 2877 (1944).

Defenses.

Trial judge did not err in rejecting defendant's defense of entrapment to sexual solicitation charge, absent showing that Government instilled criminal notion in otherwise innocent individual. D.C. Code 1981, § 22-2701. *Blyther v. United States*, 577 A.2d 1154, 1990 D.C. App. LEXIS 167 (1990).

Where defendant who was convicted of soliciting for prostitution confirmed his encounter with morals officer, where defendant by his own testimony was conversant with jargon of solicitation bargaining process, and where defendant did not claim to be an unwary innocent with no intent to engage in the solicitation process, no basis existed on which to premise a defense of "entrapment" since defendant did not maintain that morals officer implanted the criminal design in his mind to solicit her for prostitution, and since officer's role was limited to her presence and to an exploration of defendant's purposes. D.C. Code § 22-2701. *Williams v. United States*, 342 A.2d 367, 1975 D.C. App. LEXIS 437 (1975).

Evidence which showed that while some women solicited each other for sodomitic acts, only men were arrested for homosexual solicitation under statute which made solicitation for sodomitic acts a crime, where there was no indication as to whether lesbian solicitation was known to the police, showed no more than a failure to prosecute others because of a lack of knowledge and did not show discriminatory enforcement. D.C. Code §§ 22-2701, 22-3502; U.S. Const. Amend. 14. *United States v. Cozart*,

321 A.2d 342, 1974 D.C. App. LEXIS 229 (1974).

That two police officers, who were government witnesses, heard accused say, on being asked by trial court to state her account of the facts after she indicated desire to enter guilty plea, that she did not solicit officer but that he solicited her and she refused did not prejudice accused, in that accused heard officers' version of the occurrence and in that the defense commonly used in such a prosecution was that solicitation was by the officer and not by defendant. D.C. Code § 22-2701. *United States v. Lester*, 318 A.2d 899, 1974 D.C. App. LEXIS 420 (1974).

Defendants' testimony did not support claim of entrapment as a matter of law. D.C. Code 1961, § 22-2701. *Willis v. United States*, 198 A.2d 751, 1964 D.C. App. LEXIS 209 (App. 1964).

Defendant's honorable discharge from United States Army approximately five years before offense charged did not require defendant's acquittal of charge of soliciting for lewd and immoral purpose as a matter of law. D.C. Code 1940, § 22-2701. *Brenke v. U.S.*, 78 A.2d 677, 1951 D.C. App. LEXIS 133 (Cr.App. 1951).

Dismissal, nolle prosequi, or discontinuance.

Evidence did not support trial court's finding on motion to dismiss indictment that there was discriminatory enforcement of the District of Columbia statute prohibiting soliciting for prostitution. D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Dismissal of information, which charged solicitation for prostitution, merely on basis of determination that accused was prejudiced by fact that two police officers, who were government witnesses, heard accused say, on being asked by trial court to state her account of the facts after she indicated desire to enter guilty plea, that she did not solicit officer but that he solicited her and she refused was error. D.C. Code § 22-2701. *United States v. Lester*, 318 A.2d 899, 1974 D.C. App. LEXIS 420 (1974).

Judgments were required to be vacated and nolle prosequis entered in cases which had been pending before Court of General Sessions where government's action in entering the nolle prosequis could not be characterized as an abuse of its power, and to allow government to file new informations at a subsequent date would not violate double jeopardy clause of Fifth Amendment. D.C. Code 1961, §§ 22-504, 22-2701; U.S. Const. Amend. 5. *United States v. Foster*, 226 A.2d 164, 1967 D.C. App. LEXIS 130 (App. 1967).

Enforcement of law.

Statute which proscribes sexual solicitation

[D.C. Code 1981, § 22-2701] does not encourage arbitrary enforcement, where it prohibits specified conduct and requires that such conduct be for the purpose of prostitution, as such requirements provide more than "minimal guidelines" to law enforcement officers. U.S.C. Const. Amends. 5, 14. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Decision to adopt a particular method of law enforcement is normally left to the police and will be upheld unless there has been some form of invidious discrimination. D.C. Code 1981, §§ 17-305(a), 22-2701. *Eissa v. United States*, 485 A.2d 610, 1984 D.C. App. LEXIS 576 (1984), writ of certiorari denied by 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 474, 1985 U.S. LEXIS 4693, 54 U.S.L.W. 3375 (1985).

Evidence and witnesses, generally.

Prosecution was not entitled to attempt to impeach testimony of defendant indicted for second-degree murder by referring to thirteen prior convictions of petty offenses of vagrancy, disorderly conduct and soliciting prostitution, inasmuch as, although such offenses were District of Columbia Code offenses as distinguished from municipal ordinances, none of them was triable by jury. D.C. Code 1961, §§ 14-305, 16-705(b), 22-1107, 22-1112(a), 22-1121, 22-2701, 22-3302, 22-3304; U.S. Const. art. 3, § 2, cl. 3. *Pinkney v. United States*, 363 F.2d 696, 1966 U.S. App. LEXIS 5565 (C.A.D.C. 1966).

Great caution should be applied in considering testimony of arresting officer in cases where alleged assault is nonviolent sexual touching which by its nature left no traces and to which there were no other witnesses. D.C. Code 1951, §§ 22-504, 22-1112, 22-2701. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

Testimony asserting sodomy must be subjected to most careful scrutiny, and such principal is applicable to invitation to sodomy. D.C. Code 1940, § 22-2701. *Kelly v. U.S.*, 194 F.2d 150, 1952 U.S. App. LEXIS 2737 (C.A.D.C. 1952).

Testimony of single witness to statutory offense of verbal invitation to sodomy should be received and considered with great caution. D.C. Code 1940, § 22-2701. *Kelly v. U.S.*, 194 F.2d 150, 1952 U.S. App. LEXIS 2737 (C.A.D.C. 1952).

In the absence of evidence that area in which defendant was observed dressed in female attire was plagued by solicitations for immoral or lewd purposes, fact that the area was plagued by solicitation for prostitution could not be considered in determining defendant's guilt of solicitation for lewd or immoral purposes. D.C. Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

In prosecution for inviting on the street a person to accompany defendant for lewd or immoral purpose, refusal to approve issuance of subpoena duces tecum seeking evidence to contradict statement on cross-examination of plain-clothes policeman testifying for prosecution that policeman had not been transferred as result of testimony in prior and unrelated case was not error since such evidence would not have been admissible. D.C. Code 1940, § 22-2701; Federal Rules of Civil Procedure, rule 45, 18 U.S.C.; Federal Rules of Criminal Procedure, rule 17, 18 U.S.C. *Kelly v. U.S.*, 73 A.2d 232, 1950 D.C. App. LEXIS 138 (Cr.App. 1950).

Forfeitures.

Seizure of motor vehicles in which defendants were arrested for sexual solicitation was improper because: (1) use of the property in the offense was not deliberate or planned but merely incidental and fortuitous; (2) use of the motor vehicle was not important or necessary to success of the crime but simply provided a convenient location in which the defendants engaged in the unlawful speech; (3) extent of the temporal and spatial use of the motor vehicles in the offense was limited; (4) use of the motor vehicles in the offense was, as was the offense itself, an isolated event; and (5) defendants did not acquire or maintain the property for purpose of facilitating violation of subsection (a) of this section. *United States v. Esparza*, 124 WLR 1553 (Super. Ct. 1996).

Indictment and information.

Inasmuch as statute proscribing solicitation for prostitution is free of ambiguity and case law places defendant on notice as to the breach of that proscription, information charging solicitation for prostitution in statutory language properly charged that offense. D.C. Code § 22-2701; D.C. Code SCR, Criminal Rule 7(c). *United States v. Miqueli*, 349 A.2d 472, 1975 D.C. App. LEXIS 290 (1975).

Where statute proscribed two types of sexual solicitation in the disjunctive, i.e., solicitation for prostitution or solicitation for an immoral and lewd purpose, information or indictment could charge both of the prohibited acts in the conjunctive and under such charge government could proceed to prove any one or more of the acts, and could not properly be required to elect between the conjunctively charge solicitations. D.C. Code § 22-2701. *United States v. Miqueli*, 349 A.2d 472, 1975 D.C. App. LEXIS 290 (1975).

Since offense of soliciting for lewd and immoral purposes had been limited by judicial construction to solicitation for acts of sodomy, defendants charged by information in statutory language with soliciting for lewd and immoral purposes were on clear notice that they were charged with solicitation for sodomy. D.C. Code

§ 22-2701; D.C. Code SCR, Criminal Rule 7(c). *United States v. Miqueli*, 349 A.2d 472, 1975 D.C. App. LEXIS 290 (1975).

Since informations charging in statutory language solicitation for prostitution and immoral and lewd purpose thereby alleged as ultimate facts all the elements necessary to constitute the offense and included the date of the solicitation and the name of the person solicited, such informations were sufficiently definite to apprise defendants of the nature of the accusations against them and thus enable them to prepare the defense and to plead an acquittal or conviction in bar of future prosecution, and nothing more by way of pleading evidentiary facts was necessary. D.C. Code § 22-2701; D.C. Code SCR, Criminal Rule 7(c). *United States v. Miqueli*, 349 A.2d 472, 1975 D.C. App. LEXIS 290 (1975).

Legislative and police powers.

Reasonable regulation of solicitation of prostitution is within the permissible exercise of state police power. D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Congress possesses the police power of the individual states in limiting solicitation for prostitution in the District of Columbia in furtherance of societal interests. D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

There is a legitimate, national, state, and community interest in maintaining a decent society and the stemming of commercialized sexual solicitations is an acceptable means of furthering this interest. U.S. Const. Amend. 1; D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Nature and elements of offenses.

— Clarity or ambiguity of invitation, nature and elements of offenses.

Charges of sexual solicitation were improperly dismissed on ground that no member of general public complained, that undercover officer when approached by a defendant and asked if he was dating or sporting was deceptive in answering affirmatively, that transsexuals have an "inherent sexual dilemma" and that, for such reasons, arrests and prosecutions were shockingly unfair and cruel and unusual punishment. D.C. Code § 22-2701. *United*

States v. Kenyon, 354 A.2d 861, 1976 D.C. App. LEXIS 502 (1976).

— Corroboration, nature and elements of offenses.

Corroboration of undercover officer's testimony was not necessary to prove solicitation for purpose of homosexual prostitution. D.C. Code 1981, § 22-2701(a). *Moore v. United States*, 609 A.2d 1133, 1992 D.C. App. LEXIS 167 (1992).

In prosecution for solicitation for lewd and immoral purposes, corroboration was required of testimony of covert police officer who stopped his car and was allegedly approached by defendant. D.C. Code § 22-2701. *Griffin v. United States*, 396 A.2d 211, 1978 D.C. App. LEXIS 582 (1978).

Decision abrogating rule that rape victim's testimony must be corroborated did not overturn need for corroboration in prosecutions for solicitations for lewd and immoral purposes but, rather, was limited to rape and its lesser included offenses. D.C. Code § 22-2701. *Griffin v. United States*, 396 A.2d 211, 1978 D.C. App. LEXIS 582 (1978).

In prosecution for soliciting for prostitution, no corroboration was required for testimony of arresting officer. D.C. Code § 22-2701. *Garrett v. United States*, 339 A.2d 372, 1975 D.C. App. LEXIS 399 (1975).

In prosecution for soliciting for the purpose of prostitution, it was not necessary that testimony of the person solicited be corroborated. D.C. Code 1951, § 22-2701. *Parker v. U.S.*, 143 A.2d 98, 1958 D.C. App. LEXIS 320 (Cr.App. 1958).

Corroboration of testimony of witness for prosecution is not required in a case of solicitation for prostitution. D.C. Code 1951, § 22-2701. *Price v. U.S.*, 135 A.2d 854, 1957 D.C. App. LEXIS 312 (Cr.App. 1957).

A conviction of soliciting for a lewd and immoral purpose may be based on uncorroborated testimony of one government witness. D.C. Code 1940, § 22-2701. *Brenke v. U.S.*, 78 A.2d 677, 1951 D.C. App. LEXIS 133 (Cr.App. 1951).

— In general.

Before use of assault statute to cover conduct that appears to fall within bounds of misdemeanor statutes can be countenanced court must be certain that elements of assault had been established. D.C. Code 1951, §§ 22-504, 22-1112, 22-2701. *Guarro v. U.S.*, 237 F.2d 578, 1956 U.S. App. LEXIS 2939 (C.A.D.C. 1956).

It is the simultaneous existence of the named conduct and related criminal intent which constitutes the offense of "solicitation" for an immoral or lewd purpose; if either the "actus reus", the unlawful conduct, or the "mens rea", the criminal intent, is missing at the time of the alleged offense, there can be no conviction. D.C.

Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

Actual ability to pay is not element of crime of soliciting prostitution; crime is completed by agreeing to engage or offering to engage in sex for money or other material gain. D.C. Code 1981, §§ 22-2701, 22-2701.1(1). *Nche v. United States*, 526 A.2d 23, 1987 D.C. App. LEXIS 360 (1987).

Word "address," as used in statute making it unlawful to address one for purpose of inviting, enticing and persuading him for the purpose of prostitution, carries with it no element or overture of active initiation of a conversation or transaction; word "address" removes the suggestion that an initial, active effort to engage someone in a conversation or transaction involving prostitution is a prerequisite to guilt. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

Word "entice" as used in statute making it unlawful to entice or address one for purpose of inviting him, enticing or persuading for purpose of prostitution means to tempt or to draw on by arousing hope or desire; "enticing" also does not require an active, initiatory effort but can occur in a responsive manner. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

— **Initiation of conversation, nature and elements of offenses.**

Defendant could properly be convicted of solicitation for lewd or immoral purposes regardless of whether his participation in conversation was initiatory or responsive, because even if responsive, his participation in conversation ripened into inviting, enticing, persuading, or addressing for lewd or immoral purposes; responsive conduct by defendant was in itself inviting, enticing, persuading, or addressing, where there was a certain amount of negotiation involved on defendant's part. D.C. Code 1981, § 22-2701(a). *Thompson v. United States*, 618 A.2d 110, 1992 D.C. App. LEXIS 312 (1992).

Violation of statute prohibiting inviting for purposes of prostitution does not turn on who broaches commercial nature of transaction. D.C. Code 1973, § 22-2701. *Lutz v. United States*, 434 A.2d 442, 1981 D.C. App. LEXIS 346 (1981).

Under statute making it unlawful for any person to invite, entice, persuade or address for purpose of inviting, enticing or persuading another for purpose of prostitution or any immoral or lewd purpose, questions of who makes the first contact or overture, be it visual or verbal, and who first broaches the subject of money or gain for such services are not critical. D.C. Code § 22-2701. *Dinkins v. United States*,

374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

One can "entice" for the purpose of a commercial sex act without being the one to initiate the overall conversation or transaction; enticement can occur at any point in a conversation and even responsive conduct or speech can ripen into an enticement. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

For purpose of statute making it unlawful to entice or address for a purpose of enticing one for purpose of prostitution, once there is an enticement or an address for the purpose of enticement, it becomes unimportant who broaches the commercial nature of the transaction; it is sufficient that an understanding emerges that a commercial venture was contemplated when the sexual availability was made apparent. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

— **Noncommercial invitation, nature and elements of offenses.**

Violation of "immoral or lewd purpose" clause of statute proscribing inviting for purposes of prostitution may, but need not, involve commercial rather than voluntary solicitation for sodomy. D.C. Code 1973, § 22-2701. *Lutz v. United States*, 434 A.2d 442, 1981 D.C. App. LEXIS 346 (1981).

— **Nonverbal conduct, nature and elements of offenses.**

Being in the wrong place, wearing the wrong clothing, and acting in a manner which might be consistent with the desire to engage in sexual activity cannot form the basis for a conviction for solicitation for lewd and immoral purposes. D.C. Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

Dressing in female attire may not be considered indicative of male's intent to invite for lewd or immoral purposes. D.C. Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

Absence of direct proof that defendant spoke words of solicitation was not fatal to prosecution for sexual solicitation. D.C. Code 1981, § 22-2701. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Evidence as to the provocative position of defendant on a park bench, physical blandishment, challenging verbal invitation, prompt discussion of financial terms, and the ready arrangement for a room, sustained conviction of soliciting prostitution. D.C. Code 1940, § 22-2701. *Hall v. U.S.*, 34 A.2d 631, 1943 D.C. App. LEXIS 206 (Cr.App. 1943).

Presumptions and burden of proof.

Though Government was not required to prove that defendant could pay at time he

solicited prostitution, proof of ability to pay was sufficient, where at trial, defendant testified that he was in vicinity in order to make purchase of toy for his son, and thus, had his checkbook with him; therefore nothing prevented defendant from obtaining money. D.C. Code 1981, § 22-2701. *Nche v. United States*, 526 A.2d 23, 1987 D.C. App. LEXIS 360 (1987).

To warrant conviction for sexual solicitation, the evidence must have been sufficient to sustain finding beyond reasonable doubt that defendant's conduct was for purpose of prostitution. D.C. Code 1981, § 22-2701. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Fact finder may not presume that defendant had the intent to invite for purpose of prostitution merely because government has proven that defendant has committed one or more of the acts enumerated in statute proscribing sexual solicitation [D.C. Code 1981, § 22-2701], for example, repeated beckoning, stopping, or interfering, but must, instead, consider such conduct in light of the surrounding circumstances to determine whether government has proved purpose of prostitution beyond reasonable doubt. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Purpose requirement of statute proscribing sexual solicitation [D.C. Code 1981, § 22-2701], that conduct was for purpose of prostitution, remains separate element that government must prove. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Proof of particular language or conduct is not necessary to establish offense of enticing or addressing for purpose of inviting, enticing or persuading anyone for purpose of prostitution; for example, an offer to perform a specific sex act is not necessary to complete the offense; nor is it significant that the arresting officer makes the first overture. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

Proof of specific offer to perform sex act is not element of offense of solicitation for prostitution. D.C. Code § 22-2701. *United States v. Smith*, 330 A.2d 759, 1975 D.C. App. LEXIS 304 (1975).

In prosecution for soliciting prostitution of any person sixteen years of age or older, lack of testimony as to age of police officers allegedly solicited by defendant did not entitle her to acquittal when officers were in court so that judge, sitting without jury, could use his senses and draw inferences as to their ages by his personal observation. D.C. Code 1940, § 22-2701. *Cunningham v. U.S.*, 86 A.2d 918, 1952 D.C. App. LEXIS 144 (Cr.App. 1952).

It is not necessary to prove any particular language or conduct to establish that a defendant solicited prostitution. D.C. Code 1940,

§ 22-2701. *Curran v. U.S.*, 52 A.2d 121, 1947 D.C. App. LEXIS 122 (Cr.App. 1947).

Prosecuting authority.

Prosecution for violation of statute rendering it unlawful to invite, entice or persuade any person fifteen years of age or over for purpose of prostitution or any other immoral or lewd purpose, should be conducted by United States attorney in name of and for benefit of United States, since offense is punishable by both fine and imprisonment. D.C. Code 1951, §§ 22-2701 et seq., 23-101, 23-102; Act July 29, 1892, §§ 7, 18, 27 Stat. 322. *U.S. v. Strothers*, 228 F.2d 34, 1955 U.S. App. LEXIS 3640 (C.A.D.C. 1955).

Statute establishing offense of soliciting for purposes of prostitution is not penal statute in the nature of a police or municipal ordinance or regulation, and thus, prosecutions under statute are to be conducted by United States and not by corporation counsel for District of Columbia. D.C. Code 1981, §§ 22-2701, 23-101. In re *Prosecution of Monaghan*, 690 A.2d 476, 1997 D.C. App. LEXIS 31 (1997).

Public officers and employees.

Government employee's alleged taking of a hotel room with a prostitute did not constitute "criminal conduct" which would support dismissal of the government employee where the conduct charged was not a crime under applicable laws even though employee had admitted his act to police and had forfeited collateral following a purported arrest therefor. D.C. Code 1961, §§ 22-1002, 22-2701. *Pelicone v. Hodges*, 320 F.2d 754, 1963 U.S. App. LEXIS 4988 (C.A.D.C. 1963).

Purposes.

Statute establishing offense of soliciting for purposes of prostitution was designed to address proliferation of prostitutes in some District of Columbia neighborhoods, and reflects legislature's belief that prostitution activities have grown so large as to require additional deterrents to bring such activities to an end. D.C. Code 1987, § 22-2701. In re *Prosecution of Monaghan*, 690 A.2d 476, 1997 D.C. App. LEXIS 31 (1997).

Questions of law and fact.

In the final analysis, it is a question of fact whether acts and words of defendant in general, viewed in light of surrounding circumstances, constitute the enticing or addressing prohibited by statute making it unlawful to entice or address for purpose of inviting, enticing or persuading any person for purpose of prostitution. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

In prosecution for soliciting for purposes of prostitution, whether the defendant or the arresting officer made the solicitation was for

trial court under conflicting testimony. D.C. Code 1961, § 22-2701. *Wajer v. United States*, 222 A.2d 68, 1966 D.C. App. LEXIS 211 (App. 1966).

In prosecution for soliciting a person for immoral or lewd purposes, whether a solicitation occurred and whether solicitation was by defendant or by arresting officer, were for jury where testimony was conflicting and conflicting inferences could reasonably be drawn therefrom. D.C. Code 1940, § 22-2701. *Bicksler v. U.S.*, 90 A.2d 233, 1952 D.C. App. LEXIS 185 (Cr.App. 1952).

It is ordinarily a question of fact whether the acts and words of the defendant, viewed in the light of surrounding circumstances, constitute solicitation of prostitution. D.C. Code 1940, § 22-2701. *Curran v. U.S.*, 52 A.2d 121, 1947 D.C. App. LEXIS 122 (Cr.App. 1947).

In prosecution for soliciting prostitution, conflicting evidence raised question for trial judge, whose decision was conclusive on appeal where supported by substantial evidence. D.C. Code 1940, § 22-2701. *Curran v. U.S.*, 52 A.2d 121, 1947 D.C. App. LEXIS 122 (Cr.App. 1947).

Review.

Appellate court was without jurisdiction to hear defendant's challenge to judgment of hearing commissioner's finding that defendant was guilty of soliciting for prostitution absent review of commissioner's order by Superior Court. D.C. Code 1981, §§ 11-1732, 22-2701; Criminal Rule 117(f)(1). *Speight v. United States*, 558 A.2d 357, 1989 D.C. App. LEXIS 96 (1989).

In prosecution for sexual solicitation, defendant's failure to renew her motion for judgment of acquittal at the close of all the evidence, after introducing evidence after denial of her motion for judgment of acquittal made at the end of the Government's case, waived review of denial of that motion but did not foreclose review of the sufficiency of the evidence; it simply required that the scope of appellate review be expanded to include all of the evidence. D.C. Code 1981, § 22-2701. *Washington v. United States*, 475 A.2d 1127, 1984 D.C. App. LEXIS 394 (1984).

Court-appointed counsel's failure to raise at trial issue of constitutionality of presumptively valid statute governing solicitation of prostitution did not amount to a violation of defendant's Sixth Amendment right to effective representation, where issue in decision of Superior Court judge allegedly holding statute unconstitutional was a purely legal one and not binding precedent and such case was on appeal. U.S. Const. Amend. 6; D.C. Code § 22-2701. *Angarano v. United States*, 312 A.2d 295, 1973 D.C. App. LEXIS 383 (1973).

Review of vagrancy convictions was not necessary when sentences for vagrancy were ordered to run concurrently with proper sen-

tences for soliciting for lewd and immoral purposes. D.C. Code 1961, §§ 22-2701, 22-3302. *Willis v. United States*, 198 A.2d 751, 1964 D.C. App. LEXIS 209 (App. 1964).

In prosecution for addressing a person for immoral purposes, brought to court without a jury, record did not establish that accused was not afforded presumption of innocence. D.C. Code 1940, § 22-2701. *King v. U.S.*, 90 A.2d 229, 1952 D.C. App. LEXIS 184 (Cr.App. 1952).

In prosecution for addressing a person for immoral purposes, brought to court without jury, record did not establish that court failed to afford accused protection accused would have been afforded by properly instructed jury. D.C. Code 1940, § 22-2701. *King v. U.S.*, 90 A.2d 229, 1952 D.C. App. LEXIS 184 (Cr.App. 1952).

In prosecution for addressing a person for immoral purposes, brought to court without jury, record did not establish that guilt of accused was pre-judged by trial court. D.C. Code 1940, § 22-2701. *King v. U.S.*, 90 A.2d 229, 1952 D.C. App. LEXIS 184 (Cr.App. 1952).

Where prior to taking of testimony on information motion to dismiss on ground that information did not charge crime was denied, and evidence was taken and motion on ground that no crime was charged and that crime had not been established was granted because evidence was insufficient, and judgment of not guilty was then entered on record, judgment was that evidence failed to sustain offense charged and state had no right to appeal. D.C. Code 1940, § 22-2701. *U.S. v. Hallams*, 82 A.2d 127, 1951 D.C. App. LEXIS 184 (Cr.App. 1951).

Right to trial by jury.

Defendant charged with soliciting for the purpose of prostitution, which was a petty offense for which the maximum penalty prescribed was a fine of \$250 or imprisonment for 90 days or both, was not entitled to a jury trial, since the Sixth Amendment does not require that a person charged with a petty offense be afforded, at his request, a jury trial, and since Congress has defined a "petty offense" in this context as any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or fine of not more than \$500 or both. D.C. Code § 22-2701; 18 U.S.C. § 1(3); U.S. Const. Amend. 6. *Marshall v. United States*, 302 A.2d 746, 1973 D.C. App. LEXIS 260 (1973).

Defendant had neither a statutory nor a constitutional right to a jury trial on charge of soliciting for the purpose of prostitution, the penalty for which offense was a fine of \$250 and/or 90 days' imprisonment. D.C. Code § 22-2701. *Austin v. United States*, 299 A.2d 545, 1973 D.C. App. LEXIS 216 (1973).

Defendant, who was charged with solicitation for immoral and lewd purpose of committing oral sodomy, was not entitled to jury trial

in view of fact such offense was not indictable at common law and that penalty imposed was not more than \$250 or imprisonment for not more than 90 days or both. D.C. Code §§ 16-75, 22-2701. *Gaithor v. United States*, 251 A.2d 644, 1969 D.C. App. LEXIS 223 (App. 1969).

Sentence and punishment.

Although a sentence of imprisonment cannot be for a greater period than six months where there is no right to a jury trial, and although the minor defendant, who pled guilty to two charges of soliciting for the purpose of prostitution, had no right to a jury trial, committing her under the Federal Youth Corrections Act to the custody of the Attorney General for an indefinite period up to six years did not exceed permissible sentence, since she was not "imprisoned" at all; rather, in the terms of the Act, she had "in lieu of the penalty of imprisonment" been sentenced "for treatment and supervision." D.C. Code § 22-2701; 18 U.S.C. §§ 5010(a, b), 5011. *Austin v. United States*, 299 A.2d 545, 1973 D.C. App. LEXIS 216 (1973).

Defendant was not entitled to relief from sentence imposed upon failure to pay fine imposed in addition to maximum imprisonment authorized as punishment on any theory that if she were indigent, alternative sentence coupled with primary sentence would be tantamount to sentence in excess of that authorized and that court should have, as part of sentencing procedure, inquired into her ability to pay where record revealed nothing as to her financial resources, she did not claim inability to pay fine, and there was nothing to indicate that court used alternative sentence to accomplish imprisonment for term longer than permitted by statute. D.C. Code 1961, §§ 11-715a, 11-776(b), 22-2701. *Henderson v. United States*, 189 A.2d 132, 1963 D.C. App. LEXIS 206 (App. 1963).

Section does not deprive the court of the power to suspend the imposition or execution of sentence. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Court was limited to sentencing defendant as a first offender because the government had not filed enhancement papers. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Validity.

— Due process of law, validity.

Alleged misconduct perpetrated by police officer to arrest defendant for sexual solicitation and secure her presence in court, which resulted in cuts and bruises on defendant's face, did not implicate due process rights, and thus, did not preclude criminal prosecution. D.C. Code 1981, § 22-2701. *Washington v. United States*, 475 A.2d 1127, 1984 D.C. App. LEXIS 394 (1984).

Nothing in the record existed which would justify any contention on part of defendant, who was convicted of soliciting for prostitution, that conduct of law enforcement agents was so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction. D.C. Code § 22-2701. *Williams v. United States*, 342 A.2d 367, 1975 D.C. App. LEXIS 437 (1975).

In absence of any showing that government's policy in requiring corroboration in prosecutions involving homosexual conduct, while not requiring such corroboration in prosecutions for solicitation for prostitution, was based on distinction between sex of defendants, such policy did not result in unconstitutional sex discrimination in violation of right to due process. D.C. Code § 22-2701; U.S. Const. Amend. 5. *Garrett v. United States*, 339 A.2d 372, 1975 D.C. App. LEXIS 399 (1975).

Statute proscribing solicitation for lewd and immoral purposes, construed as proscribing solicitations for sodomy, was sufficiently certain to inform public of conduct proscribed, and was not void for vagueness amounting to a deprivation of due process of law. D.C. Code § 22-2701. *Riley v. United States*, 298 A.2d 228, 1972 D.C. App. LEXIS 304 (1972), writ of certiorari denied by 414 U.S. 840, 94 S. Ct. 96, 38 L. Ed. 2d 77, 1973 U.S. LEXIS 514 (1973).

The statute declaring it a crime "to invite, entice, persuade...any person...for purpose of prostitution", is not unconstitutional as setting up no ascertainable standard of guilt or so vague, indefinite and general as to violate rights of one accused of such offense under Fifth Amendment, but is clear in language and purpose, free of ambiguity, and lays down definite and easily understandable standard of criminal liability. D.C. Code 1951, § 22-2701; U.S. Const. Amend. 5. *Hawkins v. U.S.*, 105 A.2d 250, 1954 D.C. App. LEXIS 139 (Cr.App. 1954).

— Equal protection of laws, validity.

Females were not denied equal protection of the law by statute which prohibits the solicitation for prostitution where the statute is sex-neutral on its face and the practice of the solicitation by one male of another male for purposes of sodomy is violative of the provision. D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Statute which proscribes solicitation for the purpose of committing sodomy, defined as taking into one's mouth or anus the sexual organ of any other person, does not violate constitutional guarantee of equal protection on its face by prohibiting acts between either two men or a man and a woman but not between two women.

D.C. Code §§ 22-2701, 22-3502; U.S. Const. Amend. 14. *United States v. Cozart*, 321 A.2d 342, 1974 D.C. App. LEXIS 229 (1974).

— **Freedom of speech and press, validity.**

Even if prostitution per se is not unlawful, a prostitute's offer to engage in a commercial sexual act is not speech protected by the First Amendment. U.S. Const. Amend. 1; D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Statute which prohibits the soliciting for prostitution is not unconstitutional on ground that it violates the First Amendment protection of freedom of speech. U.S. Const. Amend. 1; D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Statute which proscribes soliciting for prostitution deals not with speech but with a straightforward business proposal which may be regulated under the standards applicable to "purely commercial advertising." U.S. Const. Amend. 1; D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

A solicitation for prostitution is not entitled to immunity under the First Amendment. U.S. Const. Amend. 1; D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Statute in effect prohibiting solicitation for offense of sodomy is within domain of state power and statute proscribing such conduct does not offend the First Amendment protection of freedom of expression. U.S. Const. Amend. 1; D.C. Code § 22-2701. *Riley v. United States*, 298 A.2d 228, 1972 D.C. App. LEXIS 304 (1972), writ of certiorari denied by 414 U.S. 840, 94 S. Ct. 96, 38 L. Ed. 2d 77, 1973 U.S. LEXIS 514 (1973).

— **In general.**

Statute [D.C. Code 1981, § 22-2701] prohibiting sexual solicitation would be constitutional, even if prostitution was not unlawful activity, in that statute advances substantial government interest in maintaining decent society and is narrowly tailored to serve that interest. U.S. Const. Amend. 1. *Wood v. United States*, 498 A.2d 1140, 1985 D.C. App. LEXIS 494 (1985).

Defendant, whose conduct revealed intent to solicit for proscribed purpose of prostitution,

was clearly put on notice of illegality of her actions by statute proscribing sexual solicitation [D.C. Code 1981, § 22-2701], as statute prohibits specified conduct for the purpose of prostitution. *Wood v. United States*, 498 A.2d 1140, 1985 D.C. App. LEXIS 494 (1985).

Statute which proscribes sexual solicitation [D.C. Code 1981, § 22-2701], which requires that conduct be for purpose of prostitution and provides that objective criteria must be present in order to support conviction, is not void for vagueness. U.S. Const. Amends. 5, 14. *Wood v. United States*, 498 A.2d 1140, 1985 D.C. App. LEXIS 494 (1985).

Commercial sex does not concern intimate relationship of sort deemed worthy of constitutional protection. D.C. Code 1973, § 22-2701. *Lutz v. United States*, 434 A.2d 442, 1981 D.C. App. LEXIS 346 (1981).

Statute defining crime of solicitation for prostitution was constitutional. D.C. Code § 22-2701. *Garrett v. United States*, 339 A.2d 372, 1975 D.C. App. LEXIS 399 (1975).

A would-be prostitute constitutionally may be forbidden to solicit customers and a would-be customer similarly may be forbidden to solicit a person to engage in prostitution. U.S. Const. Amend. 1; D.C. Code § 22-2701. *Garrett v. United States*, 339 A.2d 372, 1975 D.C. App. LEXIS 399 (1975).

The statutory prohibition against solicitation for prostitution is reasonable. U.S. Const. Amend. 1; D.C. Code § 22-2701. *Garrett v. United States*, 339 A.2d 372, 1975 D.C. App. LEXIS 399 (1975).

Lack of scientific or empirical data to support asserted societal interests in prohibiting soliciting for prostitution did not render invalid the statute proscribing such solicitation. D.C. Code § 22-2701. *Garrett v. United States*, 339 A.2d 372, 1975 D.C. App. LEXIS 399 (1975).

Statute in effect prohibiting solicitation for sodomy, as applied to persons accused of public solicitations of strangers for sodomy, did not impinge upon personal rights that could be deemed fundamental or implicit in concept of ordered liberty. D.C. Code § 22-2701; U.S. Const. Amends. 1, 3-5, 9, 14. *United States v. Carson*, 319 A.2d 329, 1974 D.C. App. LEXIS 407 (1974).

Statute proscribing solicitation for lewd and immoral purposes, limited to solicitations for sodomy, was not void for vagueness. D.C. Code § 22-2701. *Riley v. United States*, 298 A.2d 228, 1972 D.C. App. LEXIS 304 (1972), writ of certiorari denied by 414 U.S. 840, 94 S. Ct. 96, 38 L. Ed. 2d 77, 1973 U.S. LEXIS 514 (1973).

— **Privacy rights, validity.**

Constitutional right to privacy protecting certain intimate conduct does not extend to advertised commercial sexual solicitation performed inside a private residence. D.C. Code

1981, § 22-2701. *Blyther v. United States*, 577 A.2d 1154, 1990 D.C. App. LEXIS 167 (1990).

There is no fundamental right to privacy for commercial sexual solicitation. D.C. Code 1973, § 22-2701. *Lutz v. United States*, 434 A.2d 442, 1981 D.C. App. LEXIS 346 (1981).

Although constitutional right to privacy for certain intimate conduct extends beyond home to hotel room, such right does not extend to protection for commercial sexual solicitation. D.C. Code 1973, § 22-2701. *Lutz v. United States*, 434 A.2d 442, 1981 D.C. App. LEXIS 346 (1981).

Statute proscribing solicitation for the purpose of prostitution did not constitute an unconstitutional invasion of the right of privacy of defendants who were arrested upon allegedly making solicitations of police officers for prostitution, with the solicitations presumably having been made in some public place. D.C. Code § 22-2701. *United States v. Moses*, 339 A.2d 46, 1975 D.C. App. LEXIS 389 (1975), writ of certiorari denied by 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373, 1976 U.S. LEXIS 1943 (1976).

Constitutionality of solicitation statute was to be upheld against assertion that it violated defendant's right of privacy, not only in situation where solicitation was for homosexual sodomy, but also in situation where solicitations were by a man of a woman. D.C. Code § 22-2701. *United States v. Dumas*, 327 A.2d 826, 1974 D.C. App. LEXIS 304 (1974).

Fact that any of persons accused of public solicitations of strangers for sodomy ultimately may have contemplated a private and consensual act was of no legal significance on overbreadth right of privacy issue as concerned soliciting statute. D.C. Code § 22-2701; U.S. Const. Amends. 1, 3-5, 9, 14. *United States v. Carson*, 319 A.2d 329, 1974 D.C. App. LEXIS 407 (1974).

Weight and sufficiency of evidence.

In prosecution in which accused is charged with unlawfully inviting another to accompany him for lewd and immoral purpose in violation of statute, trial court should require corroboration of circumstances surrounding parties at time and place of alleged occurrence and similar provable circumstances. D.C. Code 1940, § 22-2701. *Kelly v. U.S.*, 194 F.2d 150, 1952 U.S. App. LEXIS 2737 (C.A.D.C. 1952).

Evidence was insufficient to sustain conviction for unlawful invitation by accused to another to accompany accused for lewd and immoral purpose. D.C. Code 1940, § 22-2701. *Kelly v. U.S.*, 194 F.2d 150, 1952 U.S. App. LEXIS 2737 (C.A.D.C. 1952).

There was sufficient evidence that defendant knew phrase "top or bottom" meant sexual acts to support his conviction of solicitation for purpose of homosexual prostitution. D.C. Code

1981, § 22-2701(a). *Moore v. United States*, 609 A.2d 1133, 1992 D.C. App. LEXIS 167 (1992).

Evidence was sufficient to sustain defendant's conviction of sexual solicitation for a fee, notwithstanding absence of discussion of sexual acts during defendant's telephone call with cooperating witness, in light of advertisement defendant placed in newspaper and conversations between cooperating witness and defendant both on telephone and in defendant's apartment. D.C. Code 1981, § 22-2701. *Blyther v. United States*, 577 A.2d 1154, 1990 D.C. App. LEXIS 167 (1990).

Even if appellate court had jurisdiction to consider defendant's appeal, judgment of conviction on charge of soliciting for prostitution would stand in light of ample evidence from which trier of fact could find defendant guilty beyond reasonable doubt; female undercover police officer testified that defendant had offered her money to perform sexual act. D.C. Code 1981, § 22-2701. *Speight v. United States*, 558 A.2d 357, 1989 D.C. App. LEXIS 96 (1989).

Defendant's conviction for soliciting for lewd and immoral purposes was not supported by evidence of his "unremarkable behavior" of appearing in an area known for prostitution, dressed in female clothes, waving and speaking to male motorists before driving off with one male motorist and then returning after several minutes. D.C. Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

Even if trier-of-fact could reasonably infer from evidence that defendant was dressed in female clothing in an area with a high incidence of prostitution and observed waving at passing male motorist and from evidence that defendant got in automobile with one male motorist, drove off, and returned a few minutes later, it did not follow that the activity included sodomy and evidence thus could not support conviction for solicitation for lewd and immoral purposes. D.C. Code 1981, § 22-2701. *Rose v. United States*, 535 A.2d 849, 1987 D.C. App. LEXIS 516 (1987).

Evidence offered by Government was insufficient to sustain convictions of soliciting for prostitution absent evidence of an understanding that a commercial venture was contemplated when sexual availability was made apparent. D.C. Code 1981, § 22-2701. *Ford v. United States*, 533 A.2d 617, 1987 D.C. App. LEXIS 489 (1987).

There was insufficient evidence that defendants were offering sex "in return for a fee," as required to support conviction of "inviting for purposes of prostitution." D.C. Code 1981, § 22-2701. *Graves v. United States*, 515 A.2d 1136, 1986 D.C. App. LEXIS 451 (1986).

Evidence was sufficient for finding of guilt of sexual solicitation beyond reasonable doubt;

defendant was dropped off at 2:30 a.m. in area known for solicitation of prostitution, for one and one-half hours defendant approached only male pedestrians and male motorists, and she did not hand out leaflets or conduct a survey. D.C. Code 1981, § 22-2701. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Evidence that defendant approached police decoy and offered to pay her \$10 if she would "screw" him was sufficient to support sexual solicitation conviction. D.C. Code 1981, § 22-2701. *Eissa v. United States*, 485 A.2d 610, 1984 D.C. App. LEXIS 576 (1984), writ of certiorari denied by 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 474, 1985 U.S. LEXIS 4693, 54 U.S.L.W. 3375 (1985).

Evidence in prosecution for sexual solicitation, including police officer's testimony that defendant approached him while he was on patrol in his car, inquired whether he was there to "screw," how much money he would spend, and whether he would need and could obtain a prophylactic device, along with fact that setting in which this conversation occurred and fact that the officer and the defendant drove to building where defendant was arrested were corroborated by second officer who observed such events, and fact that defendant presented no evidence to contradict the officers' testimony or to support an affirmative defense, was sufficient to establish elements of solicitation and to permit a finding of guilt beyond a reasonable doubt. D.C. Code 1981, § 22-2701. *Washington v. United States*, 475 A.2d 1127, 1984 D.C. App. LEXIS 394 (1984).

Defendant's attire, i.e., red sweater, blue miniskirt and corduroy knee length boots, her prolonged presence on street corner, her approach to complete stranger, her extremely suggestive verbal responses to plainclothes officer, e. g., that she would do anything officer wanted her to do, her prompt discussion of financial terms and her ready arrangement for a room, were legally sufficient for fact finder to conclude beyond a reasonable doubt that she was guilty of violating statute making it unlawful to entice or address another for purpose of enticing him for the purpose of prostitution. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

Finder of fact could reasonably have concluded that defendant's comment, in response to plainclothes officer's inquiry as to what she did, that she would do anything officer wanted to do was intended to tempt or draw on by arousing hope or desire and, therefore, operated as an enticement within the meaning of statute making it unlawful to entice any person

for purpose of prostitution. D.C. Code § 22-2701. *Dinkins v. United States*, 374 A.2d 292, 1977 D.C. App. LEXIS 314 (1977).

Evidence supported conviction for soliciting for prostitution despite defendant's contention that it established only a single solicitation without further proof from surrounding circumstances that defendant was indiscriminate. D.C. Code § 22-2701. *Garrett v. United States*, 339 A.2d 372, 1975 D.C. App. LEXIS 399 (1975).

In prosecution for soliciting for purposes of prostitution, arresting officer's testimony need not be corroborated. D.C. Code 1961, § 22-2701. *Wajer v. United States*, 222 A.2d 68, 1966 D.C. App. LEXIS 211 (App. 1966).

In prosecution for soliciting for purposes of prostitution, even if defense of entrapment was available, record was devoid of proof of entrapment. D.C. Code 1961, § 22-2701. *Wajer v. United States*, 222 A.2d 68, 1966 D.C. App. LEXIS 211 (App. 1966).

Evidence sustained convictions for soliciting for lewd and immoral purposes. D.C. Code 1961, § 22-2701. *Willis v. United States*, 198 A.2d 751, 1964 D.C. App. LEXIS 209 (App. 1964).

Trial court could properly find defendant guilty of soliciting for lewd and immoral purpose on testimony of officer, uncontradicted as to time and place, that he noticed defendant, dressed in female attire, motioning him to curb, that defendant offered to perform act of perversion for stated amount, corroborated by testimony of another officer who saw defendant conversing with arresting officer, where there was no evidence introduced of defendant's good character or denial that he was dressed in female attire. D.C. Code 1961, § 22-2701. *Berneau v. United States*, 188 A.2d 301, 1963 D.C. App. LEXIS 193 (App. 1963).

Conviction for soliciting another male for a lewd and immoral purpose was based on sufficient corroboration as to time, place and circumstances. D.C. Code 1961, § 22-2701. *Alexander v. United States*, 187 A.2d 901, 1963 D.C. App. LEXIS 187 (App. 1963).

Evidence justified conviction for soliciting a person for immoral or lewd purposes. D.C. Code 1940, § 22-2701. *Bicksler v. U.S.*, 90 A.2d 233, 1952 D.C. App. LEXIS 185 (Cr.App. 1952).

Evidence justified conviction for addressing a person for immoral purposes. D.C. Code 1940, §§ 22-2701. *Bicksler v. U.S.*, 90 A.2d 233, 1952 D.C. App. LEXIS 185 (Cr.App. 1952).

Evidence, consisting only of testimony of arresting officer was sufficient to support conviction of soliciting for lewd and immoral purpose. D.C. Code 1940, § 22-2701. *Brenke v. U.S.*, 78 A.2d 677, 1951 D.C. App. LEXIS 133 (Cr.App. 1951).

§ 22-2701.01. Definitions.

For the purposes of this section, §§ 22-2701, 22-2703, and 22-2723, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722.

(1) “Arranging for prostitution” means any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or a fee was paid.

(2) “Domestic partner” shall have the same meaning as provided in § 32-701(3).

(3) “Prostitution” means a sexual act or contact with another person in return for giving or receiving a fee.

(4) “Prostitution-related offenses” means those crimes and offenses defined in this act and in the acts cited in the lead-in language of this section.

(5) “Sexual act” shall have the same meaning as provided in § 22-3001(8).

(6) “Sexual contact” shall have the same meaning as provided in § 22-3001(9).

(7) “Solicit for prostitution” means to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution.

(Dec. 10, 1981, D.C. Law 4-57, § 2, 28 DCR 4652; May 7, 1993, D.C. Law 9-267, § 3, 39 DCR 5684; Apr. 24, 2007, D.C. Law 16-306, § 212, 53 DCR 8610.)

Section references. — This section is referred to in § 16-2301.

Prior Codifications. — 1981 Ed., § 22-2701.1.

Effect of amendments. — D.C. Law 16-306 rewrote the section.

Emergency legislation. — For temporary (90 day) amendment of section, see § 212 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 212 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 212 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 212 of Omnibus Public Safety Sec-

ond Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 4-57. — Law 4-57, the “Community Park West Designation Act of 1981,” was introduced in Council and assigned Bill No. 4-184, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on September 15, 1981, and September 29, 1981, respectively. Signed by the Mayor on October 19, 1981, it was assigned Act No. 4-98 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-267. — For legislative history of D.C. Law 9-267, see Historical and Statutory Notes following § 22-2723.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

References in text. — “This act”, referred to in the introductory language, is D.C. Law 4-57.

CASE NOTES

ANALYSIS

Fee for services.

In general.

Purpose requirement.

Solicitation.

Validity.

Fee for services.

Appellate court properly refrained from deciding issue of whether there was sufficient evidence of a fee in prosecution for soliciting for prostitution where there was no challenge on appeal to the proof of the purpose of the solicitation, but only as to whether the police officer's

testimony established solicitation. *Ford v. United States*, 533 A.2d 617, 1987 D.C. App. LEXIS 489 (1987).

The term “fee” in context of statute defining prostitution as engaging, agreeing to engage, or offering to engage in sexual acts or contacts with another person in return for a fee refers to payment in return for professional services rendered. D.C. Code 1981, § 22-2701.1(1). *Muse v. United States*, 522 A.2d 888, 1987 D.C. App. LEXIS 314 (1987).

Transaction in which defendant offered to exchange his gold necklace for a “date” with undercover police officer was the type of purely commercial exchange of sexual acts for a “fee” that was encompassed by definition of prostitution, even though no money was involved in suggested bargain. D.C. Code 1981, § 22-2701.1(1). *Muse v. United States*, 522 A.2d 888, 1987 D.C. App. LEXIS 314 (1987).

Sufficient evidence supported trial judge’s conclusion, in prosecution for solicitation for purposes of prostitution, that gold necklace of defendant had some value and was thus a “fee” within purview of prostitution statute. D.C. Code 1981, § 22-2701.1(1). *Muse v. United States*, 522 A.2d 888, 1987 D.C. App. LEXIS 314 (1987).

There was insufficient evidence that defendants were offering sex “in return for a fee,” as required to support conviction of “inviting for purposes of prostitution.” D.C. Code 1981, § 22-2701. *Graves v. United States*, 515 A.2d 1136, 1986 D.C. App. LEXIS 451 (1986).

In general.

Although the act of soliciting sex in return for money is a crime, prostitution itself is not. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

The status of being a prostitute is not a crime in the District of Columbia, but only the act of offering to engage in some sort of sexual conduct with another person in return for fee. *Ford v. United States*, 533 A.2d 617, 1987 D.C. App. LEXIS 489 (1987).

Actual ability to pay is not element of crime of soliciting prostitution; crime is completed by agreeing to engage or offering to engage in sex

for money or other material gain. D.C. Code 1981, §§ 22-2701, 22-2701.1(1). *Nche v. United States*, 526 A.2d 23, 1987 D.C. App. LEXIS 360 (1987).

Purpose requirement.

Purpose requirement of statute proscribing sexual solicitation [D.C. Code 1981, § 22-2701], that conduct was for purpose of prostitution, remains separate element that government must prove. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Solicitation.

Evidence was sufficient for finding of guilt of sexual solicitation beyond reasonable doubt; defendant was dropped off at 2:30 a.m. in area known for solicitation of prostitution, for one and one-half hours defendant approached only male pedestrians and male motorists, and she did not hand out leaflets or conduct a survey. D.C. Code 1981, § 22-2701. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Absence of direct proof that defendant spoke words of solicitation was not fatal to prosecution for sexual solicitation. D.C. Code 1981, § 22-2701. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

To warrant conviction for sexual solicitation, the evidence must have been sufficient to sustain finding beyond reasonable doubt that defendant’s conduct was for purpose of prostitution. D.C. Code 1981, § 22-2701. *Ford v. United States*, 498 A.2d 1135, 1985 D.C. App. LEXIS 492 (1985).

Validity.

Statute defining prostitution as engaging, agreeing to engage, or offering to engage in sexual acts or contacts with another person in return for a fee is not unconstitutionally vague due to lack of definition of “fee.” D.C. Code 1981, § 22-2701.1(1). *Muse v. United States*, 522 A.2d 888, 1987 D.C. App. LEXIS 314 (1987).

Prostitution statute does not implicate First Amendment values; therefore, defendant charged with solicitation for purposes of prostitution did not have standing to challenge the statute as being overbroad. D.C. Code 1981, § 22-2701.1(1); U.S. Const. Amend. 1. *Muse v. United States*, 522 A.2d 888, 1987 D.C. App. LEXIS 314 (1987).

§ 22-2702. Inmate or frequenter of house of ill fame. [Repealed].

Repealed.

(Dec. 17, 1941, 55 Stat. 810, ch. 589, § 5.)

Prior Codifications. — 1981 Ed., § 22-2702.

§ 22-2703. Suspension of sentence; conditions; enforcement.

The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include an order to stay away from the area within which the offense or offenses occurred, submission to medical and mental examination, diagnosis and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.

(Aug. 15, 1935, 49 Stat. 651, ch. 546, § 3; Aug. 1, 1950, 64 Stat. 393, ch. 513, § 1; May 24, 1996, D.C. Law 11-130, § 3(b), 43 DCR 1570.)

Prior Codifications. — 1981 Ed., § 22-2703.

1973 Ed., § 22-2703.

Emergency legislation. — For temporary amendment of section, see § 3(b) of the Safe Streets Anti-Prostitution Emergency Amendment Act of 1996 (D.C. Act 11-252, April 15, 1996, 43 DCR 2139).

For temporary addition of § 2703a, see § 12

of the Metropolitan Police Department Civilianization and Street Solicitation for Prostitution Emergency Amendment Act of 1998 (D.C. Act 12-428, August 6, 1998, 45 DCR 5884).

Legislative history of Law 11-130. — For legislative history of D.C. Law 11-130, see Historical and Statutory Notes following § 22-2701.

CASE NOTES

Sentence and punishment.

Trial judge, who knew that defendant had been convicted for the same offense on at least three prior occasions and had received nine-month probation term on last conviction for soliciting for prostitution and who also knew that defendant was supporting children and had allegedly secured a job which was to begin in a month, did not abuse his discretion in imposing the maximum sentence, then suspending that sentence and ordering a three-year term of probation. *Simmons v. United States*, 461 A.2d 463, 1983 D.C. App. LEXIS 370 (1983).

Split sentence, unaccompanied by conditions and an order of probation, was authorized un-

der § 16-710, but was not authorized by this section; this section controls and sentence was, therefore, not authorized. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Section 22-2701, when read alone, appears plainly to require a penalty of a \$300 fine for first offenders; it cannot be read alone, however, for this section also applies to penalties for solicitation. Further, § 16-710 permits the court "in criminal cases" to suspend imposition or execution of sentence, or any part thereof, and place a defendant on probation. Both of these statutes have been held to authorize the trial court to grant probation upon conviction of solicitation. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

§ 22-2704. Abducting or enticing child from his or her home for purposes of prostitution; harboring such child.

(a) It is unlawful for any person, for purposes of prostitution, to:

(1) Persuade, entice, or forcibly abduct a child under 18 years of age from his or her home or usual abode, or from the custody and control of the child's parents or guardian; or

(2) Secrete or harbor any child so persuaded, enticed, or abducted from his or her home or usual abode, or from the custody and control of the child's parents or guardian.

(b) A person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years, or by a fine of not more than \$20,000, or both.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 813; May 21, 1994, D.C. Law 10-119, § 2(q), 41 DCR 1639; Apr. 24, 2007, D.C. Law 16-306, § 213, 53 DCR 8610.)

Cross references. — Armed offenses, additional penalty for committing crime when armed, see §§ 22-4501 and 22-4502.

Child witness testimony, exception from corroboration requirement, see § 23-114.

Criminal offense against a victim who is a minor defined, violations of this section see § 24-4101.

Prior Codifications. — 1981 Ed., § 22-2704.

1973 Ed., § 22-2704.

Effect of amendments. — D.C. Law 16-306 rewrote the section, which had previously read:

"Any person who, for purposes of prostitution, persuades, entices, or forcibly abducts a child under 16 years of age from his or her home or usual abode, or from the custody and control of the child's parents or guardian, shall be punished by imprisonment for not less than 2 years and not more than 20 years; and whoever knowingly secretes or harbors any child so persuaded, enticed, or abducted shall be punished by imprisonment for not more than 8 years."

Emergency legislation. — For temporary (90 day) amendment of section, see § 213 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 213 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 213 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 213 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

Nature and elements of offenses.

Statute prohibiting solicitation for the purpose of prostitution applies to solicitation for homosexual acts. D.C. Code §§ 22-2701, 22-

2704 to 22-2720, 22-2722. *Harris v. United States*, 293 A.2d 851, 1972 D.C. App. LEXIS 421 (1972).

§ 22-2705. Pandering; inducing or compelling an individual to engage in prostitution.

(a) It is unlawful for any person, within the District of Columbia to:

(1) Place or cause, induce, entice, procure, or compel the placing of any individual in the charge or custody of any other person, or in a house of prostitution, with intent that such individual shall engage in prostitution;

(2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual:

(A) To reside with any other person for the purpose of prostitution;

(B) To reside or continue to reside in a house of prostitution; or

(C) To engage in prostitution; or

(3) Take or detain an individual against the individual's will, with intent to compel such individual by force, threats, menace, or duress to marry the abductor or to marry any other person.

(b) It is unlawful for any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual's being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact.

(c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) or (b) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years, or by a fine of not more than \$5,000, or both.

(2) A person who violates subsection (a) or (b) of this section when the individual so placed, caused, compelled, induced, enticed, procured, taken, detained, or used or attempted to be so placed, caused, compelled, induced, enticed, procured, taken, detained, or used is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than \$20,000, or both.

(June 25, 1910, 36 Stat. 833; Jan. 3, 1941, 54 Stat. 1225, ch. 936, § 1; May 21, 1994, D.C. Law 10-119, § 12(a), 41 DCR 1639; May 17, 1996, D.C. Law 11-119, § 3, 43 DCR 528; Apr. 24, 2007, D.C. Law 16-306, § 214(a), 53 DCR 8610.)

Cross references. — Armed offenses, additional penalty for committing a crime when armed, see §§ 22-4501 and 22-4502.

Prior Codifications. — 1981 Ed., § 22-2705.

1973 Ed., § 22-2705.

Effect of amendments. — D.C. Law 16-306 rewrote the section, which had previously read as follows: "Any person who, within the District of Columbia shall place or cause, induce, procure, or compel the placing of any individual in the charge or custody of any other person, or in a house of prostitution, with intent that such individual shall engage in prostitution, or who shall compel, induce, entice, or procure or attempt to compel, induce, entice, or procure any individual to reside with any other person for immoral purposes or for the purpose of prostitution, or who shall compel, induce, entice, or

procure or attempt to compel, induce, entice, or procure any such individual to reside or continue to reside in a house of prostitution, or compel, induce, entice, or procure or attempt to compel, induce, entice, or procure such individual to engage in prostitution, or who takes or detains an individual against the individual's will, with intent to compel such individual by force, threats, menace, or duress to marry the abductor or to marry any other person; or any parent, guardian, or other person having legal custody of the person of an individual, who consents to the individual's taking or detention by any person, for the purpose of prostitution or sexual intercourse, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000."

Emergency legislation. — For temporary

amendment of section, see § 3(c) of the Safe Streets Anti-Prostitution Emergency Amendment Act of 1996 (D.C. Act 11-252, April 15, 1996, 43 DCR 2139).

For temporary (90 day) amendment of section, see § 214(a) of Omnibus Public Safety Congressional Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 214(a) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 214(a) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 214(a) of Omnibus Public Safety Second Congressional Review Emergency

Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

Legislative history of Law 11-119. — Law 11-119, the “Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and transmitted to both Houses of Congress for its review. D.C. Law 11-119 became effective May 17, 1996.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

ANALYSIS

Admissibility of evidence.

In general.

Indictment and information.

Instructions.

Jury.

Nature and elements of offenses.

New trial.

Review.

Verdict.

Weight and sufficiency of evidence.

Admissibility of evidence.

Testimony of Government's expert witness on modus operandi of pimps and nature of relationship between pimps and prostitutes was relevant in trial on charges of interstate transportation of females and minors for prostitution; testimony might have shed light on critical issues in case—such as, whether defendant was pimp or merely gambler with flashy lifestyle and penchant for travel as he claimed and whether Government's young witnesses traveled with defendant independently or as part of pimp-prostitute relationship—and could also have helped jury to determine credibility of Government's prostitute-witnesses. 18 U.S.C. §§ 2421, 2423; Fed.Rules Evid.Rules 401, 402, 18 U.S.C. *United States v. Anderson*, 851 F.2d 384, 1988 U.S. App. LEXIS 8681 (C.A.D.C. 1988), writ of certiorari denied by 488 U.S. 1012, 109 S. Ct. 801, 102 L. Ed. 2d 792, 1989 U.S. LEXIS 231, 57 U.S.L.W. 3452 (1989).

In prosecution for pandering and procuring, evidence of assault by defendant upon complainant showed that defendant exerted control over complainant when she tried to leave him, and was relevant to issue of defendant's intent

to coerce complainant to engage in prostitution. D.C. Code 1973, §§ 22-2705, 22-2707. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

In general.

Whether the District of Columbia was already adequately protected from the evils of prostitution without the added prohibition of transportation for that purpose was for Congress, not the courts, to decide. White Slave Traffic Act, § 2, 18 U.S.C. § 2421; D.C. Code 1940, §§ 22-2701, 22-2702, 22-2705 to 22-2712. *U.S. v. Beach*, 65 S.Ct. 602, 1945 U.S. LEXIS 2400 (U.S. Dist. Col. 1945).

Indictment and information.

It was proper to charge in first count of indictment that defendants compelled, induced, enticed and procured a certain female to engage in prostitution, and in second count to charge an attempt. D.C. Code 1940, §§ 22-2705; Fed.Rules Crim.Proc. rules 8, 13, 14, 18 U.S.C. *Welch v. U.S.*, 135 F.2d 465, 1943 U.S. App. LEXIS 3300 (1943).

Instructions.

Trial court was not required to instruct jury on corroboration, in prosecution for inducing a female to engage in prostitution and for compelling a female to reside with defendant for purpose of prostitution, where none of the offenses for which defendant was convicted involved sexual activity between defendant and complainant. D.C. Code §§ 22-2705, 22-2706. *Villines v. United States*, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

Jury.

In prosecution for pandering, the fact that a number of government employees served on

jury, did not deprive defendant of his constitutional rights to an impartial jury trial and to due process of law. D.C. Code 1940, §§ 11-1420 to 11-1422, 22-2705, 22-2707; U.S. Const. Amends. 5, 6. *Wright v. U.S.*, 183 F.2d 821, 1950 U.S. App. LEXIS 3014 (C.A.D.C. 1950).

Nature and elements of offenses.

The Mann Act penalizing the transportation in the District of Columbia of any woman with the intent or purpose to induce or entice the woman transported to practice prostitution does not conflict with any other legislation applicable to the District. *White Slave Traffic Act* § 2, 18 U.S.C. § 398; D.C. Code 1940, §§ 22-2701, 22-2702, 22-2705 to 22-2712. *U.S. v. Beach*, 65 S.Ct. 602, 1945 U.S. LEXIS 2400 (U.S. Dist. Col. 1945).

The *White Slave Act* is not applicable in a prostitution case involving transportation solely within the District of Columbia in view of fact that Congress has enacted local laws which cover the entire local field. *White Slave Act*, § 2, 18 U.S.C. § 2421; D.C. Code 1929, T. 6, §§ 177, 179; D.C. Code 1940, §§ 22-2701, 22-2702, 22-2705, 22-2707, 22-2709 to 22-2712. *Beach v. U.S.*, 144 F.2d 533, 1944 U.S. App. LEXIS 2877 (1944).

To convict defendant of procuring, Government had to prove that he actually received money from arranging for complainant to have sex on at least one occasion, and to convict defendant of pandering, Government had to prove that he induced or coerced complainant to engage in prostitution, not merely that he facilitated or arranged for act that she, herself, elected to do, and thus there was no merger of the two offenses. D.C. Code 1973, §§ 22-2705, 22-2707. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Since evidence showed that offenses arose out of separate acts no need existed to consider whether offense of inducing a female to engage in prostitution was a lesser included offense of compelling female to reside with defendant for purposes of prostitution, or whether assault with a dangerous weapon was a lesser included charge of malicious disfigurement. D.C. Code §§ 22-502, 22-506, 22-2705, 22-2706. *Villines v. United States*, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

New trial.

Record supported trial court's ruling, on motion for new trial following defendant's conviction for pandering and procuring, that recantation by complaining witness was not credible. D.C. Code 1973, §§ 22-2705, 22-2707; Criminal Rule 33. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Review.

Where trial court had not reviewed or commented upon evidence in his charge to jury and

elements essential to convict were explained without reference to any aspect of evidence and counsel prior to charge failed to formulate desired instruction, refusing oral request that the charge be enlarged to include a specific reference to defendant's theory of the evidence was not reversible error. 18 U.S.C. § 2421; D.C. Code 1961, § 22-2705; Fed. Rules Crim. Proc. rules 30, 52(b), 18 U.S.C. *Clarke v. U.S.*, 301 F.2d 543, 1962 U.S. App. LEXIS 5539 (C.A.D.C. 1962).

In prosecution for pandering, where trial court permitted extensive and exhaustive cross-examination of complaining witness, particularly on matters affecting witness' credibility, trial court's refusal to permit repetition of questions already asked as well as reference to a matter not pertinent to case, was not an abuse of discretion. D.C. Code 1940, §§ 22-2705, 22-2707. *Wright v. U.S.*, 183 F.2d 821, 1950 U.S. App. LEXIS 3014 (C.A.D.C. 1950).

Counsel should have interviewed complainant after she told him that she wished to take stand to recant, but reversal of convictions for pandering and procuring was not mandated where no reasonable juror could have found recantation credible. D.C. Code 1973, §§ 22-2705, 22-2707; Criminal Rule 33; U.S.C. Const. Amend. 6. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Verdict.

Permitting jury to return its verdict on some of counts of indictment before jury had reached verdict on other counts was not error in absence of any affirmative indication that rights of defendant were affected. *White Slave Traffic Act*, § 2, 18 U.S.C. § 2421; D.C. Code 1940, § 22-2705. *Clainos v. U.S.*, 163 F.2d 593, 1947 U.S. App. LEXIS 2287 (1947).

Where first count of indictment charged that defendants compelled, induced, enticed and procured a certain female to engage in prostitution, and second count charged an attempt, the fact that court directed a verdict on the first count and that jury convicted defendants on the second count resulted in no inconsistency. D.C. Code 1940, § 22-2705. *Welch v. U.S.*, 135 F.2d 465, 1943 U.S. App. LEXIS 3300 (1943).

Where first count of indictment charged that defendants compelled, induced, enticed and procured a certain female to engage in prostitution, and second count charged an attempt, even if there had been inconsistency between directed verdict on first count and verdict finding defendants guilty on second count, that would constitute no reason for setting aside verdict of jury. D.C. Code 1940, § 22-2705. *Welch v. U.S.*, 135 F.2d 465, 1943 U.S. App. LEXIS 3300 (1943).

Weight and sufficiency of evidence.

Evidence was sufficient to sustain conviction for attempting to compel, induce, entice, and

procure a certain female to engage in prostitution. D.C. Code 1940, § 22-2705. *Welch v. U.S.*,

135 F.2d 465, 1943 U.S. App. LEXIS 3300 (1943).

§ 22-2706. Compelling an individual to live life of prostitution against his or her will.

(a) It is unlawful for any person, within the District of Columbia, by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact.

(b)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 15 years or by a fine of not more than \$15,000, or both.

(2) A person who violates subsection (a) of the section when the individual so detained or compelled is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than \$20,000, or both.

(June 25, 1910, 36 Stat. 833, ch. 404, § 2; Jan. 3, 1941, 54 Stat. 1225, ch. 936, § 2; May 21, 1994, D.C. Law 10-119, § 12(b), 41 DCR 1639; Apr. 24, 2007, D.C. Law 16-306, § 214(b), 53 DCR 8610.)

Cross references. — Armed offenses, additional penalty for committing a crime when armed, see §§ 22-4501 and 22-4502.

Prior Codifications. — 1981 Ed., § 22-2706.

1973 Ed., § 22-2706.

Effect of amendments. — D.C. Law 16-306 rewrote the section, which had previously read as follows: "Any person who, within the District of Columbia, by threats or duress, detains any individual against such individual's will, for the purpose of prostitution or sexual intercourse, or any person who shall compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or sexual intercourse, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and a fine of not more than \$1,000."

Emergency legislation. — For temporary (90 day) amendment of section, see § 214(b) of Omnibus Public Safety Emergency Amend-

ment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 214(b) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 214(b) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 214(b) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

ANALYSIS

Instructions.

Nature and elements of crime.

Instructions.

Trial court was not required to instruct jury

on corroboration, in prosecution for inducing a female to engage in prostitution and for compelling a female to reside with defendant for purpose of prostitution, where none of the offenses for which defendant was convicted involved sexual activity between defendant and

complainant. D.C. Code §§ 22-2705, 22-2706. *Villines v. United States*, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

Nature and elements of crime.

Since evidence showed that offenses arose out of separate acts no need existed to consider whether offense of inducing a female to engage

in prostitution was a lesser included offense of compelling female to reside with defendant for purposes of prostitution, or whether assault with a dangerous weapon was a lesser included charge of malicious disfigurement. D.C. Code §§ 22-502, 22-506, 22-2705, 22-2706. *Villines v. United States*, 320 A.2d 313, 1974 D.C. App. LEXIS 227 (1974).

§ 22-2707. Procuring; receiving money or other valuable thing for arranging assignation.

(a) It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.

(b)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years or by a fine of not more than \$5,000, or both.

(2) A person who violates subsection (a) of this section when the individual so arranged for or caused to engage in prostitution or a sexual act or contact is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than \$20,000, or both.

(June 25, 1910, 36 Stat. 833, ch. 404, § 3; Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 3; May 21, 1994, D.C. Law 10-119, § 12(c), 41 DCR 1639; Apr. 24, 2007, D.C. Law 16-306, § 214(c), 53 DCR 8610.)

Cross references. — Sexual performances using minors, see § 22-3101 et seq.

Prior Codifications. — 1981 Ed., § 22-2707.

1973 Ed., § 22-2707.

Effect of amendments. — D.C. Law 16-306 rewrote the section, which had previously read as follows: “Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of arranging for or causing any individual to have sexual intercourse with any other person or to engage in prostitution, debauchery, or any other immoral act, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and a fine of not more than \$1,000.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 214(c) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 214(c) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 214(c) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 214(c) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

ANALYSIS

Admissibility of evidence.

Conduct of trial.

Construction and application.

Corroboration.

Indictment or information.

Instructions.

Jury.

Nature and elements of offense.

Presumptions and burden of proof.

Review.

Validity.

Weight and sufficiency of evidence.

Admissibility of evidence.

In prosecution on indictment containing several counts each charging defendant with receiving money and arranging for a named female to engage in prostitution, etc., in violation of statute, evidence of conditions at defendant's house at time of her arrest which established presence of the two women referred to in the indictment was relevant in proof of an element in each offense, that is, their "engagement" in prostitution. D.C. Code 1940, § 22-2707. *Smith v. U.S.*, 180 F.2d 775, 1950 U.S. App. LEXIS 2498 (C.A.D.C. 1950).

In prosecution for pandering and procuring, evidence of assault by defendant upon complainant showed that defendant exerted control over complainant when she tried to leave him, and was relevant to issue of defendant's intent to coerce complainant to engage in prostitution. D.C. Code 1973, §§ 22-2705, 22-2707. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Conduct of trial.

Defendants were not denied fair trial in prosecutions for violating Mann Act and for receiving money for arranging for acts of prostitution, because of actions of trial court and Assistant United States Attorney. 18 U.S.C. § 2421; D.C. Code 1961, § 22-2707. *Fabianich v. U.S.*, 302 F.2d 904, 1962 U.S. App. LEXIS 5157 (C.A.D.C. 1962).

Construction and application.

Telephone dispatcher who worked at escort service did not knowingly aid and abet in "transport[ing] and caus[ing] the transportation" of women in interstate commerce, within meaning of Mann Act; Mann Act section prohibiting transportation could not be interpreted so broadly as to encompass inducement. 18 U.S.C. §§ 2, 2421, 2422. *United States v. Jones*, 909 F.2d 533, 1990 U.S. App. LEXIS 12482 (C.A.D.C. 1990).

The White Slave Act is not applicable in a prostitution case involving transportation solely within the District of Columbia in view of fact that Congress has enacted local laws which cover the entire local field. White Slave Act, § 2, 18 U.S.C. § 2421; D.C. Code 1929, T. 6, §§ 177, 179; D.C. Code 1940, §§ 22-2701, 22-2702, 22-2705, 22-2707, 22-2709 to 22-2712. *Beach v. U.S.*, 144 F.2d 533, 1944 U.S. App. LEXIS 2877 (1944).

The pandering act does not penalize brothel keeper as such or agents who procure patrons for brothels or for woman elsewhere so long as they do nothing toward bringing the woman there for that purpose and for money or value received. D.C. Code 1929, T. 6, § 181. *Boykin v. U.S.*, 130 F.2d 416, 1942 U.S. App. LEXIS 3115 (1942).

Corroboration.

Failure of prosecution to produce second officer who as a corroborating witness could only have testified to time and place of defendant's arrest for attempted procuring because he did not hear conversation between arresting officer and defendant was not error in view of prosecution's effort to secure a continuance because second officer was in another court and defendant's then counsel's willingness to proceed to trial in second officer's absence. D.C. Code 1961, §§ 22-103, 22-2707. *Blakney v. United States*, 225 A.2d 654, 1967 D.C. App. LEXIS 121 (App. 1967).

Indictment or information.

Where defendant was convicted on seven counts of an eight count indictment, each charging her with receiving money and arranging for a named female to engage in prostitution, etc., in violation of statute, four counts relating to one female and three to another, the offenses charged in the several counts were of same character, and therefore joinder was permissible. D.C. Code 1940, § 22-2707; Federal Rules of Criminal Procedure, rule 8(a), 18 U.S.C. *Smith v. U.S.*, 180 F.2d 775, 1950 U.S. App. LEXIS 2498 (C.A.D.C. 1950).

To sustain conviction under pandering statute, the government must charge and prove an act of procuring a woman for or placing her in a house of prostitution or elsewhere, for the purpose of causing her to cohabit illegally with a male person or person, and that the defendant received money or other valuable thing for or on account of the procuring or placing. D.C. Code 1929, T. 6, Sec. 181. *Boykin v. U.S.*, 130 F.2d 416, 1942 U.S. App. LEXIS 3115 (1942).

Instructions.

Instruction that permitted jury to convict defendants under Travel Act for participation in alleged prostitution business, without including elements of state prostitution statutes, impermissibly relieved Government of its burden to prove beyond reasonable doubt that defendants had requisite intent as specified in state statutes; instruction implied that jury could convict if activities of escort service violated only some vaguely conceived notion of prostitution, as opposed to specific statutes. 18 U.S.C. § 1952; U.S. Const. Amends. 5, 14. *United States v. Jones*, 909 F.2d 533, 1990 U.S. App. LEXIS 12482 (C.A.D.C. 1990).

Under statute providing that any person who shall receive any money on account of arranging for any female to engage in prostitution shall be guilty of a felony, where defendant objected to a portion of charge on ground that if jury had any reasonable doubt as to who made arrangements, there was justification for acquittal, and court thereupon recessed for lunch, and when court reconvened gave a new charge, the time lapse between the two charges was not prejudicial. D.C. Code 1940, § 22-2707. *Byas v. U.S.*, 182 F.2d 94, 1950 U.S. App. LEXIS 2754 (C.A.D.C. 1950).

Instruction that essential elements of crime would have to be proved by government beyond reasonable doubt, that such elements were receipt of money by defendant on account of arranging for a female to engage in prostitution with a male person and that government was not required to prove that arrangements were made exclusively by defendant, was not subject to the objection that court should have charged specifically that jury should acquit if they had reasonable doubt that defendant made the arrangement. D.C. Code 1940, § 22-2707. *Byas v. U.S.*, 182 F.2d 94, 1950 U.S. App. LEXIS 2754 (C.A.D.C. 1950).

In prosecution under statute providing that any person who shall receive any money on account of arranging for any female to engage in prostitution shall be guilty of a felony, charge stating elements of offense need not define the word "arrange". D.C. Code 1940, § 22-2707. *Byas v. U.S.*, 182 F.2d 94, 1950 U.S. App. LEXIS 2754 (C.A.D.C. 1950).

In prosecution for pandering, where defendant produced witnesses who testified to his general reputation, and court refused requested instruction on weight to be given to evidence of good character but expressed purpose to instruct on the subject, failure to give instruction on weight to be given to evidence of good character was error. D.C. Code 1940, § 22-2707. *Colbert v. U.S.*, 146 F.2d 10, 1944 U.S. App. LEXIS 2220 (1944).

Giving of instruction, in prosecution for attempted procuring involving contents of conversation that concededly took place between defendant and officer at street corner, that if witness testified falsely concerning any material fact, about which witness could not be reasonably mistaken, all testimony of such witness could be disregarded, except such parts as were corroborated by other testimony, was not plain error requiring reversal in absence of objection. D.C. Code §§ 22-103, 22-2707; D.C. Code General Sessions Court Rules, Criminal Division rules 30, 52(b). *Smith v. United States*, 269 A.2d 446, 1970 D.C. App. LEXIS 346 (App. 1970).

Instruction, in prosecution for attempted procuring, that jury must decide whether defendant had intent to procure female for immoral

purposes, was proper when placed in context with entire charge as obviously referring to illegal sexual immoralities. D.C. Code §§ 22-103, 22-2707. *Langley v. United States*, 264 A.2d 503, 1970 D.C. App. LEXIS 276 (App. 1970).

Jury.

In prosecution for pandering, the fact that a number of government employees served on jury, did not deprive defendant of his constitutional rights to an impartial jury trial and to due process of law. D.C. Code 1940, §§ 11-1420 to 11-1422, 22-2705, 22-2707; U.S. Const. Amends. 5, 6. *Wright v. U.S.*, 183 F.2d 821, 1950 U.S. App. LEXIS 3014 (C.A.D.C. 1950).

Nature and elements of offense.

Under statute providing that any person who shall receive any money on account of arranging for any female to engage in prostitution shall be guilty of a felony, "arranging" may include act of procuring, but is not confined to that activity, and is a word of much broader significance, embracing many more activities than the one of procuring. D.C. Code 1940, § 22-2707. *Byas v. U.S.*, 182 F.2d 94, 1950 U.S. App. LEXIS 2754 (C.A.D.C. 1950).

Under the pandering statute the placing of woman in house of prostitution or elsewhere for purpose of causing her to cohabit illegally with male person or persons and prohibited intent must coincide but payment for the placing need not do so and it may occur before, at or after the placing, but whenever it takes place it must be for or on account of that act. D.C. Code 1929, T. 6, § 181. *Boykin v. U.S.*, 130 F.2d 416, 1942 U.S. App. LEXIS 3115 (1942).

The pandering act does not punish merely procuring patrons for a woman, or sharing her earnings, or keeping or maintaining her even with intent to cause her to cohabit illegally. D.C. Code 1929, T. 6, § 181. *Boykin v. U.S.*, 130 F.2d 416, 1942 U.S. App. LEXIS 3115 (1942).

Under the pandering act it is immaterial whether the procurer receives much or little and it is not important whether payment is made all at once in a lump sum or in scattered amounts at different times. D.C. Code 1929, T. 6, § 181. *Boykin v. U.S.*, 130 F.2d 416, 1942 U.S. App. LEXIS 3115 (1942).

Two principal elements of crime of procuring are receipt of money and arranging an assignment. D.C. Code §§ 22-103, 22-2707. *Walker v. United States*, 248 A.2d 187, 1968 D.C. App. LEXIS 226 (App. 1968).

Where defendant, upon obtaining affirmative reply to his question whether police officers were looking for girls, inquired what type they wanted, priced the girls at \$10 each, and revealed, in answer to question put by one officer, that defendant's fee was \$2, fact that defendant's actions never progressed beyond stage of

conversation and that no money was received was not fatal to a conviction for an attempt to receive money for arranging for a female to have sexual intercourse, and, had the money passed, the principal crime itself would have been consummated. D.C. Code 1951, §§ 22-103, 22-2707. *Sellers v. U.S.*, 131 A.2d 300, 1957 D.C. App. LEXIS 219 (Cr.App. 1957).

Principal elements of crime described in statute making it unlawful for any one to receive money or other valuable thing for arranging for or causing any female to have sexual intercourse with any other person or engage in prostitution, debauchery, or any other immoral act are of the receipt of money and the arranging of an assignation. D.C. Code 1951, § 22-2707. *Sellers v. U.S.*, 131 A.2d 300, 1957 D.C. App. LEXIS 219 (Cr.App. 1957).

Statute making it unlawful for any one to receive money or other valuable things for arranging for or causing any female to have sexual intercourse with any other person or to engage in prostitution, debauchery, or any other immoral act includes not only the actual act of procurement but also the agreement to procure. D.C. Code 1951, § 22-2707. *Sellers v. U.S.*, 131 A.2d 300, 1957 D.C. App. LEXIS 219 (Cr.App. 1957).

Presumptions and burden of proof.

To convict defendant of procuring, Government had to prove that he actually received money from arranging for complainant to have sex on at least one occasion, and to convict defendant of pandering, Government had to prove that he induced or coerced complainant to engage in prostitution, not merely that he facilitated or arranged for act that she, herself, elected to do, and thus there was no merger of the two offenses. D.C. Code 1973, §§ 22-2705, 22-2707. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Review.

In prosecution for pandering, where trial court permitted extensive and exhaustive cross-examination of complaining witness, particularly on matters affecting witness' credibility, trial court's refusal to permit repetition of questions already asked as well as reference to a matter not pertinent to case, was not an abuse of discretion. D.C. Code 1940, §§ 22-2705, 22-2707. *Wright v. U.S.*, 183 F.2d 821, 1950 U.S. App. LEXIS 3014 (C.A.D.C. 1950).

Defendant's contentions that the pandering statute outlaws only the act of placing, and that receiving money for or on account of some other act than placing, does not violate the statute, would be considered on merits notwithstanding claim that the contentions were too late because raised for the first time on appeal, in view of unusual circumstances in which appeal had been taken and perfected. D.C. Code 1929, T. 6,

§ 181. *Boykin v. U.S.*, 130 F.2d 416, 1942 U.S. App. LEXIS 3115 (1942).

Counsel should have interviewed complainant after she told him that she wished to take stand to recant, but reversal of convictions for pandering and procuring was not mandated where no reasonable juror could have found recantation credible. D.C. Code 1973, §§ 22-2705, 22-2707; Criminal Rule 33; U.S.C. Const.Amend. 6. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Record supported trial court's ruling, on motion for new trial following defendant's conviction for pandering and procuring, that recantation by complaining witness was not credible. D.C. Code 1973, §§ 22-2705, 22-2707; Criminal Rule 33. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Validity.

Procuring statute, prohibiting receiving value for arranging for or causing female to engage in prostitution, debauchery, or any other immoral act, is not void for vagueness or so vague as to violate due process. D.C. Code § 22-2707; U.S. Const. Amend. 5. *Langley v. United States*, 264 A.2d 503, 1970 D.C. App. LEXIS 276 (App. 1970).

Weight and sufficiency of evidence.

Evidence supported finding that defendant participated in arranging for female to commit an act of prostitution with officer. D.C. Code 1940, § 22-2707. *Byas v. U.S.*, 182 F.2d 94, 1950 U.S. App. LEXIS 2754 (C.A.D.C. 1950).

Evidence supported conviction on seven counts of an eight count indictment, each charging defendant with receiving money and arranging for named female to engage in prostitution, etc., in violation of statute. D.C. Code 1940, § 22-2707. *Smith v. U.S.*, 180 F.2d 775, 1950 U.S. App. LEXIS 2498 (C.A.D.C. 1950).

Record contained sufficient evidence to support finding that defendant received money from "arranging for" complainant to have sex for money. D.C. Code 1973, § 22-2707. *Godfrey v. United States*, 454 A.2d 293, 1982 D.C. App. LEXIS 498 (1982).

Evidence, including testimony that police department made no effort to seek out and arrest males who solicit females to engage in sexual acts with them for a price and that reason for such failure of effort was that use of women undercover officers to arrest male solicitors of prostitutes had proven infeasible, did not establish as a matter of law a conscious policy of discrimination based on sex in enforcement of statutes proscribing solicitation for prostitution. D.C. Code § 22-2707; U.S. Const. Amend. 5. *United States v. Wilson*, 342 A.2d 27, 1975 D.C. App. LEXIS 406 (1975).

Evidence sustained convictions for attempted procuring. D.C. Code §§ 22-103, 22-2707. Lan-

gley v. United States, 264 A.2d 503, 1970 D.C. App. LEXIS 276 (App. 1970).

Evidence that defendant and complaining witness bargained until they had agreed upon exchange of money, although uncertain in amount, for services of prostitute, and that immediately thereafter defendant led complaining witness a considerable distance to hotel unknown to witness where prostitute was supposedly waiting was sufficient to sustain

conviction for attempted procuring. D.C. Code §§ 22-103, 22-2707. Walker v. United States, 248 A.2d 187, 1968 D.C. App. LEXIS 226 (App. 1968).

Evidence sustained conviction for attempt to receive money for arranging for a female to have sexual intercourse. D.C. Code 1951, §§ 22-103, 22-2707. Sellers v. U.S., 131 A.2d 300, 1957 D.C. App. LEXIS 219 (Cr.App. 1957).

§ 22-2708. Causing spouse or domestic partner to live in prostitution.

Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than one year nor more than 10 years.

(June 25, 1910, 36 Stat. 833, ch. 404, § 4; May 21, 1994, D.C. Law 10-119, § 12(d), 41 DCR 1639; June 3, 1997, D.C. Law 11-275, § 6, 44 DCR 1408; Apr. 24, 2007, D.C. Law 16-306, § 214(d), 53 DCR 8610.)

Cross references. — Armed offenses, additional penalty for committing a crime when armed, see §§ 22-4501 and 22-4502.

Prior Codifications. — 1981 Ed., § 22-2708.

1973 Ed., § 22-2708.

Effect of amendments. — D.C. Law 16-306 substituted “spouse or domestic partner” for “spouse”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 214(d) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 214(d) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 214(d) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 214(d) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

Legislative history of Law 11-275. — Law 11-275, the “Second Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-909, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-520 and transmitted to both Houses of Congress for its review. D.C. Law 11-275 became effective on June 3, 1997.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

Nature and elements of offenses.

Under the Code penalizing the placement by force or fraud, etc., of one's wife in a house of prostitution or procuring her to lead a life of prostitution, gain to either the panderer or to the wife is not an essential element of the offense. D.C. Code 1940, § 22-2708. Hall v.

U.S., 180 F.2d 383, 1950 U.S. App. LEXIS 2426 (C.A.D.C. 1950).

Husband who by force, intimidation and threats compelled his wife to have sexual intercourse with a chance acquaintance whom he had brought to their apartment, was guilty of violating Codal provision penalizing the place-

ment by force, fraud, etc., of one's wife in a house of prostitution or procuring her to lead a life of prostitution, although there was no proof

of any prior acts. D.C. Code 1940, § 22-2708. *Hall v. U.S.*, 180 F.2d 383, 1950 U.S. App. LEXIS 2426 (C.A.D.C. 1950).

§ 22-2709. Detaining an individual in disorderly house for debt there contracted.

Any person or persons who attempt to detain any individual in a disorderly house or house of prostitution because of any debt or debts such individual has contracted, or is said to have contracted, while living in said house of prostitution or disorderly house shall be guilty of a felony, and on conviction thereof be imprisoned for a term not less than one year nor more than 5 years.

(June 25, 1910, 36 Stat. 833, ch. 404, § 5; May 21, 1994, D.C. Law 10-119, § 12(e), 41 DCR 1639; June 3, 1997, D.C. Law 11-275, § 6, 44 DCR 1408.)

Prior Codifications. — 1981 Ed., § 22-2709.

1973 Ed., § 22-2709.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

Legislative history of Law 11-275. — For legislative history of D.C. Law 11-275, see Historical and Statutory Notes following § 22-2708.

CASE NOTES

Construction with federal law.

The White Slave Act is not applicable in a prostitution case involving transportation solely within the District of Columbia in view of fact that Congress has enacted local laws which cover the entire local field. White Slave Act,

§ 2, 18 U.S.C. § 2421; D.C. Code 1929, T. 6, §§ 177, 179; D.C. Code 1940, §§ 22-2701, 22-2702, 22-2705, 22-2707, 22-2709 to 22-2712. *Beach v. U.S.*, 144 F.2d 533, 1944 U.S. App. LEXIS 2877 (1944).

§ 22-2710. Procuring for house of prostitution.

Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution, debauchery, or other immoral act, any individual, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000.

(June 25, 1910, 36 Stat. 833, ch. 404, § 6; as added Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 4; May 21, 1994, D.C. Law 10-119, § 13(a), 41 DCR 1639.)

Section references. — This section is referred to in § 22-2714.

Prior Codifications. — 1981 Ed., § 22-2710.

1973 Ed., § 22-2710.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

§ 22-2711. Procuring for third persons.

Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or

custody of another person for sexual intercourse, prostitution, debauchery, or other immoral purposes any individual shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000.

(June 25, 1910, 36 Stat. 833, ch. 404, § 7; as added Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 4; May 21, 1994, D.C. Law 10-119, § 13(b), 41 DCR 1639.)

Cross references. — Sexual performances using minors, see § 22-3101 et seq.

Section references. — This section is referred to in § 22-2714.

Prior Codifications. — 1981 Ed., § 22-2711.

1973 Ed., § 22-2711.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

§ 22-2712. Operating house of prostitution.

Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000.

(June 25, 1910, 36 Stat. 833, ch. 404, § 8; as added Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 4; May 21, 1994, D.C. Law 10-119, § 12(f), 41 DCR 1639.)

Section references. — This section is referred to in § 22-2714.

Prior Codifications. — 1981 Ed., § 22-2712.

1973 Ed., § 22-2712.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

CASE NOTES

Review.

Briefs, arguments and record on appeal at government expense from convictions for transporting female in interstate commerce for prostitution, and for accepting money from earnings of female engaged in prostitution for which

defendant furnished a place, presented no legally nonfrivolous questions and required that convictions be affirmed. 18 U.S.C. § 2421; D.C. Code 1961, § 22-2712. *Wisnick v. U.S.*, 311 F.2d 775, 1962 U.S. App. LEXIS 3292 (C.A.D.C. 1962).

§ 22-2713. Premises occupied for lewdness, assignation, or prostitution declared nuisance.

(a) Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

(b) Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place which is resorted to by persons using controlled substances in violation of Chapter 9 of Title 48, for the purpose of using any of these substances or for the purpose of keeping or selling any of these substances in violation of Chapter 9 of Title 48, is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such activity is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, and contents thereof, are also declared a nuisance and disorderly house, and shall be enjoined and abated as hereinafter provided.

(Feb. 7, 1914, 38 Stat. 280, ch. 16, § 1; June 19, 1998, D.C. Law 12-127, § 2(a), 45 DCR 1304.)

Cross references. — Action to abate, enjoin, and prevent a drug-related nuisance, where there is reason to believe such exists, see § 42-3101 et seq.

Chief of Police, authority and duty in regard to houses of prostitution, see §§ 5-115.06 and 5-115.07.

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720.

Prior Codifications. — 1981 Ed., § 22-2713.

1973 Ed., § 22-2713.

Legislative history of Law 12-127. — Law 12-127, the “Drug House Abatement Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-141, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 4, 1997, and January 6, 1998, respectively. Signed by the Mayor on January 26, 1998, it was assigned Act No. 12-261 and transmitted to both Houses of Congress for its review. D.C. Law 12-127 became effective on June 19, 1998.

CASE NOTES

ANALYSIS

Guilty plea.

In general.

Leased premises.

Legislative intent.

Weight and sufficiency of evidence.

Guilty plea.

Under District of Columbia law, spouse of individual who held ownership interest in residence that was subject of abatement order issued in criminal case, after defendants pled guilty to keeping disorderly house, had standing to challenge abatement order, though spouse was not party to criminal case, where spouse resided at residence in question and had demonstrable degree of control over residence. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, where defendants pled guilty to criminal offense of keeping disorderly house, existence of nuisance was established “in a criminal proceeding,” thereby requiring issuance of order of abatement. D.C. Code 1981, § 22-2717. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496

(1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

In general.

Where defendant was found guilty of maintaining a bawdy or disorderly house in violation of statute, the house had to be deemed a nuisance per se and court was compelled to issue an order of abatement. D.C. Code §§ 22-2713, 22-2717. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

Bawdy house was a classic example of a nuisance per se and Government was not obliged to present a series of witnesses to testify that house disturbed them as individuals in order to procure an order of abatement. D.C. Code §§ 22-2713 to 22-2720, 22-2714, 22-2717, 22-2722. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

Where evidence in prosecution for keeping “a bawdy or disorderly house. . . , a premises resorted to for homosexual activities,” showed that defendant was the operator of a house used by males, after payment of an initial membership fee plus a fee for each visit, for a variety of homosexual activities including sodomy, conviction was one for keeping a bawdy house as distinguished from a disorderly house, and it was unnecessary to consider contention that court’s definition of disorderly house was constitutionally overbroad. D.C. Code §§ 22-

2713, 22-2722, 22-3502. *Harris v. United States*, 293 A.2d 851, 1972 D.C. App. LEXIS 421 (1972).

Leased premises.

Where involvement of lessee in operation of bawdy house was conceded and acts of prostitution were open, obvious, notorious and continuing, where one of lessors' agents visited the premises often to collect rent and to deal with neighborhood complaints regarding crowds, and resident manager had earlier been arrested for operating a house of prostitution, lessors should have known early in lease's term that the property was being used for illegal purposes, and thus where resident manager was convicted of operating a bawdy house following second arrest, there was no error in issuing order of abatement despite lessors' contention that they, as owners of the property, lacked "guilty knowledge" of its illegal use. D.C. Code §§ 22-2713, 22-2717, 22-2718, 22-2722. *Thomas Circle Ltd. Partnership v. United States*, 372 A.2d 555, 1977 D.C. App. LEXIS 455 (1977).

Legislative intent.

Act Feb. 7, 1914 (D.C. Code 1929, T. 6, § 184

et seq.), to enjoin and abate disorderly houses, which declares such houses to be a nuisance and provides that evidence of general reputation is admissible to establish such nuisance, was not intended to subject owners or lessees to the provisions of that act, unless guilty knowledge was brought home to them, so that an injunction closing a hotel for a year must be reversed on the appeal of the owner, where the bill did not allege any facts showing his knowledge of the unlawful use. *Holmes v. U.S.*, 269 F. 489, 1920 U.S. App. LEXIS 1870 (1920).

Weight and sufficiency of evidence.

Evidence supported determination that defendant's property was disorderly house under District of Columbia law, supporting seizure prior to forfeiture; property was subject of numerous searches, pursuant to warrant, disclosing drugs and paraphernalia, and there were numerous complaints about foot traffic in area. *United States v. 1923 Rhode Island Ave.*, 522 F.Supp.2d 204, 2007 U.S. Dist. LEXIS 86605 (1923).

§ 22-2714. Abatement of nuisance under § 22-2713 by injunction — Temporary injunction.

Whenever a nuisance is kept, maintained, or exists, as defined in § 22-2713, the United States Attorney for the District of Columbia, the Attorney General of the United States, the Corporation Counsel of the District of Columbia, or any citizen of the District of Columbia, may maintain an action in equity in the name of the United States of America or in the name of the District of Columbia, upon the relation of such United States Attorney for the District of Columbia, the Attorney General of the United States, the Corporation Counsel of the District of Columbia, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course. When an injunction has been granted it shall be binding on the defendant throughout the District of Columbia and any violation of the provisions of injunction herein provided shall be a contempt as hereinafter provided.

(Feb. 7, 1914, 38 Stat. 280, ch. 16, § 2; June 19, 1998, D.C. Law 12-127, § 2(b), 45 DCR 1304.)

Cross references. — Action to abate, enjoin, and prevent a drug-related nuisance, where there is reason to believe such exists, see § 42-3101 et seq.

Section references. — This section is referred to in §§ 22-2716, 22-2717 and 22-2720.

Prior Codifications. — 1981 Ed., § 22-2714.

1973 Ed., § 22-2714.

Legislative history of Law 12-127. — Law 12-127, the “Drug House Abatement Amend-

ment Act of 1998,” was introduced in Council and assigned Bill No. 12-141, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 4, 1997, and January 6, 1998, respectively. Signed by the Mayor on January 26, 1998, it was assigned Act No. 12-261 and transmitted to both Houses of Congress for its review. D.C. Law 12-127 became effective on June 19, 1998.

CASE NOTES

In general.

Bawdy house was a classic example of a nuisance per se and Government was not obliged to present a series of witnesses to testify that house disturbed them as individu-

als in order to procure an order of abatement. D.C. Code §§ 22-2713 to 22-2720, 22-2714, 22-2717, 22-2722. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

§ 22-2715. Same — Trial; dismissal of complaint; prosecution; costs.

The action when brought shall be triable at the first term of court, after due and timely service of the notice has been given, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed, except upon a sworn statement made by the complainant and the complainant’s attorney, setting forth the reasons why the action should be dismissed, and the dismissal approved by the United States Attorney for the District of Columbia or the Attorney General of the United States of America in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, it may direct the United States Attorney for the District of Columbia to prosecute said action to judgment; and if the action is continued more than 1 term of court, any citizen of the District of Columbia, or the United States Attorney for the District of Columbia, may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen, and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen.

(Feb. 7, 1914, 38 Stat. 281, ch. 16, § 3; June 25, 1948, 62 Stat. 909, ch. 646, § 1; May 21, 1994, D.C. Law 10-119, § 14(a), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720.

Prior Codifications. — 1981 Ed., § 22-2715.

1973 Ed., § 22-2715.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

§ 22-2716. Violation of injunction granted under § 22-2714.

In case of the violation of any injunction granted under the provisions of § 22-2714, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information, under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may at any stage of the proceedings demand the production and oral examination of the witnesses. A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 nor more than \$1,000 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment.

(Feb. 7, 1914, 38 Stat. 281, ch. 16, § 4.)

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720. 1973 Ed., § 22-2716.

Prior Codifications. — 1981 Ed., § 22-2716.

§ 22-2717. Order of abatement; sale of property; entry of closed premises punishable as contempt.

If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.

(Feb. 7, 1914, 38 Stat. 281, ch. 16, § 5; Oct. 15, 1970, 84 Stat. 931, Pub. L. 91-452, title II, § 257; May 21, 1994, D.C. Law 10-119, § 14(b), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-2714, 22-2718 and 22-2720.

Prior Codifications. — 1981 Ed., § 22-2717.

1973 Ed., § 22-2717.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

CASE NOTES

ANALYSIS

Defenses.

Guilty plea.
In general.
Jurisdiction.

Nature and elements of offenses.
Parties and standing.
Presumptions and burden of proof.
Stay of proceedings.
Weight and sufficiency of evidence.

Defenses.

Under District of Columbia law, residents of house knew or should have known about drug trafficking activity transpiring there and, therefore, were properly subjected to order of abatement issued after house was established in criminal proceeding to be disorderly house, where multiple narcotic search warrants were executed at house, and residents' son as well as others were arrested in front of house for drug offenses. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Where involvement of lessee in operation of bawdy house was conceded and acts of prostitution were open, obvious, notorious and continuing, where one of lessors' agents visited the premises often to collect rent and to deal with neighborhood complaints regarding crowds, and resident manager had earlier been arrested for operating a house of prostitution, lessors should have known early in lease's term that the property was being used for illegal purposes, and thus where resident manager was convicted of operating a bawdy house following second arrest, there was no error in issuing order of abatement despite lessors' contention that they, as owners of the property, lacked "guilty knowledge" of its illegal use. D.C. Code §§ 22-2713, 22-2717, 22-2718, 22-2722. *Thomas Circle Ltd. Partnership v. United States*, 372 A.2d 555, 1977 D.C. App. LEXIS 455 (1977).

Guilty plea.

Under District of Columbia law, where defendants pled guilty to criminal offense of keeping disorderly house, existence of nuisance was established "in a criminal proceeding," thereby requiring issuance of order of abatement. D.C. Code 1981, § 22-2717. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Abatement order which was issued after defendants pled guilty to keeping disorderly house and which directed United States Marshals to remove from house all fixtures and furniture that were "used in conducting the nuisance of unlawfully selling crack cocaine base" was not unconstitutionally vague. U.S. Const. Amend. 14; D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by

152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

In general.

Under District of Columbia law, disorderly house nuisance at residence at which drug trafficking activity transpired was not already abated, and therefore order of abatement was properly issued, though many of perpetrators of nuisance had been apprehended by government, and government alleged no acts of drug activity after certain date, where two of perpetrators remained at large, and letter from neighborhood association suggested that residence continued to be nuisance. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Operation of a bawdy house constitutes a nuisance per se, and when found to exist, such a nuisance must be abated. D.C. Code § 22-2717. *Thomas Circle Ltd. Partnership v. United States*, 372 A.2d 555, 1977 D.C. App. LEXIS 455 (1977).

Where defendant was found guilty of maintaining a bawdy or disorderly house in violation of statute, the house had to be deemed a nuisance per se and court was compelled to issue an order of abatement. D.C. Code §§ 22-2713, 22-2717. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

Jurisdiction.

Assuming District of Columbia abatement statute was properly invoked, abatement order was within federal district court's jurisdiction, despite defendants' contention that order of abatement was form of equitable relief that fell within exclusive jurisdiction of District of Columbia Superior Court; order was entered as part of criminal judgment in which defendants pled guilty to keeping a disorderly house, along with federal drug charges, and penalty imposed by abatement statute was mandatory, given language stating that order of abatement "shall be entered" as part of any judgment in any criminal proceeding establishing predicate nuisance. D.C. Code 1981, §§ 11-502(3), 11-921(a)(3, 5), 22-2717, 22-2722. *United States v. Wade*, 152 F.3d 969, 1998 U.S. App. LEXIS 20492 (C.A.D.C. 1998), appeal dismissed by 1998 U.S. App. LEXIS 33921 (D.C. Cir. Dec. 4, 1998).

Federal district court had subject matter jurisdiction, after defendants in criminal case involving federal charges pled guilty to keeping disorderly house in violation of District of Columbia law, to issue order of abatement with regard to house at issue pursuant to District of Columbia statute. D.C. Code 1981, §§ 11-502(3), 22-2717, 22-2722. *United States v.*

Wade, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Nature and elements of offenses.

Under District of Columbia abatement statute, as predicted by Court of Appeals, orders of abatement may be issued only to abate nuisances arising out of the use of premises for purposes of lewdness, assignation, or prostitution, and, thus, district court lacked statutory authority to enter order of abatement against house based on defendants' conviction of keeping a "disorderly house" in connection with their drug-related activities. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 152 F.3d 969, 1998 U.S. App. LEXIS 20492 (C.A.D.C. 1998), appeal dismissed by 1998 U.S. App. LEXIS 33921 (D.C. Cir. Dec. 4, 1998).

Under District of Columbia law, existence of complaining citizenry is crucial factor in determining whether property constitutes affirmative public disturbance, such that property may be held to be disorderly house and abated. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, residence at which drug trafficking activity transpired was "disorderly house" and, therefore, an abatable nuisance, where undercover police officers made ten purchases of crack cocaine in front of residence over course of two-year investigation, police department received no fewer than 42 complaints about drug trafficking activity in front of residence, and various letters and affidavits before court attested to drug dealing at residence. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Parties and standing.

Under District of Columbia law, criminal defendant no longer charged with keeping disorderly house and various nonparties to criminal case had standing, based on their demonstration of equitable or inchoate interest in house as heirs at law, to challenge order of abatement which was issued after other defendants in case pled guilty to keeping disorderly house, though challengers were unable to show that they had legal interest in house; last titled owner of house died intestate, and challenging defendant and nonparties were children of last titled owner. D.C. Code 1981, §§ 20-105, 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997),

vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, owner of subject real property, even if not defendant in underlying criminal case for keeping bawdy or disorderly house, does have ability to contest abatement order entered pursuant to statute. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, spouse of individual who held ownership interest in residence that was subject of abatement order issued in criminal case, after defendants pled guilty to keeping disorderly house, had standing to challenge abatement order, though spouse was not party to criminal case, where spouse resided at residence in question and had demonstrable degree of control over residence. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Owners and residents of house which was subject of order of abatement, that was issued in criminal proceeding after defendants pled guilty to keeping disorderly house, were accorded sufficient pre-deprivation due process, where owners and residents were permitted to file motions prior to any formal determination as to whether they in fact had standing to challenge abatement order, owners and residents had opportunity to supply court with documentary evidence and affidavits, court held nonevidentiary adversarial hearing which permitted counsel for owners and residents to make arguments, and abatement order was stayed pending court's ruling on motion of owners and residents to vacate and reconsider order. U.S. Const. Amend. 14; D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Presumptions and burden of proof.

Under District of Columbia law, once government demonstrated that at least one of house's resident-owners had knowledge of drug trafficking activity transpiring there, such showing was sufficient to warrant issuance of order of abatement after the house was established to be disorderly house in criminal proceeding, and government was not required to show that house's other resident and nonresident owners also had guilty knowledge. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496

(1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Bawdy house was a classic example of a nuisance per se and Government was not obliged to present a series of witnesses to testify that house disturbed them as individuals in order to procure an order of abatement. D.C. Code §§ 22-2713 to 22-2720, 22-2714, 22-2717, 22-2722. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

For an abatement order to be entered against a bawdy house, evidence must show that the owner knew or should have known of the illegal activities taking place on his property. *United States v. Simms*, 113 WLR 641 (Super. Ct. 1985).

Stay of proceedings.

Three months after defendants pled guilty to keeping disorderly house and order of abatement was issued with respect to such house, it was not appropriate to stay execution of such abatement order pending resolution of appeal taken by residents and owners of house, where

house had been notorious public nuisance for nearly three years due to drug trafficking activity, and some of alleged perpetrators of nuisance were still at large. D.C. Code 1981, §§ 22-2717, 22-2722; Fed.R.Cr.Proc. Rule 38(e), 18 U.S.C. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Weight and sufficiency of evidence.

Evidence relating to defendant's connection with corporate owner of house in which he maintained an office which he visited frequently coupled with the undisguised and recurrent use of hotel by prostitutes and customers was sufficient to show that defendant knew the nature of activities conducted on premises and that he either procured it to be done or permitted it to be done or did nothing to prevent it and was guilty of keeping a bawdy house. D.C. Code §§ 22-2717, 22-2722. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

§ 22-2718. Disposition of proceeds of sale.

The proceeds of the sale of the personal property as provided in § 22-2717, shall be applied in the payment of the costs of the action and abatement and the balance, if any, shall be paid to the defendant.

(Feb. 7, 1914, 38 Stat. 281, ch. 16, § 6.)

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720.

Prior Codifications. — 1981 Ed., § 22-2718.

1973 Ed., § 22-2718.

CASE NOTES

In general.

Where involvement of lessee in operation of bawdy house was conceded and acts of prostitution were open, obvious, notorious and continuing, where one of lessors' agents visited the premises often to collect rent and to deal with neighborhood complaints regarding crowds, and resident manager had earlier been arrested for operating a house of prostitution, lessors should have known early in lease's term that the property was being used for illegal

purposes, and thus where resident manager was convicted of operating a bawdy house following second arrest, there was no error in issuing order of abatement despite lessors' contention that they, as owners of the property, lacked "guilty knowledge" of its illegal use. D.C. Code §§ 22-2713, 22-2717, 22-2718, 22-2722. *Thomas Circle Ltd. Partnership v. United States*, 372 A.2d 555, 1977 D.C. App. LEXIS 455 (1977).

§ 22-2719. Bond for abatement; order for delivery of premises; effect of release.

If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said

nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law.

(Feb. 7, 1914, 38 Stat. 281, ch. 16, § 7; May 21, 1994, D.C. Law 10-119, § 14(c), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-2717 and 22-2720.

Prior Codifications. — 1981 Ed., § 22-2719.

1973 Ed., § 22-2719.

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2704.

§ 22-2720. Tax for maintaining such nuisance.

Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purpose prohibited by §§ 22-2713 to 22-2720, there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of \$300. The assessment of said tax shall be made by the Director of the Department of Finance and Revenue of the District of Columbia and shall be made within 3 months from the date of the granting of the permanent injunction. In case the Director fails or neglects to make said assessment the same shall be made by the Chief of Police, and a return of said assessment shall be made to the Collector of Taxes. Said tax shall be a perpetual lien upon all property, both personal and real used for the purpose of maintaining said nuisance, and the payment of said tax shall not relieve the person or building from any other penalties provided by law. The provisions of the law relating to the collection and distribution of taxes upon personal and real property shall govern in the collection and distribution of the tax herein prescribed in so far as the same are applicable and not in conflict with the provisions of said sections.

(Feb. 7, 1914, 38 Stat. 282, ch. 16, § 8; Oct. 15, 1970, 84 Stat. 931, Pub. L. 91-452, title II, § 258.)

Cross references. — Collection and disbursement of taxes, see § 47-401 et seq.

Section references. — This section is referred to in § 22-2717.

Prior Codifications. — 1981 Ed., § 22-2720.

1973 Ed., § 22-2720.

References in text. — Pursuant to the Office of the Chief Financial Officer's "Notice of

Public Interest" published in the April 18, 1997, issue of the District of Columbia Register (44 DCR 2345) the Office of Tax and Revenue assumed all of the duties and functions previously performed by the Department of Finance and Revenue, as set forth in Commissioner's Order 69-96, dated March 7, 1969. This action was made effective January 22, 1997, nunc pro tunc.

§ 22-2721. Granting immunity to witnesses. [Repealed].

Repealed.

(Oct. 15, 1970, 84 Stat. 931, Pub. L. 91-452, title II, § 256.)

Prior Codifications. — 1981 Ed., § 22-2721.

§ 22-2722. Keeping bawdy or disorderly houses.

Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both.

(July 16, 1912, 37 Stat. 192, ch. 235, § 1; Dec. 23, 1963, 77 Stat. 617, Pub. L. 88-241, § 11(a); Aug. 20, 1994, D.C. Law 10-151, § 107, 41 DCR 2608; Apr. 24, 2007, D.C. Law 16-306, § 215, 53 DCR 8610.)

Cross references. — Unlawful ownership or possession of a pistol, persons convicted under this section, see § 22-4503.

Prior Codifications. — 1981 Ed., § 22-2722.

1973 Ed., § 22-2722.

Effect of amendments. — D.C. Law 16-306 substituted “\$5,000 or imprisoned not more than 5 years, or both” for “\$1,000 or imprisoned not more than 180 days, or both”.

Emergency legislation. — For temporary amendment of section, see § 107 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 215 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 215 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 215 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 215 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

ANALYSIS

Action for abatement generally.

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—Harmless or reversible error, review.

—In general.

—Presentation and reservation of grounds for review.

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Weight and sufficiency of evidence.

Action for abatement generally.

Under District of Columbia abatement statute, as predicted by Court of Appeals, orders of abatement may be issued only to abate nuisances arising out of the use of premises for

purposes of lewdness, assignation, or prostitution, and, thus, district court lacked statutory authority to enter order of abatement against house based on defendants' conviction of keeping a "disorderly house" in connection with their drug-related activities. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 152 F.3d 969, 1998 U.S. App. LEXIS 20492 (C.A.D.C. 1998), appeal dismissed by 1998 U.S. App. LEXIS 33921 (D.C. Cir. Dec. 4, 1998).

Under District of Columbia law, once government demonstrated that at least one of house's resident-owners had knowledge of drug trafficking activity transpiring there, such showing was sufficient to warrant issuance of order of abatement after the house was established to be disorderly house in criminal proceeding, and government was not required to show that house's other resident and nonresident owners also had guilty knowledge. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

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Bawdy house was a classic example of a nuisance per se and Government was not obliged to present a series of witnesses to testify that house disturbed them as individuals in order to procure an order of abatement. D.C. Code §§ 22-2713 to 22-2720, 22-2714, 22-2717, 22-2722. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

Admissibility of evidence.

Evidence concerning stakeout and search of premises allegedly used as bawdy or disorderly house was relevant to required regularity of unlawful conduct, despite contention that evidence was admitted to show another, independent crime, or to prove bad character or disposition to commit crimes. D.C. Code 1981, § 22-2722. *Thomas v. United States*, 588 A.2d 272, 1991 D.C. App. LEXIS 58 (1991).

Registration cards seized in search of tourist home in connection with arrest for operating it as disorderly house were admissible as having direct bearing upon the operation. D.C. Code

1961, § 22-2722. *Wood v. U.S.*, 183 A.2d 563, 1962 D.C. App. LEXIS 320 (Cr.App. 1962).

Testimony on single act of prostitution in house and unlawful sales prior to period specified in information was admissible in prosecution for maintaining disorderly house. D.C. Code 1951, § 22-2722. *Payne v. U.S.*, 171 A.2d 509, 1961 D.C. App. LEXIS 237 (Cr.App. 1961).

In prosecution for maintaining a disorderly house, defendant, by failing to move to quash warrant of arrest before he entered plea of not guilty, did not "waive" right to object to introduction of hotel register, seized at time of arrest, as unlawfully seized evidence. U.S. Const. Amend. 4. *Darnall v. U.S.*, 33 A.2d 734, 1943 D.C. App. LEXIS 183 (Cr.App. 1943).

Arrest.

Affidavits supporting application for warrant for arrest for operation of disorderly house alleged sufficient facts to establish probable cause for arrest. D.C. Code 1961, § 22-2722. *Wood v. U.S.*, 183 A.2d 563, 1962 D.C. App. LEXIS 320 (Cr.App. 1962).

Parade of males into defendant's apartment and her past criminal record as convicted madam and vagrant provided adequate justification for issuance of warrant for arrest resulting in prosecution for keeping disorderly house. D.C. Code 1951, § 22-2722. *Bennett v. U.S.*, 171 A.2d 252, 1961 D.C. App. LEXIS 230 (Cr.App. 1961).

In prosecution for keeping a disorderly house, affidavit made by arresting officer in applying for warrant was sufficient to establish probable cause. D.C. Code 1940, § 22-2722. *Packard v. U.S.*, 77 A.2d 19, 1950 D.C. App. LEXIS 193 (Cr.App. 1950).

Where warrant of arrest for maintaining disorderly house was void, the arrest, which was for a misdemeanor not committed in presence or within view of arresting officers, was unlawful and hotel register seized at time of arrest was unlawfully seized and inadmissible in evidence. U.S. Const. Amend. 4. *Darnall v. U.S.*, 33 A.2d 734, 1943 D.C. App. LEXIS 183 (Cr.App. 1943).

Constitutional guarantees.

Acts of sodomy which allegedly occurred at "homosexual health club" were not protected by any recognized right to privacy as the acts occurred not in a private abode but on premises of a commercial establishment open to the public. D.C. Code §§ 22-2722, 22-3502. *Harris v. United States*, 315 A.2d 569, 1974 D.C. App. LEXIS 363 (1974).

Guilty plea.

Abatement order which was issued after defendants pled guilty to keeping disorderly house and which directed United States Marshals to remove from house all fixtures and furniture that were "used in conducting the

nuisance of unlawfully selling crack cocaine base" was not unconstitutionally vague. U.S. Const. Amend. 14; D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Owners and residents of house which was subject of order of abatement, that was issued in criminal proceeding after defendants pled guilty to keeping disorderly house, were accorded sufficient pre-deprivation due process, where owners and residents were permitted to file motions prior to any formal determination as to whether they in fact had standing to challenge abatement order, owners and residents had opportunity to supply court with documentary evidence and affidavits, court held nonevidentiary adversarial hearing which permitted counsel for owners and residents to make arguments, and abatement order was stayed pending court's ruling on motion of owners and residents to vacate and reconsider order. U.S. Const. Amend. 14; D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Instructions.

Instruction in prosecution for keeping disorderly house and vagrancy that evidence of good character can be considered in determining credibility of witnesses and that such evidence, by itself, may be enough to create a reasonable doubt was a proper statement of law, and giving of instruction was not error where defendants neither offered an instruction on that point nor objected to instruction as given. D.C. Code 1961 §§ 22-2722, 22-3302. *Killeen v. United States*, 224 A.2d 302, 1966 D.C. App. LEXIS 245 (App. 1966).

Jurisdiction.

Assuming District of Columbia abatement statute was properly invoked, abatement order was within federal district court's jurisdiction, despite defendants' contention that order of abatement was form of equitable relief that fell within exclusive jurisdiction of District of Columbia Superior Court; order was entered as part of criminal judgment in which defendants pled guilty to keeping a disorderly house, along with federal drug charges, and penalty imposed by abatement statute was mandatory, given language stating that order of abatement "shall be entered" as part of any judgment in any criminal proceeding establishing predicate nuisance. D.C. Code 1981, §§ 11-502(3), 11-921(a)(3, 5), 22-2717, 22-2722. *United States v. Wade*, 152 F.3d 969, 1998 U.S. App. LEXIS 20492 (C.A.D.C. 1998), appeal dismissed by

1998 U.S. App. LEXIS 33921 (D.C. Cir. Dec. 4, 1998).

While the keeping of a disorderly house was a misdemeanor at common law, punishable by jail imprisonment, the effect of section 1, Code D.C. (D.C. Code 1929, T. 1, § 21), continuing the common law in force in this District, except in so far as it is inconsistent with the Code, and of section 910, D.C. Code 1929, T. 6, § 7, making all criminal offenses not covered by the Code and federal statutes not locally inapplicable punishable by imprisonment in the penitentiary, is to make that offense infamous in this District, and, as such, not within the jurisdiction of the police court, under sections 43 and 934 (31 Stat. 1196, 1341). *Palmer v. Lenovitz*, 35 App.D.C. 303, 1910 U.S. App. LEXIS 5898 (1910).

Federal district court had subject matter jurisdiction, after defendants in criminal case involving federal charges pled guilty to keeping disorderly house in violation of District of Columbia law, to issue order of abatement with regard to house at issue pursuant to District of Columbia statute. D.C. Code 1981, §§ 11-502(3), 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Nature and element of offenses.

Under District of Columbia law, there are two means by which court or other trier of fact may conclude that disorderly house nuisance exists: first, if property affirmatively disturbs public and/or is openly vexatious, or, in alternative, if property is inherently considered to be nuisance by nature of conduct transpiring therein, whether or not property is affirmatively bothersome. D.C. Code 1981, § 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, existence of complaining citizenry is crucial factor in determining whether property constitutes affirmative public disturbance, such that property may be held to be disorderly house and abated. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, residence at which drug trafficking activity transpired was "disorderly house" and, therefore, an abatable nuisance, where undercover police officers made ten purchases of crack cocaine in front of residence over course of two-year investigation, police department received no fewer than 42 complaints about drug trafficking activity in

front of residence, and various letters and affidavits before court attested to drug dealing at residence. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

To support conviction for keeping bawdy or disorderly house, Government must prove that premises were regularly used for commission of illegal or immoral acts. D.C. Code 1981, § 22-2722. *Thomas v. United States*, 588 A.2d 272, 1991 D.C. App. LEXIS 58 (1991).

To prove that defendant "maintained" or "kept" disorderly house, to support conviction for keeping bawdy or disorderly house, Government does not have to prove ownership or legal control of premises, but only that defendant was keeper, or one who in fact controlled or managed premises. D.C. Code 1981, § 22-2722. *Thomas v. United States*, 588 A.2d 272, 1991 D.C. App. LEXIS 58 (1991).

Police officers' testimony, in prosecution for keeping a bawdy or disorderly house, that they observed five or six couples enter apartment, stay five to fifteen minutes, and then leave, and that during search of apartment they saw couple coming out of room, with woman buttoning dress, and that apartment contained mattresses on floor and numerous used and new condoms, supported finding that defendant knew premises he operated was house of prostitution. D.C. Code 1981, § 22-2722. *Thomas v. United States*, 588 A.2d 272, 1991 D.C. App. LEXIS 58 (1991).

To establish offense of keeping a bawdy or disorderly house, Government must prove that acts take place on the premises in question that disturb the public or constitute a nuisance *per se* in the nature of a gambling house or bawdy house, that the premises are regularly resorted to for the commission of such acts and that the proprietor knows or should know of the acts and does nothing to prevent them; Government is not required to prove a subversion of public morals. D.C. Code § 22-2722. *Harris v. United States*, 315 A.2d 569, 1974 D.C. App. LEXIS 363 (1974).

"Homosexual health club" where acts of sodomy took place was similar to a bawdy house and constituted a nuisance *per se*. D.C. Code §§ 22-2722, 22-3502. *Harris v. United States*, 315 A.2d 569, 1974 D.C. App. LEXIS 363 (1974).

Within statute proscribing the keeping of a bawdy or disorderly house, proscription against keeping a "bawdy house" includes the keeping of a house for homosexual prostitution among males, and in prosecution for keeping such a house it is not necessary to show that house meets definition of "disorderly house." D.C. Code § 22-2722. *Harris v. United States*, 293 A.2d 851, 1972 D.C. App. LEXIS 421 (1972).

Application of bawdy house statute to situation revealing homosexual acts between consenting adults did not amount to overbroad encroachment upon constitutionally protected conduct. D.C. Code § 22-2722. *Harris v. United States*, 293 A.2d 851, 1972 D.C. App. LEXIS 421 (1972).

"Disorderly house" is one where acts are performed which tend to corrupt morals of community or promote breaches of peace. D.C. Code 1951, § 22-2722. *Payne v. U.S.*, 171 A.2d 509, 1961 D.C. App. LEXIS 237 (Cr.App. 1961).

Elements necessary to sustain conviction for maintaining disorderly house are that acts are contrary to law and subversive of public morals, that house is commonly resorted to for commission of such acts, and that proprietor knows, or should in reason, know facts and either procures it to be done, connives at it, or does not prevent it. D.C. Code 1951, § 22-2722. *Payne v. U.S.*, 171 A.2d 509, 1961 D.C. App. LEXIS 237 (Cr.App. 1961).

Conduct sufficient to sustain conviction for maintaining disorderly house need not disrupt peace and quiet or be open to public observation so long as it would be offensive to public sensibilities if its presence in community were generally known. D.C. Code 1951, § 22-2722. *Payne v. U.S.*, 171 A.2d 509, 1961 D.C. App. LEXIS 237 (Cr.App. 1961).

Parties and standing.

Under District of Columbia law, criminal defendant no longer charged with keeping disorderly house and various nonparties to criminal case had standing, based on their demonstration of equitable or inchoate interest in house as heirs at law, to challenge order of abatement which was issued after other defendants in case pled guilty to keeping disorderly house, though challengers were unable to show that they had legal interest in house; last titled owner of house died intestate, and challenging defendant and nonparties were children of last titled owner. D.C. Code 1981, §§ 20-105, 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, owner of subject real property, even if not defendant in underlying criminal case for keeping bawdy or disorderly house, does have ability to contest abatement order entered pursuant to statute. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, spouse of individual who held ownership interest in residence that was subject of abatement order issued in criminal case, after defendants pled

guilty to keeping disorderly house, had standing to challenge abatement order, though spouse was not party to criminal case, where spouse resided at residence in question and had demonstrable degree of control over residence. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Under District of Columbia law, residents of house knew or should have known about drug trafficking activity transpiring there and, therefore, were properly subjected to order of abatement issued after house was established in criminal proceeding to be disorderly house, where multiple narcotic search warrants were executed at house, and residents' son as well as others were arrested in front of house for drug offenses. D.C. Code 1981, §§ 22-2717, 22-2722. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Where involvement of lessee in operation of bawdy house was conceded and acts of prostitution were open, obvious, notorious and continuing, where one of lessors' agents visited the premises often to collect rent and to deal with neighborhood complaints regarding crowds, and resident manager had earlier been arrested for operating a house of prostitution, lessors should have known early in lease's term that the property was being used for illegal purposes, and thus where resident manager was convicted of operating a bawdy house following second arrest, there was no error in issuing order of abatement despite lessors' contention that they, as owners of the property, lacked "guilty knowledge" of its illegal use. D.C. Code §§ 22-2713, 22-2717, 22-2718, 22-2722. *Thomas Circle Ltd. Partnership v. United States*, 372 A.2d 555, 1977 D.C. App. LEXIS 455 (1977).

Presumptions and burden of proof.

Knowledge of happenings in alleged disorderly house requisite to conviction for keeping disorderly house could be proved inferentially, since a proprietor is presumed to have knowledge of that which goes on in his premises. D.C. Code 1961, §§ 22-2722, 22-3302. *Killeen v. United States*, 224 A.2d 302, 1966 D.C. App. LEXIS 245 (App. 1966).

Questions of law and fact.

In prosecution for keeping a disorderly house, evidence of defendants' guilt was properly submitted to jury. D.C. Code 1940, § 22-2722. *Packard v. U.S.*, 77 A.2d 19, 1950 D.C. App. LEXIS 193 (Cr.App. 1950).

In prosecution for maintaining disorderly house, objection to introduction of hotel register

as unlawfully seized evidence because of invalidity of warrant of arrest raised question for judge presiding at trial. U.S. Const. Amend. 4. *Darnall v. U.S.*, 33 A.2d 734, 1943 D.C. App. LEXIS 183 (Cr.App. 1943).

Review.

— Harmless or reversible error, review.

In prosecution for keeping "a bawdy or disorderly house. . . , a premises resorted to for homosexual activities" it was harmless error to instruct only on theory that what was charged was keeping a disorderly house, defined as one where acts are done which "are contrary to law and subversive to public morals," where the verdict under the disorderly house theory necessarily included a finding beyond a reasonable doubt that defendant operated, for profit or gain, a house for the purpose of homosexual activity and that such activity was a matter of course therein, and thus sustained bawdy house conviction. D.C. Code § 22-2722. *Harris v. United States*, 293 A.2d 851, 1972 D.C. App. LEXIS 421 (1972).

Even if admission into evidence of reports by police officer who investigated alleged disorderly house was error, such error was harmless where officer had testified fully as to their contents and no prejudice was shown in fact that reports may have gone to jury. D.C. Code 1961, §§ 22-2722, 22-3302. *Killeen v. United States*, 224 A.2d 302, 1966 D.C. App. LEXIS 245 (App. 1966).

Use of chart, which was not admitted as exhibit or taken to jury room, in connection with testimony concerning registration cards taken from tourist home allegedly used as disorderly house, in order that jury could more conveniently view, during trial, information on cards, was not prejudicial. D.C. Code 1961, § 22-2722. *Wood v. U.S.*, 183 A.2d 563, 1962 D.C. App. LEXIS 320 (Cr.App. 1962).

Instructions given to jury in prosecution for operating a disorderly house were not tainted with prejudicial error. D.C. Code 1940, § 22-2722. *Collins v. U.S.*, 41 A.2d 515, 1945 D.C. App. LEXIS 83 (Cr.App. 1945).

In prosecution for maintaining disorderly house, admission in evidence of hotel register which was seized at time of defendant's arrest under void warrant, notwithstanding defendant's subsequent motion to suppress register as evidence, and objection at time of trial to its admission was reversible error. U.S. Const. Amend. 4. *Darnall v. U.S.*, 33 A.2d 734, 1943 D.C. App. LEXIS 183 (Cr.App. 1943).

— In general.

Where, on review of defendant's conviction of keeping a bawdy or disorderly house, authoritative construction of disorderly house statute was rendered and earlier decision which construed the statute and which had been followed

by trial court was rejected, conviction would be reversed. D.C. Code § 22-2722. *Harris v. United States*, 315 A.2d 569, 1974 D.C. App. LEXIS 363 (1974).

Where evidence in prosecution for keeping "a bawdy or disorderly house. . . , a premises resorted to for homosexual activities," showed that defendant was the operator of a house used by males, after payment of an initial membership fee plus a fee for each visit, for a variety of homosexual activities including sodomy, conviction was one for keeping a bawdy house as distinguished from a disorderly house, and it was unnecessary to consider contention that court's definition of disorderly house was constitutionally overbroad. D.C. Code §§ 22-2713, 22-2722, 22-3502. *Harris v. United States*, 293 A.2d 851, 1972 D.C. App. LEXIS 421 (1972).

— Presentation and reservation of grounds for review.

Defendants in prosecution for keeping disorderly house and vagrancy who at trial neither offered an instruction upon bearing of evidence of good character on credibility of witnesses nor objected to instruction as given were not allowed to raise objection to instruction for first time on appeal. D.C. Code 1961, §§ 22-2722, 22-3302. *Killeen v. United States*, 224 A.2d 302, 1966 D.C. App. LEXIS 245 (App. 1966).

Sentence and punishment.

A penalty of a fine not exceeding \$1,000, or imprisonment for not more than five years, or both, imposed upon one keeping a disorderly house, is not so severe as to come within the inhibition of the federal Constitution. *Palmer v. Lenovitz*, 35 App.D.C. 303, 1910 U.S. App. LEXIS 5898 (1910).

Stay of proceedings.

Three months after defendants pled guilty to keeping disorderly house and order of abatement was issued with respect to such house, it was not appropriate to stay execution of such abatement order pending resolution of appeal taken by residents and owners of house, where house had been notorious public nuisance for nearly three years due to drug trafficking activity, and some of alleged perpetrators of nuisance were still at large. D.C. Code 1981, §§ 22-2717, 22-2722; Fed.R.Cr.Proc. Rule 38(e), 18 U.S.C. *United States v. Wade*, 992 F. Supp. 6, 1997 U.S. Dist. LEXIS 21496 (1997), vacated by 152 F.3d 969, 332 U.S. App. D.C. 20, 1998 U.S. App. LEXIS 20492 (1998).

Validity.

Defendant who was charged with keeping a bawdy or disorderly house, specifically a commercial establishment resorted to for homosexual activities, had no standing to challenge constitutionality of statutory proscription

against sodomy on theory that statute was overbroad in that it could be applied to conduct within private abode between those in a familial relationship as defendant was not himself within the class whose alleged right of privacy was affected by application of the statute. D.C. Code §§ 22-2722, 22-3502; U.S. Const. Amend. 1. *Harris v. United States*, 315 A.2d 569, 1974 D.C. App. LEXIS 363 (1974).

Weight and sufficiency of evidence.

Evidence relating to defendant's connection with corporate owner of house in which he maintained an office which he visited frequently coupled with the undisputed and recurrent use of hotel by prostitutes and customers was sufficient to show that defendant knew the nature of activities conducted on premises and that he either procured it to be done or permitted it to be done or did nothing to prevent it and was guilty of keeping a bawdy house. D.C. Code §§ 22-2717, 22-2722. *Raleigh v. United States*, 351 A.2d 510, 1976 D.C. App. LEXIS 471 (1976).

In prosecution for maintaining a disorderly house, it was not necessary to prove defendants' actual knowledge of acts done on premises if it could be shown that defendants should in reason have known what was happening. D.C. Code 1961, §§ 22-2722, 22-3302. *Killeen v. United States*, 224 A.2d 302, 1966 D.C. App. LEXIS 245 (App. 1966).

Evidence was sufficient to support finding or inference by jury that restaurant proprietors had requisite knowledge of activities occurring on their premises to be chargeable with keeping disorderly house and vagrancy. D.C. Code 1961, §§ 22-2722, 22-3302. *Killeen v. United States*, 224 A.2d 302, 1966 D.C. App. LEXIS 245 (App. 1966).

Evidence supported conviction for operating as a disorderly house a tourist home to which constant stream of couples came, especially late at night, on foot, in taxis, or by private automobile, without luggage and in many instances oddly dressed and at which they stayed for brief periods not exceeding two and one-half hours. D.C. Code 1961, § 22-2722. *Wood v. U.S.*, 183 A.2d 563, 1962 D.C. App. LEXIS 320 (Cr.App. 1962).

Evidence sustained conviction for keeping disorderly house. D.C. Code 1951, § 22-2722. *Payne v. U.S.*, 171 A.2d 509, 1961 D.C. App. LEXIS 237 (Cr.App. 1961).

Evidence sustained conviction for keeping disorderly house. D.C. Code 1951, § 22-2722. *Payne v. U.S.*, 171 A.2d 509, 1961 D.C. App. LEXIS 237 (Cr.App. 1961).

Evidence sustained defendants' convictions for keeping a disorderly house. D.C. Code 1940, § 22-2722. *Packard v. U.S.*, 77 A.2d 19, 1950 D.C. App. LEXIS 193 (Cr.App. 1950).

Evidence was sufficient to sustain conviction for operating a disorderly house. D.C. Code 1940, § 22-2722. *Collins v. U.S.*, 41 A.2d 515, 1945 D.C. App. LEXIS 83 (Cr.App. 1945).

§ 22-2723. Property subject to seizure and forfeiture.

(a) The following are subject to forfeiture:

(1) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense, provided that:

(A) No conveyance used by any person as a common carrier in the course of transacting business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of a prostitution-related offense;

(B) No conveyance is subject to forfeiture under this section by reason of any act or omission that the owner establishes was committed or omitted without the owner's knowledge or consent;

(C) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission; or

(D) Where the conveyance is not being driven by the owner of the conveyance, there is a presumption that the owner is without knowledge of the illegal act, and therefore the conveyance should not be forfeited.

(2) All money, coins, and currency which has been used, or was intended for use, in violation of a prostitution-related offense.

(a-1)(1) A lien in favor of the District of Columbia is hereby created in an amount equal to the costs of towing, storing, and administrative processing of a conveyance seized and subject to forfeiture pursuant to §§ 22-2701, 22-2703, and this section.

(2) The Mayor, or his or her designee, shall establish a reasonable cost for the towing, storing, and administrative processing of seized conveyances.

(3) The Corporation Counsel of the District of Columbia, or his or her designee, may agree to release a lien by stipulation with the registered owner or lienholder of a seized conveyance.

(b) All seizures and forfeitures of property under this section shall be pursuant to § 48-905.02, except that seized money, coins, and currency shall be deposited as provided in subchapter IIA of Chapter 5 of Title 23 of the District of Columbia Official Code.

(Aug. 15, 1935, 49 Stat. 651, ch. 546, § 5, as added May 7, 1993, D.C. Law 9-267, § 2, 39 DCR 5684; May 24, 1996, D.C. Law 11-130, § 3(c), 43 DCR 1570; October 4, 2000, D.C. Law 13-160, § 403(a), 47 DCR 4619; Apr. 24, 2007, D.C. Law 16-306, § 211(b), 53 DCR 8610.)

Prior Codifications. — 1981 Ed., § 22-2723.

Effect of amendments. — D.C. Law 13-160 rewrote subsec. (b), which had read:

"All seizures and forfeitures of property under this section shall be pursuant to § 33-552 [1981 Ed.]."

D.C. Law 16-306, in pars. (1) and (2) of

subsec. (a), substituted “a violation of a prostitution-related offense” for “a violation of this act”.

Emergency legislation. — For temporary amendment of section, see § 3 of the Safe Streets Anti-Prostitution Emergency Amendment Act of 1995 (D.C. Act 11-133, August 11, 1995, 42 DCR 4680) and see § 3 of the Safe Streets Anti-Prostitution Legislative Review Emergency Amendment Act of 1995 (D.C. Act 11-153, November 9, 1995, 42 DCR 6567).

For temporary (90 day) amendment of section, see § 211(b) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 211(b) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 211(b) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 211(b) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 9-267. — Law 9-267, the “Safe Streets Forfeiture Amendment

Act of 1992,” was introduced in Council and assigned Bill No. 9-260, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 2, 1992, and July 7, 1992, respectively. Signed by the Mayor on July 21, 1992, it was assigned Act. No. 9-250 and transmitted to both Houses of Congress for its review. D.C. Law 9-267 became effective on May 7, 1993.

Legislative history of Law 11-77. — For legislative history of D.C. Law 11-77, see Historical and Statutory Notes following § 22-2701.

Legislative history of Law 11-130. — For legislative history of D.C. Law 11-130, see Historical and Statutory Notes following § 22-2701.

Legislative history of Law 13-160. — Law 13-160, the “Omnibus Police Reform Amendment Act of 2000,” was introduced in Council and assigned Bill No. 13-118, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on February 1, 2000, and April 3, 2000, respectively. Signed by the Mayor on April 24, 2000, it was assigned Act No. 13-334 and transmitted to both Houses of Congress for its review. D.C. Law 13-160 became effective on October 4, 2000.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

In general.

Forfeiture of truck pursuant to Safe Streets Forfeiture Act constituted, at least in part, “punishment” for owner’s sexual solicitation of undercover officer and was therefore a “fine” subject to Eighth Amendment scrutiny. U.S. Const. Amend. 8; D.C. Code 1981, § 22-2723. One, 718 A.2d 558 (1995).

Forfeiture of truck with value of \$15,500 pursuant to Safe Streets Forfeiture Act, for owner’s first-time offense of sexual solicitation, violated excessive fines clause; as first time offender, owner was exposed to maximum criminal fine of \$300 and no incarceration, and owner received no more than a \$150 fine, and thus, forfeiting truck inflicted penalty on owner on order of 50 times the fine authorized by council and 100 times the fine actually imposed. U.S. Const. Amend. 8; D.C. Code 1981, § 22-2723. One, 718 A.2d 558 (1995).

Seizure of motor vehicles in which defendants were arrested for sexual solicitation was improper because: (1) use of the property in the

offense was not deliberate or planned but merely incidental and fortuitous; (2) use of the motor vehicle was not important or necessary to success of the crime but simply provided a convenient location in which the defendants engaged in the unlawful speech; (3) extent of the temporal and spatial use of the motor vehicles in the offense was limited; (4) use of the motor vehicles in the offense was, as was the offense itself, an isolated event; and (5) defendants did not acquire or maintain the property for purpose of facilitating violation of § 22-2701(a). *United States v. Esparza*, 124 WLR 1553 (Super. Ct. 1996).

Forfeitures of defendants’ motor vehicles under this section constituted an excessive fine prohibited by the Eighth Amendment of the United States Constitution, violated the Excessive Fines Clause on proportionality grounds, and subjected the defendants to punishment for the same offense twice in violation of the Double Jeopardy Clause of the Fifth Amendment. *United States v. Esparza*, 124 WLR 1553 (Super. Ct. 1996).

§ 22-2724. Impoundment.

(a) Any vehicle used in furtherance of a violation of a prostitution-related offense shall be subject to impoundment pursuant to this section.

(b) Whenever a police officer has probable cause to believe that a vehicle is being used in furtherance of a violation of a prostitution-related offense, and an arrest is made for that violation, the police officer, other member of the Metropolitan Police Department, or duly authorized agent thereof shall:

(1) Arrange for the towing of the vehicle by the Department of Public Works, or other designee of the Mayor, to a facility controlled by the District of Columbia or its agents, as designated by the Mayor, or, if towing services are not immediately available, arrange for the immobilization of the vehicle until such time as towing services become available; and

(2) Provide written notice to the owner of record of the vehicle and to the person who is found to be in control of the vehicle at the time of the seizure conveying the fact of seizure and impoundment of the vehicle, as well as the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, in lieu of requesting a hearing.

(c) The notices to be given pursuant to this section shall be provided by hand delivery at the time of the seizure and impoundment of the vehicle to the person in control of the vehicle or to the owner of record of the vehicle. If the owner of record of the vehicle is not available to receive such notice at the time of the seizure, the notice shall be mailed by first class mail, no later than 5 days after the vehicle is received at an impoundment or storage facility, to the last known address of the owner or owners of record of the vehicle, as that information is indicated in the records of the Department of Motor Vehicles or in the records of the appropriate agency of the jurisdiction where the vehicle is registered.

(d) An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of \$150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.

(e) An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of nolle prosequi or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen

at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.

(f) An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.

(g) Vehicles seized and impounded under this section shall not be subject to replevin, but shall be deemed to be in the custody of the Mayor.

(h) Vehicles that remain unclaimed for 30 days may be disposed of pursuant to §§ 50-2421.07(c), (d), (e), and (f), 50-2421.08, 50-2421.09, and 50-2421.10; provided, that if the owner wants to claim the vehicle before it is auctioned, the owner must pay the administrative civil penalty imposed by subsection (d) of this section in addition to the amounts required in § 50-2421.09.

(i) The Attorney General for the District of Columbia, or his or her assistants, shall represent the District of Columbia in all proceedings under this section.

(j) The Mayor shall issue rules setting forth the process by which a refund shall be obtained timely pursuant to subsection (e) of this section. Until such rules are published in the District of Columbia Register, this section shall not be enforceable.

(Aug. 15, 1935, 49 Stat. 651, ch. 546, § 6, as added Apr. 24, 2007, D.C. Law 16-306, § 211(c), 53 DCR 8610; Nov. 6, 2010, D.C. Law 18-259, § 4(1), 57 DCR 5591.)

Effect of amendments. — D.C. Law 18-259, in subsec. (c), rewrote the second sentence which had read as follows: “If the owner of record of the vehicle is not available to receive such notice at the time of seizure, then the notice shall be sent to each owner of record via registered mail, return receipt requested, to the address listed in the records of the Department of Motor Vehicles within 3 days of the time of the impoundment, excluding Saturdays, Sundays, and legal holidays.”; and, in subsec. (d), substituted “a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing,” for “a booting fee, if applicable.”

Emergency legislation. — For temporary (90 day) addition, see § 211(c) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 211(c) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 211(c)

of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 211(c) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-259. — Law 18-259, the “Community Impact Statement Amendment Act of 2010”, was introduced in Council and assigned Bill No. 18-549, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on May 4, 2010, and June 1, 2010, respectively. Signed by the Mayor on June 28, 2010, it was assigned Act No. 18-446 and transmitted to both Houses of Congress for its review. D.C. Law 18-259 became effective on November 6, 2010.

Delegation of Authority. — Delegation of Authority pursuant to Section 6(f) of an Act for the Suppression of Prostitution in the District of Columbia, see Mayor’s Order 2009-25, March 5, 2009 (56 DCR 6760).

§ 22-2725. Anti-Prostitution Vehicle Impoundment Proceeds Fund.

(a) There is established as a nonlapsing fund the Anti-Prostitution Vehicle

Impoundment Proceeds Fund (“Fund”), which shall be used for the purpose set forth in subsection (b) of this section. All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723, and any and all interest earned on those funds, shall be deposited into the Fund, and shall not revert to the unrestricted fund balance of the General Fund of the District of Columbia at the end of a fiscal year, or at any other time, but shall be continually available for the uses and purposes set forth in subsection (b) of this section with regard to fiscal year limitation, subject to authorization by Congress.

(b) The Fund shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense.

(c) The Mayor shall submit to the Council, as part of the annual budget, a requested appropriation for expenditures from the Fund.

(Aug. 15, 1935, 49 Stat. 651, ch. 546, § 7, as added Apr. 24, 2007, D.C. Law 16-306, § 211(c), 53 DCR 8610; Nov. 6, 2010, D.C. Law 18-259, § 4(2), 57 DCR 5591.)

Effect of amendments. — D.C. Law 18-259 rewrote subsec. (a), which had read as follows:

“(a) There is established a fund designated as the Anti-Prostitution Vehicle Impoundment Proceeds Fund (‘Fund’), which shall be used for the purpose set forth in subsection (b) of this section. All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723, and any and all interest earned on those funds, shall be deposited into the Fund, and shall be continually available for the uses and purposes set forth in subsection (b) of this section, subject to authorization by Congress, except that any unused funds remaining in the Fund on September 30th of each fiscal year shall revert to the General Fund of the District of Columbia.”

Emergency legislation. — For temporary (90 day) addition, see § 211(c) of Omnibus

Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 211(c) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 211(c) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 211(c) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-259. — For history of Law 18-259, see notes under § 22-2724.

Subchapter II. Prostitution Free Zones.

§ 22-2731. Prostitution free zones; penalty.

(a) For the purposes of this section, the term:

(1) “Chief of Police” means the Chief of the Metropolitan Police Department.

(2) “Disperse” means to depart from the designated prostitution free zone and not to reassemble within the prostitution free zone with anyone from the group ordered to depart for the duration of the zone.

(3) “Known participant in prostitution or prostitution-related offenses” means a person who has been convicted in any court in any jurisdiction of any violation involving prostitution or prostitution-related offenses.

(4) “MPD” means the Metropolitan Police Department.

(5) "Prostitution" shall have the same meaning as provided in § 22-2701.01(3).

(6) "Prostitution free zone" means public space or public property in an area not to exceed a square of 1000 feet on each side that is established pursuant to subsection (b) of this section.

(7) "Prostitution-related offenses" means those crimes and offenses defined in § 22-2701, § 22-2703, and § 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722.

(b)(1) The Chief of Police may declare any public area a prostitution free zone for a period not to exceed 480 consecutive hours. The Chief of Police shall inform his commanders, the Mayor, and the Council of the declaration of a prostitution free zone.

(2) In determining whether to designate a prostitution free zone, the Chief of Police shall find the following:

(A) The occurrence of disproportionately high arrests for prostitution or prostitution-related offenses, and calls for police service because of prostitution or prostitution-related offenses in the proposed prostitution free zone within the preceding 6-month period;

(B) Objective evidence or verifiable information that shows that disproportionately high incidence of prostitution or prostitution-related offenses are occurring on public space or public property within the proposed prostitution free zone; and

(C) Any other verifiable information from which the Chief of Police may ascertain whether the public health or safety is endangered by prostitution or prostitution-related offenses in the prostitution free zone.

(c) Upon the designation of a prostitution free zone, the MPD shall mark each block within the prostitution free zone by using barriers, tape, signs, or police officers that post or announce the following information in the immediate area of, and borders around, the prostitution free zone:

(1) A statement that it is unlawful for a person to congregate in a group of 2 or more persons for the purposes of prostitution or prostitution-related offenses within the boundaries of a prostitution free zone, and fail to disperse after being instructed to disperse by a uniformed officer of the MPD, or a non-uniformed officer of the MPD upon display of MPD identification, who reasonably believes the person is congregating for the purpose of engaging in prostitution or prostitution-related offenses;

(2) The boundaries of the prostitution free zone;

(3) A statement of the effective dates of the prostitution free zone designation; and

(4) Any other additional information the Chief of Police provides.

(d)(1) It shall be unlawful for a person to congregate in a group of 2 or more persons on public space or public property within the perimeter of a prostitution free zone established pursuant to subsection (b) of this section and thereafter to fail to disperse after being instructed to disperse by a uniformed officer of the MPD, or a non-uniformed officer of the MPD upon display of MPD identification, who reasonably believes the person is congregating for the purpose of engaging in prostitution or prostitution-related offenses.

(2) In making a determination that a person is congregating in a prostitution free zone for the purpose of engaging in prostitution or prostitution-related offenses, the totality of the circumstances involved shall be considered. Among the circumstances which may be considered in determining whether such purpose is manifested are:

(A) The conduct of a person being observed, including that such person is behaving in a manner raising a reasonable belief that the person is engaging or is about to engage in prostitution or prostitution-related offenses, such as:

(i) Repeatedly beckoning to, stopping, attempting to stop, or attempting to engage passers-by in conversation for the purpose of prostitution;

(ii) Stopping or attempting to stop motor vehicles for the purpose of prostitution; or

(iii) Repeatedly interfering with the free passage of other persons for the purpose of prostitution;

(B) Information from a reliable source indicating that a person being observed routinely engages in or is currently engaging in prostitution or prostitution-related offenses within the prostitution free zone;

(C) Physical identification by an officer of the person as a member of a gang or association which engages in prostitution or prostitution-related offenses;

(D) Knowledge by an officer that the person is a known participant in prostitution or prostitution-related offenses; and

(E) Knowledge by an officer that any vehicle involved in the observed circumstances is registered to a known participant in prostitution or prostitution-related offenses, or a person for whom there is an outstanding arrest warrant for a crime involving prostitution or prostitution-related offenses.

(e) Any person who violates this section shall, upon conviction, be subject to a fine of not more than \$300, imprisonment for not more than 6 months, or both.

(f) The Attorney General for the District of Columbia, or his or her assistants, shall prosecute all violations of this section.

(Apr. 24, 2007, D.C. Law 16-306, § 104, 53 DCR 8610; Dec. 10, 2009, D.C. Law 18-88, § 212, 56 DCR 7413.)

Effect of amendments. — D.C. Law 18-88, in subsec. (b)(1), substituted “480 consecutive hours” for “240 consecutive hours”.

Emergency legislation. — For temporary (90 day) addition, see § 104 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 104 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 104 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 104 of Omnibus Public Safety Second Congressional

Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 212 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 212 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

For temporary (90 day) addition of sections, see §§ 202 and 203 of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) addition of sections, see §§ 202 and 203 of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 16-306. — Law 16-306, the “Omnibus Public Safety Amendment Act of 2006”, was introduced in Council and assigned Bill No. 16-247, which was re-

ferred to Committee on the Judiciary. The Bill was adopted on first and second readings on June 6, 2006, and October 3, 2006, respectively. Signed by the Mayor on October 17, 2006, it was assigned Act No. 16-482 and transmitted to both Houses of Congress for its review. D.C. Law 16-306 became effective on April 24, 2007.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CHAPTER 27A. PROTEST TARGETING A RESIDENCE.

Sec.

22-2751. Definitions.

22-2752. Engaging in an unlawful protest targeting a residence.

§ 22-2751. Definitions.

For the purposes of this chapter, the term:

(1) “Demonstration” means marching, congregating, standing, parading, demonstrating, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief.

(2) “Mask” means a covering for the face or part of the face whereby the identity of the wearer is disguised. The term “Mask” shall not include clothing worn for the purpose of providing protection from the elements nor clothing worn as a religious covering.

(3) “Residence” means a building or structure, but not a hotel, used or designed to be used, in whole or in part, as a living or a sleeping place by one or more human beings.

(May 26, 2011, D.C. Law 18-374, § 2, 58 DCR 715.)

Legislative history of Law 18-374. — Law 18-374, the “Residential Tranquility Act of 2010”, was introduced in Council and assigned Bill No. 18-63, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings

on November 23, 2010, and December 7, 2010, respectively. Signed by the Mayor on January 19, 2011, it was assigned Act No. 18-696 and transmitted to both Houses of Congress for its review. D.C. Law 18-374 became effective on May 26, 2011.

§ 22-2752. Engaging in an unlawful protest targeting a residence.

(a)(1) It is unlawful for a person, as part of a group of 3 or more persons, to target a residence for purposes of a demonstration:

(A) Between 10:00 p.m. and 7:00 a.m.;

(B) While wearing a mask; or

(C) Without having provided the Metropolitan Police Department notification of the location and approximate time of the demonstration.

(2) The notification required by paragraph (1)(C) of this subsection shall be provided in writing to the operational unit designated for such purpose by the Chief of Police not less than 2 hours before the demonstration begins. The Metropolitan Police Department shall post on its website the e-mail and facsimile number by which the operational unit may be notified 24 hours a day, and the address to which notification may be hand delivered, as an alternative, during business hours.

(b) A person who violates this section shall be guilty of a misdemeanor and, upon conviction, fined not more than \$500 or imprisoned for not more than 90 days.

(May 26, 2011, D.C. Law 18-374, § 3, 58 DCR 715.)

Legislative history of Law 18-374. — For history of Law 18-374, see notes under § 22-2751.

CHAPTER 28. ROBBERY.

Sec.

22-2801. Robbery.

22-2802. Attempt to commit robbery.

Sec.

22-2803. Carjacking.

§ 22-2801. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 810; Dec. 27, 1967, 81 Stat. 737, Pub. L. 90-226, title VI, § 603.)

Cross references. — Armed offenses, additional penalty for committing crime when armed, see §§ 22-4501 and 22-4502.

Burglary, see § 22-801 et seq.

Grave robbery, see § 22-3303.

Larceny and receiving stolen goods, see § 22-3201 et seq.

Murder after person has been convicted of crime of violence, minimum sentence, see § 24-403.

Receiving stolen property, see § 22-3232.

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Section references. — This section is referred to in §§ 11-502, 22-2802, and 23

Prior Codifications. — 1981 Ed., § 22-2901.

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— Acts and declarations of codefendants, admissibility of evidence.

Codefendant's prior inconsistent statement denying that he knew defendant had no probative value against defendant in armed robbery prosecution. D.C. Code 1981, §§ 22-2901, 22-3202. *Hordge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

— Admissions by accused, admissibility of evidence.

In armed robbery prosecution, inculpatory admissions made by defendant were sufficiently corroborated to support conviction. 18 U.S.C. § 2113(a, d); D.C. Code §§ 22-2901, 22-3202. *United States v. Johnson*, 589 F.2d 716, 1978 U.S. App. LEXIS 7184 (C.A.D.C. 1978).

In armed robbery prosecution, defendant's corroborated admissions to codefendant could be used to corroborate defendant's admissions to police officer. 18 U.S.C. § 2113(a, d); D.C. Code §§ 22-2901, 22-3202. *United States v. Johnson*, 589 F.2d 716, 1978 U.S. App. LEXIS 7184 (C.A.D.C. 1978).

Prosecution would not be entitled to use defendant's testimony in support of motion to suppress evidence affirmatively at trial. U.S. Const. Amend. 4; D.C. Code § 22-2901. *Pendergrast v. United States*, 416 F.2d 776, 1969 U.S. App. LEXIS 9121 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243, 1969 U.S. LEXIS 1562 (1969).

Confessions and admissions made by juveniles to police and to robbery victim at police station were properly excluded on trial of juve-

niles following waiver of jurisdiction by juvenile court and transfer to district court for trial. D.C. Code 1961, §§ 11-914, 22-2901; 18 U.S.C. § 5010(c). *Edwards v. United States*, 330 F.2d 849, 1964 U.S. App. LEXIS 6079 (C.A.D.C. 1964).

A defendant's failure to object to or deny a codefendant's statements at time they were made is especially probative of defendant's acquiescence if they are made in presence of a third party who was not an accomplice in the crime. D.C. Code §§ 22-1801(a), 22-2401, 22-2901. *Brown v. United States*, 464 A.2d 120, 1983 D.C. App. LEXIS 437 (1983).

— Circumstances and condition of person robbed, admissibility of evidence.

Where there was proper pretrial ruling that in view of defendant's acquittal on first trial of murder charge no mention should be made of robbery victim's death at second trial, court did not err in permitting testimony as to all events leading up to victim's death including testimony as to defendant's wielding of knife and to blood found in the victim's apartment, since the challenged testimony described what was undeniably a part of the circumstances at victim's apartment and did have some bearing on the armed robbery count charged in indictment. *United States v. Sarvis*, 523 F.2d 1177, 1975 U.S. App. LEXIS 11825 (C.A.D.C. 1975).

Probative value of evidence of defendant's heroin addiction to place what happened at the crime scene in an understandable context was substantially outweighed by the prejudicial effect its admission would have for defendant, such that the evidence was inadmissible for this purpose, in prosecution for burglary, robbery, kidnapping, and felony murder; jury did not need the drug-addiction evidence to derive a coherent story of the evidence, in that even without the evidence of drug addiction, the evidence suggested that the crimes likely were the acts of a desperate person, and it did not appear that the drug-addiction evidence would be indispensable to the jury's understanding of the charged offenses. *U.S. v. Morton*, 2012 WL 3242844 (2012).

Remand was required for trial court to conduct anew its discretionary balancing of the probative value of the evidence of defendant's heroin addiction as corroborative of inferences that pointed to defendant as the perpetrator against its prejudicial effect, in prosecution for burglary, robbery, kidnapping, and felony murder; defendant's addiction had probative value as corroborative of defendant's identity as the perpetrator, while evidence of his addiction might be reflective of his character and might suggest that he had criminal propensities, the relevance of the evidence was logically independent of those possibilities, and a fuller assessment by trial court of probative value of the

evidence could affect its balancing of probative value against prejudicial effect. *U.S. v. Morton*, 2012 WL 3242844 (2012).

— Confessions, admissibility of evidence.

Principle that, in cases involving tangible corpus delicti where fact that crime has been committed can be shown without identifying perpetrator, there need be no link, outside of confession, between the injury and accused who admits having inflicted it extends to crime of armed robbery. 18 U.S.C. § 2113(a, d); D.C. Code §§ 22-2901, 22-3202. *United States v. Johnson*, 589 F.2d 716, 1978 U.S. App. LEXIS 7184 (C.A.D.C. 1978).

Under totality of circumstances, including fact that minor was four months short of his 18th birthday when arrested and was "somewhat sophisticated" at least as far as his experience with law enforcement was concerned and that he voluntarily accompanied police and was never restrained, threatened or coerced and was repeatedly informed of his constitutional rights, and in view of trial court's findings that he understood those rights and was attempting to outsmart the police, mere fact that officers led him to believe that evidence against him was stronger than it was did not invalidate his confession of guilt of robbery. D.C. Code § 22-2901. *In re D. A. S.*, 391 A.2d 255, 1978 D.C. App. LEXIS 560 (1978).

— Declarations by accused, admissibility of evidence.

Where certain challenged evidence, in a robbery prosecution, was not shown to have consisted of statements made during illegal detention and did not result from police interrogation, it could not be deemed inadmissible. D.C. Code 1951, § 22-2901. *Rogers v. U.S.*, 263 F.2d 902, 1959 U.S. App. LEXIS 4387 (C.A.D.C. 1959).

— Demonstrative evidence, admissibility of evidence.

Where robbery victim testified that shotgun found in defendant's apartment was similar to the shotgun which one of the robbers had, informant testified that the shotgun belonged to defendant and that defendant had it when he left the apartment with another person to commit the robbery, the shotgun was properly admitted into evidence in prosecution for armed robbery. D.C. Code §§ 22-502, 22-2901, 22-3202(a). *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

In prosecution on several counts arising from the robbery of a mail truck, the admission in evidence of a .38-caliber pistol was proper, where a government witness testified that the pistol belonged to one of the defendants and was carried by him during the robbery. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3202.

United States v. Jackson, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

Defendant was properly precluded from submitting a tape recording of his voice as an exemplar, which he proffered to counter prosecution's submitting recording of the armed robbery that was taped by the police; government did not use police tape to identify defendant, but, rather, tape was merely a rebroadcast of police officer's testimony of how the robbery occurred. *Taylor v. United States*, 759 A.2d 604, 2000 D.C. App. LEXIS 221 (2000).

Five .38 caliber cartridges found in defendant's apartment were admissible as non-Drew evidence that defendant had gun of caliber that fired bullet that killed victim, and that the silver-colored revolver that witnesses saw defendant wield was indeed that weapon. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Bussey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

— Documentary evidence, admissibility of evidence.

In prosecution for robbery of taxi driver, police officer's report and radio broadcast transcript were properly admissible, on behalf of defendant, as business records, on showing of their trustworthiness. 18 U.S.C. §§ 1732, 1732(a); Federal Rules of Evidence, rule 803(6), 18 U.S.C.; D.C. Code §§ 22-2901, 22-3202. *United States v. Smith*, 521 F.2d 957, 1975 U.S. App. LEXIS 12262 (C.A.D.C. 1975).

Trial court did not abuse its discretion in admitting postmortem photograph of robbery, rape, and murder victim, in view of fact that photograph identified victim and showed extent of her injuries and, hence, had probative value and was not introduced solely to inflame jury. D.C. Code 1981, §§ 22-2401, 22-2801, 22-2901. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

Fact that police officer, who assertedly recopied form containing his recording of complainant's description of robbers for purpose of correcting misspellings, destroyed the original form, did not require that complainant's testimony be stricken in armed robbery prosecution, in light of fact that no issue of identification was raised and that no bad faith on part of officer was shown. D.C. Code §§ 22-2901, 22-3202; 18 U.S.C. § 3500. *Jones v. United States*, 362 A.2d 718, 1976 D.C. App. LEXIS 349 (1976).

— Evidence founded on hearsay, admissibility of evidence.

In prosecution for armed robbery and felony-murder, police detective was properly allowed to testify that he received over telephone the serial number of gun sold by defendant and what the serial number was, same being extremely reliable evidence such as that consti-

tuting extrajudicial identification testimony which is admissible as substantive evidence. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Tribble v. United States*, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

— Evidence wrongfully obtained, admissibility of evidence.

Poisonous fruit doctrine could not be applied so far as to exclude identification testimony of victims in robbery prosecution, where there was an adequate independent source for the evidence, despite claim that absent the illegal arrest and detention of defendant his identity would have remained unknown and there would have been no opportunity for the in-court identifications. D.C. Code §§ 16-2301(3)(A), 22-2901, 18 U.S.C. § 5010(a); U.S. Const. Amend. 4. *Crews v. United States*, 369 A.2d 1063, 1977 D.C. App. LEXIS 425 (1977).

Even if in-court identifications by robbery victims were causally related to defendant's unlawful arrest, such evidence was properly admitted where police misconduct consisted of arresting and detaining defendant for approximately one hour on basis of information which fell short of constituting probable cause with respect to the robberies but their suspicions as to defendant's involvement in the robberies and his possible truancy were soundly based and defendant had been released soon after he had been photographed and it was determined that he was not a truant. D.C. Code § 22-2901; U.S. Const. Amend. 4. *Crews v. United States*, 369 A.2d 1063, 1977 D.C. App. LEXIS 425 (1977).

— Excited utterance exception, admissibility of evidence.

Testimony of police officer concerning account of armed robbery provided to him by victim was not admissible under excited utterance exception to rule against hearsay; officer described victim as "upset," "excited," "shaken," and "afraid," but none of these adjectives of victim's state of mind established, or significantly addressed, critical element of spontaneity on which theory of excited utterance exception was based, there was no showing that victim remained under spell of robbery's effect, or that her reflective faculties had been stilled, or her control over them removed. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

Spontaneity and lack of opportunity for reflection constitute the key elements for purposes of determining applicability of excited utterance exception to rule against hearsay, and before admitting an out-of-court statement under this exception, the judge must be assured, i.e., fully confident, that these requirements have been satisfied. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

The decisive factor in determining admission of declarations relating to a violent crime made by the victim shortly after its occurrence is that circumstances reasonably justify the conclusion that the remarks were not made under the impetus of reflection; stated another way, the critical factor is that the declaration was made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

Elements of excited utterance exception to rule against hearsay are: (1) presence of a serious occurrence which causes a state of nervous excitement or physical shock in the declarant, (2) a declaration made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it, and (3) presence of circumstances, which in their totality suggest spontaneity and sincerity of the remark. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

What constitutes a spontaneous utterance for purposes of exception to rule against hearsay for spontaneous or excited utterances depends upon the facts peculiar to each case and such utterance is admitted in the exercise of sound judicial discretion which is not disturbed on appeal unless clearly erroneous. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

— Expert testimony, admissibility of evidence.

That witness, a psychologist, was not a psychiatrist was not alone sufficient ground to refuse his testimony that defendant could not control his behavior on dates of two robberies and that codefendant's influence over defendant, in context of latter's mental illness, led to his participation in the offenses. 18 U.S.C. § 2113; D.C. Code §§ 22-2901, 22-3202. *United States v. Caldwell*, 543 F.2d 1333, 1974 U.S. App. LEXIS 5417 (C.A.D.C. 1974), writ of certiorari denied by 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97, 1976 U.S. LEXIS 1234 (1976).

Without knowledge that codefendant exerted influence over defendant in relation to commission of crimes charged, witness, a psychologist, had no factual basis for opinion that defendant could not control his behavior on dates of the two robberies and that codefendant's influence over defendant in context of latter's mental illness led to his participation in the offenses. 18 U.S.C. § 2113; D.C. Code §§ 22-2901, 22-3202. *United States v. Caldwell*, 543 F.2d 1333, 1974 U.S. App. LEXIS 5417 (C.A.D.C. 1974), writ of certiorari denied by 423 U.S. 1087, 96 S.

Ct. 877, 47 L. Ed. 2d 97, 1976 U.S. LEXIS 1234 (1976).

In robbery prosecution, in which store detective testified that he saw defendant and co-defendant enter store together and saw defendant bump shopper while co-defendant opened pocketbook and removed wallet, trial court did not abuse discretion in admitting expert testimony on *modus operandi* of pickpockets. D.C. Code § 22-2901. *United States v. Jackson*, 425 F.2d 574, 1970 U.S. App. LEXIS 10401 (C.A.D.C. 1970).

Trial court's exclusion of robbery defendant's proffered expert testimony on eyewitness identification did not violate his constitutional right to present a defense, as defendant made an extensive presentation of his theory of misidentification through argument and a witness; witness corroborated defendant's argument of misidentification by stating that victim's book of checks and cell phone were given to her by two people other than defendant, defendant conducted ample cross-examination of victim on her ability to observe the face of her assailant, and defense counsel stated during closing argument that stranger identification was less reliable, and that victim did not have enough time to observe defendant and focused on gun instead. *Patterson v. United States*, 37 A.3d 230, 2012 D.C. App. LEXIS 64 (2012), amended by, opinion withdrawn in part by 56 A.3d 1152, 2012 D.C. App. LEXIS 502 (D.C. 2012).

In proceeding in which accused was convicted of armed robbery and possession of a prohibited weapon, exclusion of psychology professor's proffered testimony including testimony that "eye-witness [sic] identification is...not as simple as it is assumed to be...," that scientific literature supported conclusion that one under stress does not make as good an observation as one not under stress, that once a person publicly announced an opinion, he would be motivated to maintain it and that suggestions from a person in authority could have a considerable effect on identification process was not an abuse of discretion. D.C. Code §§ 22-2901, 22-3202, 22-3214(b). *Dyas v. United States*, 376 A.2d 827, 1977 D.C. App. LEXIS 359 (1977), writ of certiorari denied by 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464, 1977 U.S. LEXIS 4183 (1977).

— Harmless or reversible error, admissibility of evidence.

Where identification by complaining witness in robbery prosecution was extremely strong, claimed inconsistency between his testimony and police report and transcript of police radio broadcast was not so significant as to make erroneous exclusion of such documents prejudicial, nor would trial court's exercise of discretion to deny jury's request to see police report necessarily have been prejudicial, but where

trial court denied jury's request because trial court believed documents were inadmissible, and thus did not exercise discretion, error was prejudicial. D.C. Code §§ 22-2901, 22-3202; 18 U.S.C. § 1732(a). *United States v. Smith*, 521 F.2d 957, 1975 U.S. App. LEXIS 12262 (C.A.D.C. 1975).

Where informant's statement that defendant had been arrested on another charge was elicited on cross-examination by defendant's trial counsel, the trial judge instructed the jury to disregard the statement and the evidence of defendant's guilt was strong, the informant's statement was not prejudicial. D.C. Code §§ 22-502, 22-2901, 22-3202(a). *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

Where testimony offered by defendant in prosecution for armed bank robbery which was excluded constituted only collateral impeachment, the exclusion was not reversible error and would not have been so even if testimony had been offered by defense counsel. 18 U.S.C. § 2113(a); D.C. Code § 22-2901. *United States v. Ash*, 461 F.2d 92, 1972 U.S. App. LEXIS 11013 (C.A.D.C. 1972), reversed by 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619, 1973 U.S. LEXIS 45 (1973).

In prosecution for armed robbery of bus passengers and assault with dangerous weapon, even if defendant's statement, "I didn't mean to do it" made after he was arrested and brought back to scene and confronted by outraged passengers was somehow attributable to hostile confrontation of passengers, it was not of character to justify finding that it undermined fairness of trial, considering evidence as whole. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Porcha*, 450 F.2d 697, 1971 U.S. App. LEXIS 8068 (C.A.D.C. 1971).

Even if trial court was in error in determining that a source for an in-court identification existed independently of invalid pretrial confrontations, reversal of robbery conviction was not required, where victim's wallet was found by police in police car in which defendant was being transported upon his apprehension shortly after crime. D.C. Code § 22-2901. *United States v. Horton*, 440 F.2d 253, 1971 U.S. App. LEXIS 11392 (C.A.D.C. 1971).

Admission of hearsay testimony was not prejudicially erroneous where direct testimony affirmed hearsay. D.C. Code 1961, § 22-2901. *Williams v. United States*, 338 F.2d 530, 1964 U.S. App. LEXIS 4906 (C.A.D.C. 1964).

Evidence that defendant, who was charged with robbery, at time of his apprehension had in his possession an automobile driver's license bearing a name other than his own was irrelevant, but admission of such evidence did not require a reversal when jury trial was waived and evidence of guilt was strong. D.C. Code 1961, § 22-2901. *Fennel v. United States*, 320

F.2d 784, 1963 U.S. App. LEXIS 4820 (C.A.D.C. 1963).

Testimony by detective about surviving victim's identification of defendant as one of the participants in charged incident, though at times offering more details of victim's description of defendant's role in the events than were necessary to make the identification understandable, did not warrant reversal of murder and armed robbery convictions; case against defendant was strong, detective's testimony was brief, and surviving victim had testified and been cross-examined at length on his account of the crimes. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Any error, in murder and armed robbery prosecution, in admitting into evidence a detective's notes showing a telephone number, assigned to a residence at which defendant sometimes stayed, at which surviving victim stated he had reached defendant to set up drug transaction at which charged crimes occurred was not so prejudicial as to warrant a new trial; evidence showed that surviving victim positively identified defendant and other assailants under circumstances tending to show reliability of identifications. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Mistrial was not required, in murder and armed robbery prosecution arising from incident in which witnesses described one of the assailants as having plats in his hair, when detective testified that a police identification photograph that showed defendant with plats in his hair was taken before defendant's arrest in present case; testimony was a brief reference in a lengthy trial, and trial court gave curative instruction that possession by police of a person's photograph does not mean the person has ever committed an offense. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Error, if any, in admitting evidence of defendant's pretrial attempted flight was harmless, where defense counsel was given a full opportunity at the armed robbery trial to explain any arguments on the issue to the jury, the jury was instructed that defendant's flight could have been motivated by a number of factors and was told they were free to disregard such evidence and treat it with the weight they deemed appropriate, and the government's case, aside from the flight evidence, was otherwise strong. *Smith v. United States*, 777 A.2d 801, 2001 D.C. App. LEXIS 156 (2001).

In proceeding in which accused was charged with armed robbery and burglary offenses alleged to have occurred in carryout restaurant on June 29 and July 8 and in which restaurant employee testified that she recognized accused when he entered on July 8, error in admitting employee's remark that she knew accused "from two previous robberies where he robbed

us before" was harmless, in that untainted testimony overpoweringly established that accused committed July 8th offenses, that jury was instructed that remark was not to be considered on issue of guilt and that accused was only convicted of July 8th offenses. D.C. Code §§ 22-1801(b), 22-2901, 22-3202. *Harris v. United States*, 366 A.2d 461, 1976 D.C. App. LEXIS 432 (1976).

In prosecution for armed robbery, robbery, and assault with dangerous weapon, no prejudicial error resulted from admission of hearsay testimony, where cautionary instruction was given to jury at time, and in addition, subsequent testimony of the then absent witness giving rise to hearsay objection served further to remove any likelihood of prejudice. D.C. Code §§ 22-502, 22-2901, 22-3202. *Thompson v. United States*, 354 A.2d 848, 1976 D.C. App. LEXIS 510 (1976).

Although trial judge might have been unduly restrictive in curtailing counsel's examination of several defense witnesses, since most of the testimony as proffered was marginally relevant or cumulative its exclusion was not an abuse of discretion warranting reversal of conviction. D.C. Code §§ 22-502, 22-2901, 22-3202. *Randall v. United States*, 353 A.2d 12, 1976 D.C. App. LEXIS 481 (1976).

— Hearsay, admissibility of evidence.

In prosecution for robbery of taxi driver, driver's statements to police officer, as recorded in officer's report and as broadcast over police radio, were inadmissible as proof of driver's assertions, but once documents were established as business records, it was presumed that officer accurately transcribed and reported driver's story, and statements were thus admissible to impeach driver's testimony so long as proper foundation for impeachment was laid, and fact that officer testified did not preclude admission of the documents. 18 U.S.C. § 1732(a); D.C. Code §§ 22-2901, 22-3202. *United States v. Smith*, 521 F.2d 957, 1975 U.S. App. LEXIS 12262 (C.A.D.C. 1975).

Error in permitting police officer to testify as to victim's account of armed robbery, which was a different robbery committed by defendant nine days after charged offense, was prejudicial, and required reversal of conviction; jury learned that defendant had committed a different, but in some respects similar, armed robbery nine days later, once later robbery had been described, jury learned that defendant had, in effect, confessed to committing it, and that he had been armed with a handgun similar or identical to one used in charged crime, and, without victim's out-of-court statements to police, there would have been no predicate for admission of defendant's confession. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

Even where there is sufficient admissible evidence to support the judge's finding, the appellate court cannot treat the erroneous admission of hearsay as harmless unless the error was so inconsequential as to provide reasonable assurance that it made no appreciable difference to the outcome. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

— Identity of accused, admissibility of evidence.

While lineup was not conducted under most ideal circumstances it was not so impermissibly suggestive to misidentification as to preclude identification testimony by eyewitnesses who had ample opportunity to view defendant during robbery. D.C. Code §§ 22-502, 22-2901, 22-3204; U.S. Const. Amend. 5. *United States v. Neverson*, 463 F.2d 1224, 1972 U.S. App. LEXIS 9905 (C.A.D.C. 1972).

Evidence supported finding that each of witnesses who identified defendants as persons who robbed restaurant had seen defendants under circumstances affording an independent basis for their subsequent in-court identifications, although photographs had been used in identification process. 18 U.S.C. § 1201; D.C. Code §§ 22-502, 22-2204, 22-2901. *Matthews v. United States*, 449 F.2d 985, 1971 U.S. App. LEXIS 11551 (C.A.D.C. 1971).

Admission of testimony of robbery victims who, at time when defendant was not represented by counsel, identified defendant on his being brought into house by officers following his being restrained by men observing him fleeing from house, did not violate defendant's right to counsel, as defendant neither said nor did anything at that time that his counsel could have stopped had he been present. U.S. Const. Amends. 5, 6; D.C. Code 1961, §§ 22-1801, 22-2901. *Kennedy v. U.S.*, 353 F.2d 462, 1965 U.S. App. LEXIS 4529 (C.A.D.C. 1965).

Although confessions and admissions made by juveniles to police and to robbery victim at police station were properly excluded at trial of juveniles following waiver of jurisdiction by juvenile court, robbery victim was properly permitted to testify concerning facts of crime and to identify defendants in open court despite contention that victim would not have been able to identify juveniles in court room had he not earlier been allegedly advised by police that they had confessed and produced stolen property. D.C. Code 1961, §§ 11-914, 22-2901. *Edwards v. United States*, 330 F.2d 849, 1964 U.S. App. LEXIS 6079 (C.A.D.C. 1964).

Evidence, including fact that defendants were not brought to trial until more than two years after the robbery, and that the robbery victims had never seen any of the individuals involved in the crime prior to the event, established that an in-court identification of the

defendants by the robbery victims would not have been arrived at independent of improper photographic identifications secured by the police. D.C. Code § 22-2901. *United States v. Washington*, 292 F. Supp. 284, 1968 U.S. Dist. LEXIS 9570 (D.D.C.1968).

Record supported finding that victim's identifications of defendant as armed robbery perpetrator were sufficiently reliable to be admissible; record indicated that defendant had ample opportunity to observe the defendant, victim's companion, who also testified at trial, corroborated the identification, and in his trial testimony, defendant himself admitted that he had contact with victim and punched him. *Curtis v. United States*, 886 A.2d 92, 2005 D.C. App. LEXIS 549 (2005), writ of certiorari denied by 546 U.S. 1199, 126 S. Ct. 1396, 164 L. Ed. 2d 98, 2006 U.S. LEXIS 1557, 74 U.S.L.W. 3473 (2006).

It was not unduly suggestive for detectives to show victim surveillance videotape that captured defendant and victim standing inside restaurant prior to armed robbery, and thereafter, show victim a photographic array that included a photograph of defendant, even though defendant claimed that by victim's act of viewing the videotape before viewing photographic array caused victim to be compelled to identify defendant as person who subsequently robbed him; record indicated that on the night robbery offense occurred, victim gave a full description of both the defendant and his companion to the police who responded to the 911 call, and defendant did not claim that any part of such description was wrong. *Curtis v. United States*, 886 A.2d 92, 2005 D.C. App. LEXIS 549 (2005), writ of certiorari denied by 546 U.S. 1199, 126 S. Ct. 1396, 164 L. Ed. 2d 98, 2006 U.S. LEXIS 1557, 74 U.S.L.W. 3473 (2006).

Victim's identification of defendant, made when he was in custody, in handcuffs and under high beam lights of police car was not unduly suggestive, and was reliable; any potential for suggestivity was outweighed by promptness of show-up, which took place about one hour and 15 minutes after robbery, there was good lighting, victim had already given detailed description of robber, noting his height, weight, race, and clothing, and victim testified that she had looked at robber several times during robbery when he was chasing her around car. *Lyons v. U.S.*, 833 A.2d 481, 2003 D.C. App. LEXIS 618 (2003).

Photographic and slide arrays for identification of Chinese defendant were not made unduly suggestive because they were comprised of Asian men of various ethnicities. *Wei Hua Wu v. United States*, 798 A.2d 1083, 2002 D.C. App. LEXIS 294 (2002).

Trial court's refusal to hear expert testimony to assist the court in discerning racial distinctions among those in the photographic line-up

of Asian men was not an abuse of discretion in ruling on suggestiveness of line-up in prosecution of Chinese defendant. *Wei Hua Wu v. United States*, 798 A.2d 1083, 2002 D.C. App. LEXIS 294 (2002).

Photographic array of seven individuals was not unnecessarily suggestive, even if it contained photographs of only one other lightly complected African-American male, where all of the individuals depicted were within the same general age range, wearing facial hair, standing in front of a consistent background, and wearing button-down shirts with collars. *Smith v. United States*, 777 A.2d 801, 2001 D.C. App. LEXIS 156 (2001).

Evidence that defendant possessed a revolver that might have been the murder weapon was admissible to establish identity of defendant as person who robbed and killed victim. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

In prosecution for robbery, testimony of police officer as to victim's pretrial out-of-court identification of defendant as man who stole his wallet was admissible even though victim was not asked to make in-court identification where victim was present at trial and available for cross-examination. D.C. Code 1973, § 22-2901. *Rice v. United States*, 437 A.2d 582, 1981 D.C. App. LEXIS 318 (1981).

Lineup identification procedure to identify 15-year-old defendant charged with robbery was unnecessarily suggestive due to defendant's physical frame and apparent lack of maturity in terms of physical features as compared to others in lineup who appeared substantially older and almost all were much larger physically. D.C. Code § 22-2901. In re L.W., 390 A.2d 435, 1978 D.C. App. LEXIS 546 (1978).

Where robbery victim observed 15-year-old defendant for five to ten minutes during robbery, area was lit by streetlamps and adjacent apartment house, victim was able to observe robber's face and features closely, victim's description of defendant was substantially accurate, two days after robbery victim identified defendant's photograph and lineup occurred about nine days after robbery, such indications of victim's ability to make accurate identification of defendant were not outweighed by corrupting effect of challenged lineup identification procedure. D.C. Code § 22-2901. In re L.W., 390 A.2d 435, 1978 D.C. App. LEXIS 546 (1978).

Even if "doctrine of inevitable discovery" were accepted as permissible basis for admitting evidence obtained by official exploitation of a violation of Fourth Amendment rights, doctrine would not have permitted admission of in-court identification of defendant who had been unlawfully arrested and was subse-

quently convicted of armed robbery, in that mere fact that Government had been aware of defendant's name, age and description did not definitely establish that Government would have been able to obtain initial photograph of defendant and ultimate in-court identification. D.C. Code §§ 22-2901, 22-3202; U.S. Const. Amend. 4. *Crews v. United States*, 389 A.2d 277, 1978 D.C. App. LEXIS 542 (1978), reversed by 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537, 1980 U.S. LEXIS 1293 (1980).

Delay of three and one-half months between defendant's unlawful arrest and in-court identification of defendant in proceeding in which he was convicted of armed robbery had to be substantially discounted in determining whether taint of such arrest had been adequately purged so as to permit admission of the in-court identification testimony, in light of fact that eventual rearrest and confinement of defendant and his appearance at trial were all based on the tainted arrest. D.C. Code §§ 22-2901, 22-3202; U.S. Const. Amend. 4. *Crews v. United States*, 389 A.2d 277, 1978 D.C. App. LEXIS 542 (1978), reversed by 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537, 1980 U.S. LEXIS 1293 (1980).

Defendant's appearance in court and resulting court-ordered lineup, his grand jury indictment, his arraignment and his two pretrial status hearing appearances were not intervening events which would purge in-court identification testimony of the taint of defendant's unlawful arrest so as to permit admission of such testimony in proceeding in which defendant was convicted of armed robbery, in light of fact that such intervening events were themselves tainted by the arrest. D.C. Code §§ 22-2901, 22-3202; U.S. Const. Amend. 4. *Crews v. United States*, 389 A.2d 277, 1978 D.C. App. LEXIS 542 (1978), reversed by 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537, 1980 U.S. LEXIS 1293 (1980).

Unlawful arrest of defendant was not sufficiently innocuous so as to exempt in-court identification testimony from suppression under attenuation doctrine exception to rule excluding evidence obtained by official exploitation of unlawful arrest where defendant was intentionally subjected to investigatory arrest for purpose of obtaining identification evidence. D.C. Code §§ 22-2901, 22-3202; U.S. Const. Amend. 4. *Crews v. United States*, 389 A.2d 277, 1978 D.C. App. LEXIS 542 (1978), reversed by 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537, 1980 U.S. LEXIS 1293 (1980).

Where there was probable cause to arrest defendant for robbery at time lineup was conducted, court could have overridden any objection by defendant and ordered his presence in a lineup. D.C. Code § 22-2901. *Dublin v. United States*, 388 A.2d 461, 1978 D.C. App. LEXIS 529 (1978).

In prosecution of defendant for armed robbery and assault with a dangerous weapon, in-court identifications by complaining witness were proper as they were based upon an independent source. D.C. Code §§ 22-502, 22-2901, 22-3202. *Washington v. United States*, 377 A.2d 1348, 1977 D.C. App. LEXIS 382 (1977).

In proceeding in which accused was convicted of armed robbery and possession of a prohibited weapon, finding that only one photographic array was shown to complainant was not clearly erroneous. D.C. Code §§ 22-2901, 22-3202, 22-3214(b). *Dyas v. United States*, 376 A.2d 827, 1977 D.C. App. LEXIS 359 (1977), writ of certiorari denied by 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464, 1977 U.S. LEXIS 4183 (1977).

In proceeding in which accused was convicted of armed robbery and possession of a prohibited weapon, evidence sufficiently established that complainant had an independent source of identification based on his observation of accused during the robbery and, thus, that an allegedly impermissibly suggestive photographic array did not taint his subsequent identification of accused. D.C. Code §§ 22-2901, 22-3202, 22-3214(b). *Dyas v. United States*, 376 A.2d 827, 1977 D.C. App. LEXIS 359 (1977), writ of certiorari denied by 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464, 1977 U.S. LEXIS 4183 (1977).

In prosecution for armed robbery of victims in ladies' rest room, record supported conclusion that victims' identification testimony rested upon independent basis of victims' face-to-face encounters with their assailant, and court did not err in applying an "independent basis" test to the proffered testimony on claim that the in-court identification testimony properly could be characterized as evidence which resulted from an impermissible exploitation of an illegal arrest. D.C. Code §§ 17-305(a), 22-2901; U.S. Const. Amend. 4. *Crews v. United States*, 369 A.2d 1063, 1977 D.C. App. LEXIS 425 (1977).

Totality of circumstances did not give rise to substantial likelihood of irreparable misidentification from photographs and accordingly, trial court did not err in denying defendants' motion to suppress identification, in prosecution for armed robbery, robbery and assault with dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *Hill v. United States*, 367 A.2d 110, 1976 D.C. App. LEXIS 436 (1976).

In prosecution for armed robbery, robbery, and assault with dangerous weapon, trial court did not err in admitting testimony of detectives in relation to pretrial identification of defendant, and in any event, there was no prejudicial error. D.C. Code §§ 22-502, 22-2901, 22-3202.

Thompson v. United States, 354 A.2d 848, 1976 D.C. App. LEXIS 510 (1976).

— Identity of persons or things, admissibility of evidence.

Although victim of robbery and assault picked defendant out of group sitting in General Sessions courtroom at time when defendant was not accompanied by counsel, where such identification followed three photographic identifications based upon face-to-face encounter taking place only a few hours before first photographic identification, the General Sessions identification did not taint the later in-court identification by victim and the in-court identification was not improper. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. *United States v. York*, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

Record established that victim's photographic identification of defendant as robber and assailant was not conducted under circumstances so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. *United States v. York*, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

There is no presumption that photographic identification of defendant by victim of robbery and assault is invalid. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. *United States v. York*, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

Government has burden of presenting clear and convincing evidence that in-court identification of defendant by victim of robbery and assault is based on other than an illegally obtained pretrial identification but there is no presumption of invalidity. D.C. Code §§ 22-502, 22-2901; U.S. Const. Amend. 6. *United States v. York*, 321 F. Supp. 539, 1970 U.S. Dist. LEXIS 13048 (D.D.C.1970), affirmed by 440 F.2d 252, 142 U.S. App. D.C. 224, 1971 U.S. App. LEXIS 12030 (1971).

Even if accused, who elected not to testify at trial on charge of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon, had "testimonial privilege" at trial to don jacket he was alleged to have worn at time of the offenses, denial of request that he be permitted to put on such jacket "to make double sure" that jacket had never been seen by his wife, who had

testified that she had never seen the jacket, was not error. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a). *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

— In general.

Housebreaking, robbery and burglary are merely aggravated forms of larceny and evidence competent in one case is competent, also, in the others. *Edwards v. U.S.*, 139 F.2d 365, 1943 U.S. App. LEXIS 2287 (1943).

Trial court did not abuse its discretion in denying defendant's motion to unseal transcript of mid-trial ex parte bench conference with co-defendant regarding co-defendant's disagreement with his counsel as to which defense theory to pursue during closing argument, in trial for armed robbery, based on defendant's speculative claim that details of bench conference would have assisted his claim on appeal that his trial should have been severed from co-defendant's. *Van Kuhn v. United States*, 900 A.2d 691, 2006 D.C. App. LEXIS 301 (2006).

Evidence that defendant's brother committed armed robbery with which defendant was charged was not admissible under reverse *Drew/Winfield* standard governing admissibility of evidence proffered by criminal defendant that another person committed crime alleged; there was no evidence that anyone had ever confused defendant and brother for one another, or that brother was in any way connected to armed robbery, brother's prior robbery conviction for a pocketbook snatch did not raise reasonable probability that same person committed both crimes, and lack of probative value of evidence outweighed any perceived prejudice to defendant. *Bruce v. United States*, 820 A.2d 540, 2003 D.C. App. LEXIS 151 (2003).

In prosecution for armed robbery, trial court had no authority to countermand pretrial judge's order that codefendant's statement could be admitted only after all references to defendant had been eliminated, since that order had become the law of the case, and therefore, admission of codefendant's statement without redaction required reversal of defendant's conviction. *Jones v. United States*, 452 A.2d 1185, 1982 D.C. App. LEXIS 485 (1982).

In robbery case based on purse snatching, the purse, found by police, should have been preserved by them as potential evidence, at least until defense had been given an opportunity to examine it. D.C. Code § 22-2901; D.C. Code SCR, Criminal Rule 16(b, f). *Marshall v. United States*, 340 A.2d 805, 1975 D.C. App. LEXIS 423 (1975).

— Juvenile proceedings, admissibility of evidence.

Trial court did not err, at juvenile defendant's trial on assault and robbery charges stemming

from group attack on pedestrian, by admitting testimony about group's assault on another, unknown pedestrian earlier the same evening; earlier attack occurred after gang had agreed to attack any would-be drug buyers and thus was relevant to explain the circumstances surrounding the charged offenses. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. In re T.H.B., 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

In delinquency proceeding relating to juvenile who was accused of attempted rape and robbery, fact that trial court acted in violation of pretrial suppression order when it permitted complainant to make an in-court identification of the juvenile did not provide a basis for reversal where the identification, which occurred during the government's redirect examination of the complainant and during questioning by the court, elicited no evidence that had not already been brought out by the juvenile, whose counsel twice elicited testimony from the complainant that she was positive of her lineup identification of her assailant; under such circumstances, the juvenile was responsible for the first in-court identification and thus, could not complain about the second and third. D.C. Code §§ 22-501, 22-2901. In re F., 407 A.2d 1062, 1979 D.C. App. LEXIS 466 (1979).

In delinquency proceeding, police detective's hearsay testimony concerning robbery victim's pretrial identification of juvenile was not admissible under the corroboration of identification exception to hearsay rule where victim testified that he was not in the least bit positive when he made such pretrial identification of defendant. D.C. Code § 22-2901. In re O., 400 A.2d 1055, 1979 D.C. App. LEXIS 346 (1979).

In delinquency proceeding in which robbery victim testified that he was not the least bit positive when he made a pretrial identification of juvenile, detective's testimony in regard to the pretrial identification was not admissible as a prior inconsistent statement, in light of fact that government was not surprised by victim's testimony. D.C. Code §§ 14-102, 22-2901. In re O., 400 A.2d 1055, 1979 D.C. App. LEXIS 346 (1979).

Even if government was surprised in delinquency proceeding by robbery victim's testimony that he was not the least bit positive when he made pretrial identification of juvenile certain statute would have permitted use of detective's testimony only in regard to such pretrial identification for purpose of impeaching credibility of victim, and not as substantive evidence of the matter asserted. D.C. Code §§ 14-102, 22-2901. In re O., 400 A.2d 1055, 1979 D.C. App. LEXIS 346 (1979).

In delinquency proceeding, detective's testimony in regard to robbery victim's pretrial identification of juvenile was not admissible as substantive proof of the matter asserted as an adoptive statement of admission, in light of fact

that victim testified that he was not the least bit positive when he made such pretrial identification. D.C. Code § 22-2901. In re O., 400 A.2d 1055, 1979 D.C. App. LEXIS 346 (1979).

In absence of improperly obtained confession and evidence resulting therefrom, evidence in delinquency proceeding based on charge of robbery was insufficient to sustain adjudication of delinquency. D.C. Code § 22-2901. In re R.A.H., 314 A.2d 133, 1974 D.C. App. LEXIS 345 (1974).

— Opinion evidence, admissibility of evidence.

Permitting police officer to testify regarding direction from which shot causing bullet hole in wall was fired did not constitute an abuse of discretion in prosecution for armed robbery and for carrying a dangerous weapon. D.C. Code §§ 22-2901, 22-3202, 22-3204. United States v. Pierson, 503 F.2d 173, 1974 U.S. App. LEXIS 7074 (C.A.D.C. 1974).

— Other offenses, admissibility of evidence.

Evidence of narcotics dealing was appropriate means of establishing Government's theory that defendant had induced accomplice to commit robbery in order to obtain additional narcotics and to pay for narcotics which he had previously purchased from defendant on credit. D.C. Code §§ 22-2901, 22-3202. United States v. Lee, 509 F.2d 400, 1974 U.S. App. LEXIS 5476 (C.A.D.C. 1974), writ of certiorari denied by 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765, 1975 U.S. LEXIS 1180 (1975).

Prosecutor's eliciting of testimony from defendant that defendant had previously been convicted of six counts of robbery and assault with a dangerous weapon, which was designed to persuade jury that defendant would rob a man, and in fact committed the robbery for which he was charged, constituted reversible error. D.C. Code §§ 14-305(b), 22-2901. United States v. Carter, 482 F.2d 738, 1973 U.S. App. LEXIS 8836 (C.A.D.C. 1973).

Witness's reference to prior drug dealings with defendant was admissible to show defendant's motive for committing the crimes, his intent in entering house, and his knowledge of where to find the hidden safe, in prosecution arising from double murder during a residential robbery. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. Dancy v. United States, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

In prosecution for felony-murder, rape, and prison breach, prejudice to defendant from inference that could flow from evidence of his joint participation with witness in prior robberies far outweighed any enhancement of such witness' credibility from his testimony and its admission denied defendant a fair trial. D.C.

Code §§ 22-2401, 22-2601, 22-2801, 22-2901. Rindgo v. United States, 411 A.2d 373, 1980 D.C. App. LEXIS 426 (1980).

Evidence that defendant committed second robbery was probative of Government's charge that she committed the first robbery, where circumstances of two were so similar and so proximate in time as to tend to establish her identity, but for the evidence to be admissible, it was necessary that its probative value outweigh potential prejudice to defendant arising from propensity of jury to consider such evidence as tending to show disposition to commit crime. D.C. Code SCR, Criminal Rules 8(a), 14; D.C. Code §§ 22-2901, 22-3202. Samuels v. United States, 385 A.2d 16, 1978 D.C. App. LEXIS 445 (1978).

In view of fact that evidence relating to two robberies was simple and distinct and there was no claim that jury confused it and where defendants at trial were well-prepared in their attempt to refute each charge separately and where circumstances of the two robberies were so similar and so proximate in time as to tend to establish defendant's identity, trial court did not abuse discretion in ruling that potential prejudice from admission of evidence of defendant's commission of second robbery was outweighed by highly probative value of such evidence. D.C. Code SCR, Criminal Rules 8(a), 14; D.C. Code §§ 22-2901, 22-3202. Samuels v. United States, 385 A.2d 16, 1978 D.C. App. LEXIS 445 (1978).

In prosecution upon two robbery counts, admission of evidence of first robbery, although it was not probative of any element of Government's case against defendant in second robbery, was not an abuse of discretion where it was probative of codefendant's intent to commit second robbery, where defendant did not object to joint trial with codefendant, where there was no indication that evidence of the two crimes was confused in its presentation to jury and trial judge had no reason to suppose that jury could not keep separate what was relevant to each, and where evidence of second robbery was probative of Government's charge that defendant committed first robbery, and trial judge did not abuse his discretion in denying severance of counts. D.C. Code SCR, Criminal Rules 8(a), 14; D.C. Code §§ 22-2901, 22-3202. Samuels v. United States, 385 A.2d 16, 1978 D.C. App. LEXIS 445 (1978).

In proceeding in which accused was convicted of armed robbery and possession of a prohibited weapon, detective's testimony that modus operandi was "where we keep pictures of men that have committed different types of crimes...like rape, robbery, so on" did not require new trial on ground that it was evidence of another crime committed by accused, in view of the relatively attenuated connection made by detective's testimony between accused's photograph and the

modus operandi file and in view of instruction that the reference to modus operandi was not to be considered as an indication that accused had any record of previous crimes. D.C. Code §§ 22-2901, 22-3202, 22-3214(b). *Dyas v. United States*, 376 A.2d 827, 1977 D.C. App. LEXIS 359 (1977), writ of certiorari denied by 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464, 1977 U.S. LEXIS 4183 (1977).

In criminal proceeding in which accused was charged with armed robbery and burglary offenses alleged to have occurred in carryout restaurant on June 29 and July 8 and in which restaurant employee testified that she recognized accused when he entered on July 8, employee's remark that she knew accused "from two previous robberies where he robbed us before" was not admissible for purpose of establishing identity, in that there was no need for reference to uncharged offense because employee could have testified that she recognized accused on basis of having seen him in restaurant on two prior occasions. D.C. Code §§ 22-1801(b), 22-2901, 22-3202. *Harris v. United States*, 366 A.2d 461, 1976 D.C. App. LEXIS 432 (1976).

— **Relevancy, admissibility of evidence.**

In proceeding in which defendant was convicted of armed robbery, testimony concerning his association with prostitution was relevant to defendant's means of support and to rebut defendant's denial that he frequented the area. D.C. Code §§ 22-2901, 22-3202. *Fitzhugh v. United States*, 415 A.2d 548, 1980 D.C. App. LEXIS 304 (1980).

— **Res gestae, admissibility of evidence.**

Testimony by accomplices as to statements which were made to them by defendant during commission of crimes charged in prosecutions for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary and which incriminated codefendants, were admissible under either exception to hearsay rule for contemporaneous declarations which partake of the event or exception for spontaneous declarations or excited utterances. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Federal Rules of Evidence, rule 803(2), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Robbery complainant's remark to investigating officer that he had lost a brown manila envelope containing \$6,000 in cash qualified as a spontaneous utterance, especially since at the time the elderly complainant appeared confused, disoriented and extremely upset remark was made within 15 minutes after alleged robbery and complainant was unaware that he had been a victim of a crime but, rather, thought his loss was accidental; that remark was made in response to an inquiry by the police did not

demonstrate a lack of spontaneity. D.C. Code § 22-2901. *Harrison v. United States*, 407 A.2d 683, 1979 D.C. App. LEXIS 465 (1979).

— **Subsequent incriminating or exculpatory circumstances, admissibility of evidence.**

Testimony of circumstances surrounding defendant's arrest by officers pursuant to a warrant for his arrest, not for the robberies and murder for which he was being tried, but for armed assault on police officer, offered as indicating consciousness of guilt or resistance to arrest, was admissible in context in which case was tried. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

Probative value of evidence of defendant's attempted flight was not substantially outweighed by danger of unfair prejudice, where the attempted flight occurred after trial court ruled, at preliminary hearing, that defendant would be held without bond pending the trial for armed robbery. *Smith v. United States*, 777 A.2d 801, 2001 D.C. App. LEXIS 156 (2001).

Defendant's attempted flight after trial court ruled, at preliminary hearing, that defendant would be held without bond pending the trial for armed robbery reasonably supported an inference that defendant fled because of consciousness of guilt. *Smith v. United States*, 777 A.2d 801, 2001 D.C. App. LEXIS 156 (2001).

In prosecution for armed robbery and felony-murder, trial court properly admitted testimony concerning defendant's sale of revolver where such evidence constituted consciousness of guilt and where such testimony did not far outweigh its probative value. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Tribble v. United States*, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

Argument and conduct of counsel.

In prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, unvariegated emphasis of word "they" by counsel for defendant in counsel's closing argument, in which he often referred to perpetrators as "they," was not plain error prejudicing two codefendants where at least six men were in group which ransacked victim's apartment at time of charged offenses. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed.Rules Crim.Proc. rule 52(b). *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where portions of prosecution's closing argument were objectionable but were sufficiently offset by court's warning to jury respecting same matter, objectionable argument was not ground for reversal of robbery conviction. D.C. Code 1961, § 22-2901. *Trimble v. United*

States, 369 F.2d 950, 1966 U.S. App. LEXIS 4971 (C.A.D.C. 1966).

Reversal of robbery conviction would not be appropriate, even assuming that prosecutor's comments in closing argument that government was exceptionally proud of its witnesses in the case were objectionable, where testimony of victim was convincingly substantiated by fact that her critical identification of distinctive nature of items taken from her pocketbook had been given to police before defendant's capture with these items in his possession, and other key government witness likewise gave convincing testimony. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 359 F.2d 260, 1966 U.S. App. LEXIS 6620 (C.A.D.C. 1966), writ of certiorari denied by 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104, 1966 U.S. LEXIS 994 (1966).

Reference by prosecutor in closing argument of robbery case to "reputable officers" and "very sweet" complaining witness who testified for government did not exceed advocacy. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 359 F.2d 260, 1966 U.S. App. LEXIS 6620 (C.A.D.C. 1966), writ of certiorari denied by 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104, 1966 U.S. LEXIS 994 (1966).

In robbery prosecution, prosecutor's statements that the defendants did not make a statement that they struck the victim in self-defense and that the prosecutor did not intend to convey that to the jury and that it was only an inference that the prosecutor was trying to say could be drawn from the evidence but that he thought that testimony was that they struck the victim were not reversible error under the evidence. D.C. Code 1951, § 22-2901. *Johnson v. U.S.*, 275 F.2d 898, 1960 U.S. App. LEXIS 5183 (C.A.D.C. 1960).

Prosecutor's unobjected-to comments during closing argument that robbery defendant's use of his girlfriend as a defense witness in an attempt to bolster his defense that victim had misidentified him as the perpetrator was a bunch of "malarkey" and "garbage," did not constitute plain error, as the arguments were made in the context of the overwhelming corroborative evidence and, in all likelihood, had very little effect on outcome of trial, and prosecutor was attempting to discredit the misidentification defense and reinforce victim's identification of defendant. *Patterson v. United States*, 37 A.3d 230, 2012 D.C. App. LEXIS 64 (2012), amended by, opinion withdrawn in part by 56 A.3d 1152, 2012 D.C. App. LEXIS 502 (D.C. 2012).

Allegedly improper argument by prosecutor of aiding and abetting theory during rebuttal, following closing arguments in which none of the defendants directly addressed such a theory, did not require reversal of murder and armed robbery convictions; argument was not a surprise because government had addressed

aiding and abetting theory in opening argument, and defense made rational judgment not to address that argument when it had opportunity to do so. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

The Government's untimely disclosure of allegedly exculpatory evidence did not entitle defendant to mistrial, in prosecution for armed robbery; defendant failed to demonstrate any prejudice resulting from delay in receipt of the evidence. U.S. Const. Amends. 5, 14; D.C. Code 1981, §§ 22-2901, 22-3202. *Bellanger v. United States*, 548 A.2d 501, 1988 D.C. App. LEXIS 182 (1988).

Error, if any, arising from codefendant's closing argument that he was not guilty and was caught in defendant's robbery, was harmless in view of overwhelming evidence of guilt. D.C. Code 1981, §§ 22-2901, 22-3202. *Hordge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

Trial court's cautionary instruction that arguments of counsel were not evidence mitigated any prejudice as result of codefendant's closing argument that he was not guilty and that he was caught in defendant's robbery. D.C. Code 1981, §§ 22-2901, 22-3202. *Hordge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

Prosecutor's statement that first defendant was telling second defendant to pick up the radio, could not be regarded as reasonable inference from evidence adduced at trial, i.e., that defendant was gesturing, and amounted to plain error, which was not cured by trial court's instruction that arguments of counsel were not evidence; prosecutor was arguing fact not in evidence and, on facts of case, first defendant could be found guilty only if he aided and abetted second defendant when second defendant took the radio, and prosecutor's comment significantly strengthened inference that first defendant was aider and abettor, so that reversal of robbery conviction was required. D.C. Code 1981, § 22-2901. *Jones v. United States*, 512 A.2d 253, 1986 D.C. App. LEXIS 349 (1986).

Prosecutor's improper, incomplete missing witness argument which claimed that only defendant's sister and girl friend supported alibi defense of being at party with several other potential witnesses, which trial court ordered prosecutor to abandon, and which was made in context of strong evidence against defendant did not substantially sway jury and did not prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who failed to disclose witness' photographic identification of defendant despite trial court's order to disclose all identifications to defense before testimony and who could have informed defendant of photographic identification at bench conference immediately preceding testimony of witness committed misconduct in prosecution for armed robbery, assault with intent to commit robbery while armed, assault with intent to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's misconduct which consisted of failure to disclose witness' photographic identification of defendant before testimony despite trial court's order to disclose all photographic identifications to defendant, which occurred after another witness' identification of defendant's photograph, and which occurred in trial with weak defense to robbery charges and implausible explanation by defendant for possession of stolen property did not substantially prejudice defendant by swaying jury verdict in prosecution for armed robbery, assault with intent to kill and commit robbery while armed assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's closing argument, which urged jurors to use "knowledge of the street" to evaluate each witness' testimony and which stated that two victims for reasons of their own repeatedly testified as to inability to recall events, created ambiguity whether prosecutor intended to remind jurors to use common sense or whether prosecutor was arguing facts not in evidence and suggesting that victims suffered false loss of memory, did not clearly demonstrate prosecutor's intent to argue worst possible meaning, and, therefore, was not misconduct in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who made incomplete missing witness argument after objection was sustained to claim that only girl friend and sister supported defendant's alibi of being at party with several other people acted improperly in prosecution for armed robbery, assault with intent to commit robbery and with intent to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code

1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor who called victims of robbery to testify despite knowledge that victims poorly remembered events, who wanted jury to be able to hear from victims named in indictment, who wanted to prevent adverse inference against government that could result from absence of victims' testimony, and who wanted to test witnesses' ability to contribute to truth did not call witnesses for improper motives and did not commit misconduct in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In prosecution wherein one defendant was convicted of carrying a pistol without a license and both defendants were convicted of armed robbery, suggestion that dire harm would have come to victim, taxi driver, if defendants had had correct caliber bullet was speculative, totally lacking in support by evidence, and irrelevant, and was objectionable as clearly calculated to arouse sympathy of jurors for victim and to play on their personal fears about violence. D.C. Code 1973, §§ 22-2901, 22-3202, 22-3204. *Powell v. United States*, 455 A.2d 405, 1982 D.C. App. LEXIS 496 (1982).

Where there was no evidence adduced at trial to support prosecutor's contentions of perjury or lying under oath and evidence of guilt of armed robbery, as reflected in record, was not overwhelming and could have led to verdict for either party, and where defense counsel did not request specific remedial instructions and none were given, prosecutor's remarks were prejudicial and defendant was entitled to new trial. D.C. Code 1973, §§ 22-2901, 22-3202. *Miller v. United States*, 444 A.2d 13, 1982 D.C. App. LEXIS 312 (1982).

Trial court in reprosecution did not abuse its discretion in permitting prosecutor to comment in regard to missing alibi witnesses or in giving missing witness instructions; in any case, any error was harmless in view of overwhelming evidence of defendant's guilt. D.C. Code §§ 22-2801, 22-2901, 22-3502; D.C. Code, SCR, Criminal Rule 12.1. *Washington v. United States*, 404 A.2d 197, 1979 D.C. App. LEXIS 428 (1979).

Where defendant claimed that armed robbery victim owed him \$30 as result of defrauding him in marijuana sale, but defendant allegedly took over \$500 from offending drug dealer and dealer's companions, defendant did not establish claim of right defense, and thus trial court did not err in prohibiting defense counsel

from arguing said defense to jury. *Smith v. United States*, 330 A.2d 519, 1974 D.C. App. LEXIS 336 (1974).

Arrest.

Where officer upon hearing defendant identified as robber went to home of defendant's brother to investigate and met another officer who had followed suspect to the home and who was waiting and preparing to call for assistance, officers had probable cause to believe that person who had entered home had been involved in the crime and even if woman who admitted officers into home did not voluntarily consent to officers' entry, entry was lawful under the circumstances and subsequent arrest was valid. D.C. Code § 22-2901. *United States v. Hines*, 455 F.2d 1317, 1971 U.S. App. LEXIS 7345 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2427, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2409 (1972).

Where defendant, in response to investigatory stop by officer who saw defendant fleeing from direction of robbery, voluntarily entered officer's scout car and stated that he was tired of running, officer had necessary cause to arrest defendant. D.C. Code § 22-2901. *United States v. Hines*, 455 F.2d 1317, 1971 U.S. App. LEXIS 7345 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2427, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2409 (1972).

Officer who knew robbery had been committed in immediate vicinity and who saw defendant fleeing from direction of robbery and continuously glancing over his shoulder in that direction had requisite degree of suspicion to make a detention of defendant for purpose of questioning even if probable cause to arrest was lacking. D.C. Code § 22-2901. *United States v. Hines*, 455 F.2d 1317, 1971 U.S. App. LEXIS 7345 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2427, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2409 (1972).

There was probable cause to arrest defendant for crime of robbery, where description of robber was received by arresting officer on his radio, where officer was less than three blocks away from scene of crime, and where only a few minutes had elapsed. D.C. Code § 22-2901. *United States v. Horton*, 440 F.2d 253, 1971 U.S. App. LEXIS 11392 (C.A.D.C. 1971).

Robbery victim's physical condition and victim's positive identification of defendant as participant in robbery were sufficient to give arresting officer probable cause to arrest defendant. U.S. Const. Amend. 4; D.C. Code § 22-2901. *Pendergrast v. United States*, 416 F.2d 776, 1969 U.S. App. LEXIS 9121 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243, 1969 U.S. LEXIS 1562 (1969).

Where police officers in plain clothes saw two defendants who were known to officers to be

pickpockets get onto bus, and first defendant bumped into victim, and second defendant brushed up against victim, and officers arrested second defendant, and search disclosed keycase of victim, there was probable cause for arrest of second defendant, and district court properly denied motion of defendants to suppress the keycase in robbery prosecution. D.C. Code § 22-2901. *Davis v. United States*, 409 F.2d 458, 1969 U.S. App. LEXIS 8888 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 949, 89 S. Ct. 2031, 23 L. Ed. 2d 469, 1969 U.S. LEXIS 1423 (1969).

Where complaining witness who was pursuing defendant and his alleged accomplice shouted to police officer that men he was chasing had robbed him and accomplice was arrested by another officer who blocked exit to alley into which accomplice had run, officer had probable cause to arrest accomplice without warrant so that statement made by accomplice shortly after his arrest that he had seen money he was charged with robbing fall to ground was not inadmissible at trial of defendant and accomplice as fruit of an illegal arrest. D.C. Code 1961, § 22-2901. *Trimble v. United States*, 369 F.2d 950, 1966 U.S. App. LEXIS 4971 (C.A.D.C. 1966).

Fact that defendant had been present at scene of robberies, that he had minimal resemblance to general description of assailant, and that there had been weak, tenuous identification of defendant by tour guide did not afford probable cause to believe that defendant had participated in robberies and assaults, and, to thus establish that he could be arrested. D.C. Code §§ 22-2901, 22-3202; U.S. Const. Amend. 4. *Crews v. United States*, 389 A.2d 277, 1978 D.C. App. LEXIS 542 (1978), reversed by 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537, 1980 U.S. LEXIS 1293 (1980).

On defendant's appeal from proceeding in which he was convicted of armed robbery and in which photographic and lineup identifications were suppressed but in-court identifications were not suppressed, Court of Appeals had to accept trial court's determination that there had been no probable cause to arrest defendant where Government had not appealed such determination and the resulting evidentiary suppression. D.C. Code §§ 22-2901, 22-3202; U.S. Const. Amend. 4. *Crews v. United States*, 389 A.2d 277, 1978 D.C. App. LEXIS 542 (1978), reversed by 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537, 1980 U.S. LEXIS 1293 (1980).

Evidence at hearing on motion to suppress disclosed that police officer, who spotted defendant while proceeding to scene of robbery and who had obtained a description of robber which fit defendant, had probable cause to arrest defendant without a warrant. D.C. Code §§ 22-502, 22-2901, 22-3202. *Randall v. United*

States, 353 A.2d 12, 1976 D.C. App. LEXIS 481 (1976).

Totality of facts and circumstances, including information from radio report about fleeing pedestrian and pursuing citizen, and identification of pursuing citizen, justified warrantless arrest of pedestrian while he was being transported by officers to scene of reported incident, even though sum total of information available to officers when they placed pedestrian under arrest came from an unidentified victim of an undisclosed robbery and assault. D.C. Code §§ 22-502, 22-2901, 22-3201; U.S. Const. Amend. 4. *Bates v. United States*, 327 A.2d 542, 1974 D.C. App. LEXIS 297 (1974).

Common law.

According to common law, robbery has not been completed as long as robber in immediate aftermath of taking property indicates by his actions that he is not satisfied with location of stolen property. *United States v. Harrington*, 108 F.3d 1460, 1997 U.S. App. LEXIS 5476 (C.A.D.C. 1997).

Robbery remains as infamous crime as at common law, notwithstanding it may be punished, within the trial court's discretion, by imprisonment in the jail, as in the case of a simple misdemeanor. *U.S. v. Evans*, 28 App.D.C. 264, 1906 U.S. App. LEXIS 5240 (1906).

In District of Columbia, robbery retains common-law elements modified only to extent that Congress has enlarged it to encompass stealthy as well as forcible takings. D.C. Code 1961, § 22-2901. *Irby v. United States*, 250 F. Supp. 983, 1965 U.S. Dist. LEXIS 6690 (D.D.C.1965), affirmed by 390 F.2d 432, 129 U.S. App. D.C. 17, 1967 U.S. App. LEXIS 4497 (1967).

Although robbery at common law is a species of aggravated larceny, the gist of the offense is a crime against the person, as larceny is an offense against the possession. *U.S. v. Mann*, 119 F.Supp. 406, 1954 U.S. Dist. LEXIS 4397 (D.D.C.1954).

"Robbery", as used in Penal Statute of District of Columbia Code, means robbery in the usual common-law sense as expanded to include sudden or stealthy seizure or snatching. D.C. Code 1951, § 22-2901. *U.S. v. Mann*, 119 F.Supp. 406, 1954 U.S. Dist. LEXIS 4397 (D.D.C.1954).

Robbery retains its common-law elements and, thus, government must prove larceny and assault. D.C. Code 1981, § 22-2901. *Lattimore v. United States*, 684 A.2d 357, 1996 D.C. App. LEXIS 224 (1996).

Conclusiveness of adjudication.

Ruling that original indictment which charged only that defendant "stole" was insufficient because of the failure to allege specific intent to steal was not a decision which went to

substance of accusation or defenses to it and thus did not preclude, under doctrine of res judicata, subsequent grand jury indictment in same language, even absent notice of appeal by Government. D.C. Code §§ 22-2901, 22-3202, 23-104(c). *Washington v. United States*, 366 A.2d 457, 1976 D.C. App. LEXIS 408 (1976).

Dismissal of original armed robbery indictment which charged only that defendant "stole" for failure to charge specific intent to steal was not a final judgment on the merits; thus, doctrine of collateral estoppel did not make dismissal of first indictment conclusive as to sufficiency of second indictment which used identical wording. D.C. Code §§ 22-2901, 22-3202. *Washington v. United States*, 366 A.2d 457, 1976 D.C. App. LEXIS 408 (1976).

Constitutional rights of accused.

Prosecution of a defendant under both the federal bank (savings and loan) robbery statute and the local armed robbery statute of the District of Columbia is not a denial of equal protection; a defendant is subject to only a single trial in the District and there are no possible adverse consequences due to being found guilty under both federal and District of Columbia law, since he can ultimately be sentenced under only one statutory scheme. 18 U.S.C. § 2113(a); D.C. Code §§ 22-2901, 22-3202. *United States v. Shepard*, 515 F.2d 1324, 1975 U.S. App. LEXIS 13657 (C.A.D.C. 1975).

Excellent opportunities that identification witnesses had to observe defendant during robbery of United States post office were sufficient to provide a solid independent basis for their in-court identifications despite any later taint created by suggestive pretrial lineups, and thus defendant was not denied due process by court's refusal to suppress eyewitnesses' in-court identifications. *United States v. Scriber*, 499 F.2d 1041, 1974 U.S. App. LEXIS 8612 (C.A.D.C. 1974).

On-the-scene identification of defendant, conducted within minutes of his arrest as robbery suspect, was not unduly suggestive even though unusual number of policemen were present, defendant was handcuffed when brought before the witnesses, eyewitnesses were in state of nervousness and counsel was absent, and identification did not violate Fifth and Sixth Amendments. D.C. Code § 22-2901; U.S. Const. Amends. 5, 6. *United States v. Hines*, 455 F.2d 1317, 1971 U.S. App. LEXIS 7345 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2427, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2409 (1972).

Where no suggestion was made to robbery victim that defendant was believed to be one of the two robbers, but only that victim was asked to view two men because they seemed to fit descriptions victim had furnished the police and identification confrontation occurred

within an hour to an hour and a half of robbery, identification confrontation at victim's home shortly after robbery did not violate defendant's right to due process. U.S. Const. Amend. 5. *United States v. Perry*, 449 F.2d 1026, 1971 U.S. App. LEXIS 9919 (C.A.D.C. 1971).

Identification of defendants who were charged with armed robbery and assault with a deadly weapon, by victim, after defendants were picked up near scene of the crime and brought back to a squad car did not violate defendants' due process rights on theory identification was tainted by suggestive circumstances surrounding it, where victim had given officer a detailed description of the robbers, had participated in the search for them and in fact had pointed out defendants to the arresting officer. *United States v. Perry*, 449 F.2d 1026, 1971 U.S. App. LEXIS 9919 (C.A.D.C. 1971).

Where only a few minutes elapsed from time of liquor store robbery until arrest of defendant in waiting room of dentist, and one of the owners of liquor store, who had observed robber for several minutes in well-lit liquor store, identified defendant as the robber, the confrontation was not so unnecessarily suggestive as to deny defendant due process. *United States v. Perry*, 449 F.2d 1026, 1971 U.S. App. LEXIS 9919 (C.A.D.C. 1971).

Where robbery victim on morning after robbery was shown 15 photographs depicting males of various ages, including one photograph of defendant that was not highlighted so as to prompt its selection and victim identified defendant's photograph, which was sixth photograph shown to him, as that of robber and remained firm in such identification after examining remaining photographs, such identification did not deny due process and did not vitiate subsequent in-court identification. D.C. Code §§ 22-502, 22-2901; Fed. Rules Crim. Proc. rule 52(b). *United States v. Hamilton*, 420 F.2d 1292, 1969 U.S. App. LEXIS 11374 (C.A.D.C. 1969).

Continuation of defendant's robbery trial, after his codefendant changed his plea to guilty at completion of government's case and after trial judge, in questioning codefendant, elicited statement that implicated defendant, did not constitute denial of due process, either on theory that trial judge, having heard statement, would be prejudiced against defendant or on theory that jury must have realized that codefendant had changed his plea and must have been improperly influenced thereby in passing on defendant's guilt. D.C. Code § 22-2901. *Scott v. United States*, 419 F.2d 264, 1969 U.S. App. LEXIS 8942 (C.A.D.C. 1969).

District of Columbia prisoner failed to establish his custody, pursuant to second violator warrant, was in violation of Constitution, laws, or treaties of United States, and thus grant of § 2241 habeas relief was not warranted; pris-

oner had received prison sentence within lawful range, had received credit for time served prior to his release on probation, and, upon revocation of probation, had forfeited all time spent on probation. *Foster v. Wainwright*, 820 F.Supp.2d 36, 2011 U.S. Dist. LEXIS 123606 (2011).

Totality of circumstances surrounding photographic identification of defendants, including fact that one robbery victim was shown only the photographs of the four suspects, that those photographs contained police markings, and that there was no necessity whatsoever for a photographic identification since the suspects had been apprehended, established that the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" and that there was thus a serious and irreconcilable breach of due process of law. D.C. Code § 22-2901. *United States v. Washington*, 292 F. Supp. 284, 1968 U.S. Dist. LEXIS 9570 (D.D.C.1968).

The trial court had discretion, in armed robbery prosecution, to grant defendant's request for one-person showup to permit defendant's witness to identify complaining witness in courtroom as man whom she had heard threatening defendant; due process concerns did not preclude the showup in that proposed showup was intended to identify not the defendant, but rather the complaining witness, and thus, even if complaining witness was identified by suggestive means, complaining witness would not have run the risk of imprisonment. U.S. Const. Amend. 5. *Hollingsworth v. United States*, 531 A.2d 973, 1987 D.C. App. LEXIS 444 (1987).

Where there had been unequivocal, unsuggested and otherwise constitutionally acceptable identification of defendants by robbery victim when he sighted defendants after robbery and pointed them out to officers, subsequent unnecessarily suggestive photographic identification procedure was not conducive to irreparable misidentification in violation of due process; thus, an inquiry into whether there was an independent source for victim's subsequent lineup and in-court identifications of defendants was not required before such identifications could be admitted into evidence. D.C. Code § 22-2901; U.S. Const. Amendments. 5, 14. *Patterson v. United States*, 384 A.2d 663, 1978 D.C. App. LEXIS 457 (1978).

Position advanced by defendants, charged with robbing priests of money and other valuables at gun point while ostensibly at church rectory for purpose of arranging a baptism, that all Catholics should have been excluded from their jury in that Catholics, as a class, are unable to judge impartially truth or falsity of testimony of Catholic clerics because of their religious faith, was "suspect" under equal pro-

tection provisions of Constitution. U.S. Const. Amend. 14. *Coleman v. United States*, 379 A.2d 951, 1977 D.C. App. LEXIS 260 (1977).

Admission, in prosecution for armed robbery of food store, of evidence of contemporaneous armed robbery of a nearby store did not violate due process where all the jury knew was that another had been arrested for the contemporaneous robbery and that "lookout" subsequently was issued for automobile in which instant defendants eventually were found; even if it were clear that the other had somehow implicated instant defendants in the offense for which he was arrested, evidence of such other offense was both legitimate and necessary to establish sequence of events from time of food store robbery to time of arrest. D.C. Code §§ 22-2901, 22-3202. *Coleman v. United States*, 379 A.2d 951, 1977 D.C. App. LEXIS 260 (1977).

Neither Fifth Amendment privilege against self-incrimination nor due process standards prevented standing of codefendants side by side before jury to assess their relative physical appearances, in prosecution for armed robbery, robbery and assault with a dangerous weapon, and it was of no consequence that defendant declined to take stand to testify on his own behalf since such physical display did not constitute "testimony." U.S. Const. Amend. 5; D.C. Code §§ 22-502, 22-2901, 22-3202. *Hill v. United States*, 367 A.2d 110, 1976 D.C. App. LEXIS 436 (1976).

Where alibi witness threatened victim of armed robbery outside courtroom, immediate arrest of witness, which resulted in witness' decision to invoke privilege against self-incrimination if asked about threat and defense's subsequent decision not to call witness, was not governmental action preventing defendant from presenting his defense, and did not result in a denial of due process. *Swann v. United States*, 326 A.2d 813, 1974 D.C. App. LEXIS 292 (1974).

Construction and application.

Federal statute for District of Columbia, defining crime of burglary in first degree and increasing minimum and maximum punishments therefor and increasing minimum punishment for robbery by amending prior laws on both crimes became effective at 3:05 p. m. when it was signed by the President, and not before. D.C. Code §§ 22-1801, 22-1801(a), 22-2901; 1 U.S.C. § 112; U.S. Const. art. 1, § 9, cl. 3. *United States v. Casson*, 434 F.2d 415, 1970 U.S. App. LEXIS 10177 (C.A.D.C. 1970).

Construction with federal law.

Evidence that money lost and stolen as result of restaurant robbery would otherwise have been involved in interstate transactions was sufficient to support conclusion that robbery

affected interstate commerce, thus supporting conviction of aiding and abetting Hobbs Act robbery. 18 U.S.C. §§ 2, 1951(a), (b)(3). *United States v. Harrington*, 108 F.3d 1460, 1997 U.S. App. LEXIS 5476 (C.A.D.C. 1997).

If anything, the federal mail robbery statute contemplates a single conviction, not multiple convictions, when the first tier of mail robbery is aggravated by the use of a deadly weapon. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3202. *United States v. Knight*, 509 F.2d 354, 1974 U.S. App. LEXIS 5667 (C.A.D.C. 1974).

The federal mail robbery statute and the District of Columbia robbery and crime of violence statutes are applicable throughout District of Columbia. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3202. *United States v. Spears*, 449 F.2d 946, 1971 U.S. App. LEXIS 11849 (C.A.D.C. 1971).

Counsel for accused.

—Adequacy of representation, counsel for accused.

Prosecutor, by recommending a 20-year sentence for defendant on his conviction for armed robbery and related weapons and other offenses, committed a grave and inexcusable breach of written plea agreement, pursuant to which prosecutor had agreed not to allocute for a sentence greater than ten years; while the prosecutor withdrew her request for a 20-year sentence, which occurred only after the judge brought the problem to counsel's attention, her subsequent allocution was anything but an emphatic retreat from the impropriety, and the demands of fairness required something better from the government than a blatant breach of the plea agreement followed by the prosecutor's implied dissatisfaction with that agreement during the course of her allocution. *Clark v. U.S.*, 2012 WL 2159358 (2012).

Decision by co-defendant's trial counsel to argue reasonable doubt based on testimony of State's key eyewitness that co-defendant remained about 15 feet away from where robbery was taking place and did not approach either victim, rather than to argue consistent with co-defendant's choice of "drug deal gone bad" theory, was matter of reasonable strategy after thorough investigation of law and relevant facts that did not constitute deficient performance; counsel did not prevent jury from hearing co-defendant's chosen defense and ascribing whatever weight it saw fit to his testimony, and in counsel's reasonable judgment, jury was unlikely to accept co-defendant's theory of drug deal gone bad or believe that victims and eyewitness were three bold-faced liars. *Van Kuhn v. United States*, 900 A.2d 691, 2006 D.C. App. LEXIS 301 (2006).

Defense counsel's alleged failure to raise issue of "double enhancement," was not ineffec-

tive assistance, in prosecution for robbery of a senior citizen, given that defendant had five previous convictions for burglary. *Forte v. United States*, 856 A.2d 567, 2004 D.C. App. LEXIS 398 (2004), writ of certiorari denied by 543 U.S. 1174, 125 S. Ct. 1368, 161 L. Ed. 2d 155, 2005 U.S. LEXIS 1862, 73 U.S.L.W. 3496 (2005).

Defendant was not prejudiced, as required to establish claim for ineffective assistance of counsel, by counsel's falsely advising defendant that motion to withdraw pleas had been filed and denied, when in fact, no motion was filed, where there was not a reasonable probability that motion to withdraw plea would have been granted; defendant asserted his innocence only with respect to second armed robbery, plea colloquy belied defendant's assertion that he was pressured at his plea hearing, evidence proffered by prosecution appeared to be strong, including eyewitness accounts and co-defendant's testimony, and plea hearing transcript showed that defendant understood his plea, and his decision to enter guilty pleas was not made in haste. *Butler v. United States*, 836 A.2d 570, 2003 D.C. App. LEXIS 693 (2003).

Defendant failed, in moving on ineffective assistance grounds to vacate convictions for offenses including murder and armed robbery, to demonstrate that trial counsel performed deficiently in failing to present alibi witnesses; trial counsel hired investigators to follow up on all leads as to alibi witnesses, there were many inconsistencies among alibi witnesses and defendant as to defendant's whereabouts on night of charged incident, and defendant admitted to counsel that he was present at crime scene when told that his fingerprint was on magazine of gun found at scene of shootings. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Any deficiency in trial counsel's performance in failing to present alibi witnesses in murder and armed robbery prosecution was not prejudicial and thus did not support ineffective assistance claim, particularly considering government's strong case against defendant and the many defects in his claimed alibi defense. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Trial counsel's failure to present alibi defense, despite introduction of alibi witnesses during voir dire and assertion of alibi defense during opening statement, did not constitute deficient performance that prejudiced defendant, as required to support claim of ineffective assistance of counsel, in trial for armed robbery and carrying pistol without license; decision not to call alibi witnesses was tactical decision in light of victim's was tactical one, insofar as strength of state's identification evidence was weaker than counsel had anticipated, and alibi testimony risked admission of evidence regard-

ing prior crimes. *Dobson v. United States*, 815 A.2d 748, 2003 D.C. App. LEXIS 16 (2003).

Summary denial of second motion for postconviction relief as successive, which motion was based on claim that counsel was ineffective for failure to call accomplice who would have testified that he committed robbery with someone other than defendant, did not constitute abuse of discretion, where first motion raised ineffective assistance of counsel for failure to present alibi defense, and defendant failed to demonstrate no cause for and prejudice from failure to raise second claim in first motion. *Dobson v. United States*, 815 A.2d 748, 2003 D.C. App. LEXIS 16 (2003).

Trial court erred in denying defendant's motion for new trial without evidentiary hearing, following convictions for kidnapping while armed, armed robbery, assault with intent to commit rape while armed, and possession of firearm during crime of violence, basis of which motion was ineffective assistance of counsel, where court made credibility determination that defendant had not provided names of exculpatory witnesses without hearing testimony from anyone who had any direct knowledge regarding this disputed fact, as trial attorney never denied or admitted that defendant had provided names, investigator did not testify, and defendant was not permitted to be present. *Arrington v. United States*, 804 A.2d 1068, 2002 D.C. App. LEXIS 483 (2002).

Counsel's failure to impeach complainant with complainant's alleged statement to defense investigator effectively acknowledging that defendant's entry into her home was consensual did not prejudice defendant, with respect to convictions for robbery and assault with intent to rape, and thus, defendant was not entitled to hearing on motion to vacate convictions which was based on counsel's alleged ineffective assistance, where complainant's account of robbery and assault offenses was consistent and essentially uncontradicted, and complainant reported assault and robbery to daughter a week or so after the fact. *U.S. Const. Amend. 6*; *D.C. Code* 1981, §§ 22-501, 22-2901. *Williams v. United States*, 725 A.2d 455, 1999 D.C. App. LEXIS 14 (1999).

Defendant, who was convicted of armed robbery and whose counsel elicited testimony in support of defendant's misidentification and alibi defenses, presented such defenses to jury in opening and closing arguments, may have decided not to produce character witnesses in order to preclude introduction of defendant's prior arrests into evidence and gave a sufficient opening statement after Government presented its case, was not shown to have been denied effective assistance of counsel. *D.C. Code* §§ 22-2901, 22-3202; *U.S. Const. Amend. 6*. *Fitzhugh v. United States*, 415 A.2d 548, 1980 D.C. App. LEXIS 304 (1980).

Defendant was not denied effective assistance of counsel because of failure of defendant's trial counsel to timely move for joinder of instant armed robbery with felony-murder of which defendant was acquitted. D.C. Code §§ 22-2901, 22-3201, 22-3204. *Harling v. United States*, 372 A.2d 1011, 1977 D.C. App. LEXIS 472 (1977).

Accused, who was convicted of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon and who asserted that there had been inadequate preparation by his trial counsel, was not denied his right to effective assistance of counsel, absent any indication of any substantial defense which accused might have advanced and which was excluded as result of such alleged lack of preparation. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a); U.S. Const. Amend. 6. *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

Failure to preserve, for appeal, the issue whether trial court erred in allowing in-court identifications of accused, who were convicted of armed robbery, assault with a dangerous weapon, assault on police officer and possession of prohibited weapon, did not deny effective assistance of counsel where sole ground advanced for suppression of in-court identifications was the failure of government to conduct pretrial lineups and there was no indication that on-scene confrontations between accused and government witnesses were tainted by any impermissible police procedure. D.C. Code §§ 22-502, 22-505(a), 22-2901, 22-3202, 22-3214(a); U.S. Const. Amendments. 5, 6; D.C. Code SCR, Criminal Rule 12(b)(3). *White v. United States*, 358 A.2d 645, 1976 D.C. App. LEXIS 279 (1976).

— Critical time, counsel for accused.

Fact that defendant was already in custody on charge of possession of a sawed-off shotgun did not preclude the police from conducting, in the absence of counsel, a photographic identification in order to link defendant with armed robbery. U.S. Const. Amend. 6; D.C. Code §§ 22-2901, 22-3202(a). *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

— Deprivation or allowance of counsel.

Where record unequivocally established that, after three years of representing defendant, defense counsel concurred with conclusions reached by psychiatrist and judge that defendant was a malingerer and expressed opinion that it was tactically unwise to raise an insanity defense unless he felt he had a chance, defendant was not entitled to reversal of conviction of armed robbery assault with a deadly weapon and carrying a pistol without a license

on ground of judicial interference with his defense counsel's attempt to pursue insanity issue. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3204, 24-301(a). *United States v. Simms*, 463 F.2d 1273, 1972 U.S. App. LEXIS 9318 (C.A.D.C. 1972).

— Joint representation of codefendants, counsel for accused.

Although counsel breached his duty in not moving to withdraw as counsel on appeal where he had represented convicted defendant at trial and, as defendant's attorney on appeal, raised issue of constitutional adequacy of his representation of defendant at trial, where issues were fully explored by both sides and appellate court carefully examined the merits, concluding that representation at trial was adequate, and where concern as to propriety of attorney's appearance before appellate court was raised for first time at oral argument on appeal, defendant's conviction would be affirmed. D.C. Code §§ 22-2901, 22-3201, 22-3204. *Harling v. United States*, 372 A.2d 1011, 1977 D.C. App. LEXIS 472 (1977).

Counsel for prosecution.

Prosecution's alleged Brady violation, in belatedly disclosing that complaining witness had identified someone other than defendant as the perpetrator, did not require reversal of robbery conviction, where defendant had opportunity to use the information at trial through questioning of complaining witness. *Blunt v. United States*, 863 A.2d 828, 2004 D.C. App. LEXIS 683 (2004).

Trial court, in prosecution of defendant for armed robbery and carrying a pistol without a license, did not err in refusing to order the recusal of the prosecutor. D.C. Code §§ 22-2901, 22-3201, 22-3204. *Harling v. United States*, 372 A.2d 1011, 1977 D.C. App. LEXIS 472 (1977).

Defenses, generally.

Defendant's testimony, in robbery prosecution, that he and codefendant never intended to rob victim, but that he assaulted victim and picked up his wallet only after it had fallen to the ground during their struggle, did not preclude defendant or codefendant from presenting a contradictory defense that they had intended to rob victim, but their robbery attempt had been thwarted by victim and his neighbors before they were able to complete the robbery, as would support an instruction on lesser included offense of attempted robbery. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

Court of Appeals found no manifest error or serious injustice in conviction of defendant for robbing police decoy by stealthy seizure where robbery was witnessed and documented by police surveillance. D.C. Code 1981, § 22-2901.

Noaks v. United States, 486 A.2d 1177, 1985 D.C. App. LEXIS 314 (1985).

Claim of defendant that it was not he but one of his coescapers who held knife used to rob victim fell short of complete defense to charge of armed robbery, since, even assuming defendant used no weapon, the acts of his accomplice in crime could be imputed to him thus making him chargeable as a principal. D.C. Code § 22-105. Jordan v. United States, 350 A.2d 735, 1976 D.C. App. LEXIS 459 (1976).

Discovery.

If urine test had been made upon defendant, who interposed defense of intoxication to robbery charge, Government's lack of knowledge as to bearing of the test upon defendant's condition at the time of the offense, if, in fact, the test might have shed light thereon, would not foreclose inquiry into the obligation of the Government to preserve the evidence or foreclose consideration of sanctions for failure to do so. D.C. Code § 22-2901. United States v. Butler, 499 F.2d 1006, 1974 U.S. App. LEXIS 9149 (C.A.D.C. 1974).

Since, even if urine test which Government had not produced would have convinced jury that defendant as a result of intoxication, did not have requisite intent to commit robbery, there was proof beyond reasonable doubt of lesser included offense of simple assault, which does not require proof of specific intent, defendant would not be entitled to dismissal of indictment even if test were shown to have been made and were shown to have been of potential value to defendant. D.C. Code § 22-2901. United States v. Butler, 499 F.2d 1006, 1974 U.S. App. LEXIS 9149 (C.A.D.C. 1974).

Where record of prosecution arising out of armed robbery showed that informant contacted police, some three weeks after crime, and told them of source and whereabouts of shotgun involved and of alleged conspiracy to murder government's principal witness, but record was otherwise silent as to participation by informant in offense itself, disclosure of identity of informant on pain of dismissal should not have been required. D.C. Code §§ 22-502, 22-2901. United States v. Skeens, 449 F.2d 1066, 1971 U.S. App. LEXIS 9627 (C.A.D.C. 1971).

Government was not guilty of any impropriety in failing to produce photographs of defendants, made on day of arrest, before they were demanded by defense counsel. D.C. Code §§ 22-502, 22-2901, 22-3202. United States v. Trantham, 448 F.2d 1036, 1971 U.S. App. LEXIS 12105 (C.A.D.C. 1971).

In prosecution for robbery, conspiracy to commit robbery, and for carrying a deadly weapon without a license, action of trial court in not requiring production under subpoena of arrest record of a witness for prosecution was not

prejudicial to defendant where police officer testified he had no arrest record of witness by name contained in subpoena and did not know such witness used other names mentioned by him by counsel for defendant, and counsel for defendant did not during trial procure any further subpoena for arrest record of witness under any other name. D.C. Code 1940, §§ 22-2901, 22-3204; 18 U.S.C. § 371. Bundy v. U.S., 193 F.2d 694, 1951 U.S. App. LEXIS 2938 (C.A.D.C. 1951).

Defendant's conviction of kidnapping while armed and armed robbery did not have to be reversed, based on prosecution's alleged failure to provide defense during discovery with certain incriminating statements allegedly made by defendant to police officer; error, if any, was not clear or obvious, and there was no miscarriage of justice. D.C. Code 1981, §§ 22-2101, 22-2901, 22-3202. Quallis v. United States, 654 A.2d 1281, 1995 D.C. App. LEXIS 41 (1995).

In proceeding in which juvenile was adjudged to have committed robbery, even if police officer's notes of an interview with complaining witness constituted a "statement" within purview of Jencks Act, refusal to strike such witness' testimony due to officer's inability to produce such notes was not an abuse of discretion. D.C. Code § 22-2901; 18 U.S.C. §§ 3500, 3500(e)(1, 5). In re A.B.H., 343 A.2d 573, 1975 D.C. App. LEXIS 233 (1975).

Although police who three or four days after purse snatching found the purse should not have returned it to the complaining witness, trial court's ruling that sanctions against prosecution were unwarranted was substantially supported by record and did not constitute an abuse of discretion, even if court had authority to impose sanctions, where the wet and weathered condition of purse would in all likelihood have rendered its surfaces unsusceptible to fingerprint analysis, there was no indication that surfaces were composed of material which would take and retain prints and it was possible that a number of people had handled the abandoned purse in the interim. D.C. Code § 22-2901; D.C. Code SCR, Criminal Rule 16(b, f). Marshall v. United States, 340 A.2d 805, 1975 D.C. App. LEXIS 423 (1975).

Double jeopardy.

Double jeopardy clause prohibits successive prosecutions in the District of Columbia for violations of federal and District of Columbia law arising from the same bank or savings and loan robbery, but it does not require that prosecution under the federal scheme be preferred to prosecution under local statutes, so long as only a single prosecution takes place. 18 U.S.C. § 2113(a); D.C. Code §§ 22-2901, 22-3202. United States v. Shepard, 515 F.2d 1324, 1975 U.S. App. LEXIS 13657 (C.A.D.C. 1975).

Where defendant did not raise at his second trial the issue that his acquittal of armed robbery at first trial was acquittal of unarmed robbery as well, defendant waived the defense of double jeopardy. D.C. Code §§ 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rule 12(b)(2), 18 U.S.C. United States v. Scott, 464 F.2d 832, 1972 U.S. App. LEXIS 8719 (C.A.D.C. 1972).

Where purpose and effect of proceedings in juvenile court were to provide a prompt preliminary hearing in order to set a date for trial, if allegations of petitions were denied, or to continue case pending completion of full social study and recommendations for disposition of child, case had not reached stage at which juvenile's liberty had been placed in jeopardy by his acknowledgment that he held a toy gun during alleged robbery, and when trial judge subsequently waived jurisdiction to district court for trial indictment was not subject to dismissal on ground of double jeopardy. D.C. Code 1951, §§ 11-906(a), 11-908, 11-914, 11-915, 22-2901, U.S. Const. Amend. 5. U.S. v. Dickerson, 271 F.2d 487, 1959 U.S. App. LEXIS 3323 (C.A.D.C. 1959).

"Full investigation" which statute requires before juvenile court can waive jurisdiction to district court includes informal hearings to determine whether to waive jurisdiction and jeopardy does not attach at that point. D.C. Code 1951, §§ 11-906(a), 11-908, 11-914, 11-915, 22-2901, U.S. Const. Amend. 5. U.S. v. Dickerson, 271 F.2d 487, 1959 U.S. App. LEXIS 3323 (C.A.D.C. 1959).

Counts of indictment charging assault with a dangerous weapon (ADW) merged with armed robbery counts for double jeopardy purposes, such that convictions for ADW and for corresponding counts of possession of a firearm during a crime of violence (PFCV) would be vacated. Kaliku v. United States, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Each of defendant's and codefendant's convictions for two counts of armed robbery merged for double jeopardy purposes; robbery of both victim's car and the items it contained was a single criminal act. Bryant v. United States, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Defendants, who were each convicted of three counts of possession of a firearm during a crime of violence (PFCV), were not entitled to have such convictions merged into one conviction to avoid violation of double jeopardy; three PFCV convictions were based upon predicate offenses that required proof of an element that the other did not, and with regard to the PFCV predicate offenses of second degree burglary and armed robbery, defendants had reached a "fork in the road" between their decisions to commit such offenses. Sanders v. United States, 809 A.2d 584, 2002 D.C. App. LEXIS 604 (2002), writ of

certiorari denied by 538 U.S. 937, 123 S. Ct. 1602, 155 L. Ed. 2d 340, 2003 U.S. LEXIS 2425, 71 U.S.L.W. 3610 (2003), remanded by 975 A.2d 165, 2009 D.C. App. LEXIS 241 (D.C. 2009).

More than one armed robbery occurs, for purposes of double jeopardy, where evidence shows that each person was the victim of a robbery because separate acts of violence were required to prevent each of them from retaining control of the property for which they were responsible. Sanders v. United States, 809 A.2d 584, 2002 D.C. App. LEXIS 604 (2002), writ of certiorari denied by 538 U.S. 937, 123 S. Ct. 1602, 155 L. Ed. 2d 340, 2003 U.S. LEXIS 2425, 71 U.S.L.W. 3610 (2003), remanded by 975 A.2d 165, 2009 D.C. App. LEXIS 241 (D.C. 2009).

Consecutive sentences on two armed robbery charges against different victims did not violate the Double Jeopardy Clause. Wei Hua Wu v. United States, 798 A.2d 1083, 2002 D.C. App. LEXIS 294 (2002).

If assault and armed robbery charges are triggered by separate acts, convictions do not merge for double jeopardy purposes. D.C. Code 1981, §§ 22-502, 22-2901, 22-3202; U.S.C. Const.Amend. 5. Simms v. United States, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

Assault with dangerous weapon conviction merged, for double jeopardy purposes, with armed robbery conviction; victim was struck with hard object to quiet him during robbery, perpetrators were still transporting proceeds of robbery, perpetrators had previously threatened victim with bodily harm, and there was no indication that robbery had ended when victim was struck. D.C. Code 1981, §§ 22-502, 22-2901, 22-3202; U.S. Const.Amend. 5. Simms v. United States, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

Defendant's convictions for burglary, premeditated murder, and robbery arising from single criminal transaction did not merge, so as to trigger double jeopardy protection; the three convictions required separate and distinct elements of proof. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-2901, 22-3202; U.S.C. Const.Amend. 5. Bennett v. United States, 620 A.2d 1342, 1993 D.C. App. LEXIS 44 (1993).

Imposing consecutive sentences on defendant convicted of conspiracy to commit robbery and attempted robbery did not violate double jeopardy; each offense required proof of fact that the other did not. D.C. Code 1981, §§ 22-105a, 22-2901, 22-2902, 23-112; U.S.C. Const.Amend. 5. Robinson v. United States, 608 A.2d 115, 1992 D.C. App. LEXIS 122 (1992).

Under Blockburger test, convictions of defendant on charges of armed robbery and kidnapping did not merge and thus defendant was properly sentenced separately on two offenses; armed robbery and kidnapping offenses required proof of element that other did not, given fact that armed kidnapping required

showing that defendant seized or detained victim, whereas armed robbery required showing of taking of property of value. D.C. Code 1981, §§ 22-2901, 22-3815. *Monroe v. United States*, 600 A.2d 98, 1991 D.C. App. LEXIS 332 (1991).

Imposition of separate sentences for robbery and assault with deadly weapon upon defendant who entered bedroom of victim, beat him over the head with beer bottle and robbed him, did not violate double jeopardy. D.C. Code 1981, §§ 22-502, 22-2901; U.S. Const. Amend. 5. *Floyd v. United States*, 538 A.2d 248, 1988 D.C. App. LEXIS 56 (1988).

Effect of proceedings after attachment of jeopardy.

Including evidence wrongfully admitted in violation of the confrontation clause, evidence was sufficient to withstand motion for judgment of acquittal; therefore, the double jeopardy clause did not prevent retrial after conviction was reversed based on the erroneous admission of evidence, in prosecution for felony-murder, armed robbery, and carrying a pistol without a license. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202, 22-3204; U.S. Const. Amends. 5, 6. *Thomas v. United States*, 557 A.2d 599, 1989 D.C. App. LEXIS 61 (1989).

Reinstatement of jury verdict of guilty on charge of armed robbery was not barred by double jeopardy, even though trial court had reduced conviction to petit larceny upon ruling indictment had insufficiently specified crime of armed robbery, where Court of Appeals held that indictment was sufficient as to charge of armed robbery. D.C. Code 1981, §§ 22-2901, 22-3202; Criminal Rules 7(c), 34; U.S. Const. Amend. 5. *United States v. Bradford*, 482 A.2d 430, 1984 D.C. App. LEXIS 505 (1984).

Fair trial.

Atmosphere created in proceeding, in which accused was convicted of armed robbery and possession of a prohibited weapon and in which remarks, better left unsaid, were made, was not such as to deny accused a fair trial or prejudice the defense so as to require a new trial. D.C. Code §§ 22-2901, 22-3202, 22-3214(b). *Dyas v. United States*, 376 A.2d 827, 1977 D.C. App. LEXIS 359 (1977), writ of certiorari denied by 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464, 1977 U.S. LEXIS 4183 (1977).

Harmless or reversible error, generally.

Refusal of bifurcated trial prosecution sought on ground that defendant would defend on ground of want of criminal responsibility was not reversible error where defense assured trial court that there was no defense on merits, and evidence to prove that defendant was one who robbed filling station was very strong. D.C. Code §§ 22-502, 22-2901, 22-3204; U.S. Const. Amend. 5. *United States v. Grimes*, 421 F.2d 1119, 1969 U.S. App. LEXIS 10770 (C.A.D.C.

1969), writ of certiorari denied by 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98, 1970 U.S. LEXIS 1795 (1970).

Any judicial intervention and criticism which occurred in robbery case did not deprive defendant of a fair trial and thus was not reversible error. D.C. Code 1961, § 22-2901. *Wynder v. United States*, 352 F.2d 662, 1965 U.S. App. LEXIS 5103 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 999, 86 S. Ct. 591, 15 L. Ed. 2d 487, 1966 U.S. LEXIS 2730 (1966).

Denial of motion of defendant that court obtain assistance of medical expert to examine witness, who identified defendant as robber, and who allegedly had defective eyesight, and to testify concerning vision of witness was not prejudicial error, where matter of vision of witness was adequately explored on cross-examination, and there was other strong identifying testimony. D.C. Code 1961, § 22-2901; Fed. Rules Crim. Proc. rule 28, 18 U.S.C. *Robinson v. United States*, 318 F.2d 272, 1963 U.S. App. LEXIS 5687 (C.A.D.C. 1963).

Where victims' identification of defendant charged with armed robbery and assault with a dangerous weapon was reliable, where photograph of lineup showed little suggestivity, and where photograph of lineup was introduced into evidence at trial and defense counsel had the opportunity to, and did, argue to the jury that the lineup was suggestive, any error in attorney's failure to represent defendant at lineup due to his being informed that defendant was not in lineup and his failure to recognize defendant in lineup was harmless. D.C. Code §§ 22-502, 22-2901, 22-3202. *Washington v. United States*, 377 A.2d 1348, 1977 D.C. App. LEXIS 382 (1977).

In proceeding in which accused was convicted of armed robbery and possession of a prohibited weapon, trial judge's alleged facial expressions and other outward manifestations of disbelief of a defense witness was not shown to have prejudiced accused, in view of assertion that judge turned away so as to avoid revealing his facial reaction to witness' testimony. D.C. Code §§ 22-2901, 22-3202, 22-3214(b). *Dyas v. United States*, 376 A.2d 827, 1977 D.C. App. LEXIS 359 (1977), writ of certiorari denied by 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464, 1977 U.S. LEXIS 4183 (1977).

Indictment or information.

— Amendment, indictment or information.

Allowing defendant to plead guilty to robbery rather than assault with intent to rob was improper "constructive amendment" of indictment. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct.

2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Trial court did not abuse its discretion by permitting government to change indictment before trial without resubmitting its evidence to grand jury, so as to substitute lesser included offense of assault with dangerous weapon for armed robbery and assault with intent to commit armed robbery, as indictment was narrowed, rather than broadened, where, from time they were indicted, defendants were on notice that they needed to defend against all lesser included offenses of armed robbery and of assault with intent to commit robbery. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202; U.S. Const. Amend. 5. *Williams v. United States*, 641 A.2d 479, 1994 D.C. App. LEXIS 68 (1994).

Conviction of armed robbery defendant as aider and abettor did not constitute constructive amendment or variance of indictment, which charged him as principal. D.C. Code 1981, § 22-105. *Ingram v. United States*, 592 A.2d 992, 1991 D.C. App. LEXIS 156 (1991), writ of certiorari denied by 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757, 1991 U.S. LEXIS 7189, 60 U.S.L.W. 3435 (1991).

— Description of property, indictment or information.

In robbery prosecution, it was not necessary for the government either to describe in detail in either indictment or proof the number of coins, bills, notes, items of currency or bonds taken or face value of each or date of issue or numbers thereof or other special identifying features. D.C. Code 1929, T. 6, §§ 34, 362. *Neufeld v. U.S.*, 118 F.2d 375, 1941 U.S. App. LEXIS 4014 (1941).

— Different offense included in offense charged, indictment or information.

Assault with a dangerous weapon was lesser included offense of armed robbery. D.C. Code §§ 22-2901, 22-3202. *United States v. Diggs*, 522 F.2d 1310, 1975 U.S. App. LEXIS 12115 (C.A.D.C. 1975).

An assault with a dangerous weapon on the victim of an armed robbery is lesser offense included within robbery offense and does not support a separate conviction. D.C. Code §§ 22-502, 22-2901, 22-3202(a). *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

Assaults of bank tellers with dangerous weapons were lesser included offenses of armed robberies of tellers and defendants could not be convicted of both the robberies and the assaults. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Cooper*, 504 F.2d 260, 1974 U.S. App. LEXIS 6885 (C.A.D.C. 1974).

Whether unlawful entry is lesser included offense with respect to any particular crime that is charged depends not solely upon com-

parison of statutory requirements for respective crimes but also upon analysis of facts of offense as charged in each indictment and as proved at trial. D.C. Code §§ 22-502, 22-1801(a, b), 22-2901, 22-3101, 22-3202. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Under District of Columbia statute assault with a dangerous weapon is a lesser included offense of robbery while armed. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Johnson*, 475 F.2d 1297, 1973 U.S. App. LEXIS 11465 (C.A.D.C. 1973).

Larceny is a necessarily included offense of robbery. D.C. Code §§ 22-2201, 22-2901. *Walker v. United States*, 418 F.2d 1116, 1969 U.S. App. LEXIS 12640 (C.A.D.C. 1969).

Offense of assault with dangerous weapon was not necessarily included in indictment charging robbery. Fed. Rules Crim. Proc. rule 31(c), 18 U.S.C.; D.C. Code 1961, §§ 22-502, 22-2901; U.S. Const. Amend. 5. *Crosby v. United States*, 339 F.2d 743, 1964 U.S. App. LEXIS 3783 (C.A.D.C. 1964).

Theft is lesser-included offense of robbery. *Leak v. United States*, 757 A.2d 739, 2000 D.C. App. LEXIS 183 (2000), writ of certiorari denied by 534 U.S. 1054, 122 S. Ct. 644, 151 L. Ed. 2d 562, 2001 U.S. LEXIS 10829, 70 U.S.L.W. 3372 (2001).

Taking property without right is a lesser included offense of robbery inasmuch as larceny is a lesser included offense of robbery and taking property without right is a lesser included offense of larceny. D.C. Code 1981, §§ 22-2901, 22-3811, 22-3812, 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Armed robbery was not transformed into lesser included offense of larceny simply because defendant had confronted victim and frightened him into fleeing before property was removed from victim's truck. D.C. Code § 22-2901. *Rouse v. United States*, 402 A.2d 1218, 1979 D.C. App. LEXIS 371 (1979).

Assault with a deadly weapon is not necessarily included within robbery; presumably, however, assault with a deadly weapon may be included within armed robbery. D.C. Code §§ 22-2901, 22-3202. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

Petit larceny is clearly a lesser included offense of robbery. D.C. Code §§ 22-2202, 22-2901. *Dublin v. United States*, 388 A.2d 461, 1978 D.C. App. LEXIS 529 (1978).

Where defendant was charged with entry into the dwelling of another person, with armed robbery of that person, assault with intent to commit robbery while armed as to the person's companion, and with assault with a dangerous weapon against each of two eyewitnesses to the crime, none of the crimes was a lesser included offense. D.C. Code §§ 22-501, 22-1801(a), 22-

2901, 22-3202. *Dublin v. United States*, 388 A.2d 461, 1978 D.C. App. LEXIS 529 (1978).

Armed robbery can be committed without also violating statute prohibiting possession of certain weapons; thus, possession of prohibited weapon is not lesser included offense of crime of armed robbery. D.C. Code §§ 22-2901, 22-3202, 22-3202(a), 22-3214(b). *Washington v. United States*, 366 A.2d 457, 1976 D.C. App. LEXIS 408 (1976).

Crime of assault with a dangerous weapon is a lesser included offense within the crime of armed robbery and where defendant was sentenced upon conviction of both crimes, sentence on crime of assault with a dangerous weapon was vacated. D.C. Code §§ 22-502, 22-2901, 22-3202. *Skinner v. United States*, 310 A.2d 231, 1973 D.C. App. LEXIS 372 (1973).

— Force and putting in fear, indictment or information.

Allegation in robbery indictment that defendants were armed with pistol then held in hands of named defendant was proper and not prejudicial to accused. D.C. Code 1929, T. 6, § 34. *Tomlinson v. U.S.*, 93 F.2d 652, 1937 U.S. App. LEXIS 2887 (1937).

— Harmless or reversible error, indictment or information.

In view of clear evidence that defendant aided and abetted his confederate who was armed with a gun, any error concerned with alleged prolixity of indictment which charged both armed robbery and robbery, or any other claim of defect in presentation of two theories of robbery to jury, was harmless. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Porcha*, 450 F.2d 697, 1971 U.S. App. LEXIS 8068 (C.A.D.C. 1971).

Omission from robbery indictment of language in statute that property was taken by a "sudden or stealthy seizure or snatching" would not warrant reversal of conviction where no showing was made that such omission resulted in denial of a substantial right to defendant. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 359 F.2d 260, 1966 U.S. App. LEXIS 6620 (C.A.D.C. 1966), writ of certiorari denied by 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104, 1966 U.S. LEXIS 994 (1966).

Robbery conviction will not be reversed on grounds there was a variance between indictment and proof where there was no objection to introduction of variant evidence and there was no showing or claim of actual prejudice. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 359 F.2d 260, 1966 U.S. App. LEXIS 6620 (C.A.D.C. 1966), writ of certiorari denied by 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104, 1966 U.S. LEXIS 994 (1966).

Defendant was not prejudiced by constructive amendment to indictment that occurred

when he entered guilty plea to robbery rather than charged offense of assault with intent to rob, and thus that constructive amendment was not "plain error"; penalties for the two offenses were identical, defendant received maximum sentence available under either statute, and defendant's version of charged incident admitted conduct that constituted assault with intent to commit robbery as an aider or abettor. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Misjoinder of robbery counts with burglary counts in violation of rule was not harmless error in that it was likely that misjoinder prejudiced defendants' chances of acquittal on each charge because juxtaposition of the weaker burglary defense of innocent presence with comparatively stronger robbery defense of temporary voluntary exchange may well have damaged defendants. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-2901; Criminal Rules 8, 8(a), b). *Ray v. United States*, 472 A.2d 854, 1984 D.C. App. LEXIS 319 (1984).

— In general.

The government may decline to charge armed robbery under statute authorizing an indeterminate sentence up to life for crimes of violence when committed with a dangerous weapon and may instead rely on prior formulation of robbery and assault with a dangerous weapon. D.C. Code § 22-3202. *Sutton v. United States*, 434 F.2d 462, 1970 U.S. App. LEXIS 7650 (C.A.D.C. 1970), writ of certiorari denied by 402 U.S. 988, 91 S. Ct. 1676, 29 L. Ed. 2d 153, 1971 U.S. LEXIS 2094 (1971).

An indictment, in a single count, charging robbery, "by force and violence, and against resistance, and by putting in fear, and by sudden and stealthy seizure and snatching," was sufficient to support conviction, as against objection that it charged no offense. D.C. Code 1929 T. 6, § 34. *Tomlinson v. U.S.*, 93 F.2d 652, 1937 U.S. App. LEXIS 2887 (1937).

Indictment provided fair notice of charge of conspiracy to commit armed robbery, though it did not refer to statute defining conspiracy to commit crimes, where indictment alleged that defendant and two accomplices knowingly conspired and agreed to commit together criminal offenses, that object of conspiracy was to rob victim while armed, and that named conspirators committed overt acts including arming themselves, searching out intended victim, breaking into victim's apartment, and forcing victim to ride with them to his apartment for purpose of committing armed robbery. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Armed robbery indictment sufficiently set forth all elements of the offense, although statutory language regarding "force or violence" or "putting in fear" was not employed, where indictment stated that taking was done by defendant, and another, while armed with a dangerous weapon, alleged property was taken from the person and from immediate actual possession of the victim, the words "armed robbery" appeared twice in the indictment in the caption and parenthetical reference, and caption and parenthetical also informed defendant that he was charged with violating robbery statute. D.C. Code 1981, §§ 22-2901, 22-3202; Criminal Rules 7(c), 34. *United States v. Bradford*, 482 A.2d 430, 1984 D.C. App. LEXIS 505 (1984).

Where indictment charged defendant with robbery while armed with a dangerous weapon, and proof adduced at trial showed that he was so armed, court's instruction that defendant could be convicted if jury found that he was armed with any pistol or firearm or imitation thereof was not objectionable as amending indictment but merely explained charges contained therein more fully than did indictment itself and, absent any claim of prejudice by claimed variance, instruction was not erroneous. D.C. Code §§ 22-2901, 22-3202; D.C. Code SCR, Criminal Rule 7(c). *Meredith v. United States*, 343 A.2d 317, 1975 D.C. App. LEXIS 225 (1975).

Robbery indictment should state offense charged more precisely rather than by setting forth omnibus statutory provision under which defendant is charged. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 348 F.2d 772, 1965 U.S. App. LEXIS 5354 (C.A.D.C. 1965).

Robbery is a lesser included offense of armed robbery. D.C. Code 1981, §§ 22-2901, 22-3202. *Anderson v. United States*, 490 A.2d 1127, 1985 D.C. App. LEXIS 362 (1985).

— Intent, indictment or information.

Element of specific intent should be clearly stated in robbery indictment. *Jackson v. United States*, 348 F.2d 772, 1965 U.S. App. LEXIS 5354 (C.A.D.C. 1965).

Robbery count of indictments charging that defendants by force and violence and against resistance and by putting in fear stole and took from specified person certain specified property was sufficient to charge robbery under District of Columbia statute, contrary to claim of defendants that it failed to allege all the material and necessary elements of robbery; use of word "stole" put defendants on notice that specific intent was an element of crime with which they were charged. *United States v. Owens*, 332 A.2d 752, 1975 D.C. App. LEXIS 312 (1975).

— Issues, proof, and variance, indictment or information.

Under an indictment for robbery, Government must prove assault and larceny. D.C.

Code §§ 22-2901, 22-3201, 22-3202. *United States v. McGill*, 487 F.2d 1208, 1973 U.S. App. LEXIS 7109 (C.A.D.C. 1973).

There was no fatal variance between count which charged that defendant took money from the "immediate actual possession" of post office custodian and proof that money he took was taken from postal employees, where evidence showed that custodian had control and custody of money taken, that defendant took money from an area within which the custodian reasonably could have been expected to exercise some physical control, and that defendant did so by force directed at the custodian personally. D.C. Code §§ 22-2901, 22-3202. *United States v. Spears*, 449 F.2d 946, 1971 U.S. App. LEXIS 11849 (C.A.D.C. 1971).

In prosecution for carrying unlicensed pistol and for increased punishment by reason of recidivism, defense counsel's concession, in bail application, that defendant had been convicted of robbery in 1957 was insufficient proof, for purpose of sentencing under recidivist statute, that defendant had been convicted of robbery in 1958 as charged by government. D.C. Code §§ 22-2901, 22-3204. *United States v. Clemons*, 440 F.2d 205, 1970 U.S. App. LEXIS 6320 (C.A.D.C. 1970), writ of certiorari denied by 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227, 1971 U.S. LEXIS 3030 (1971).

Evidence that over \$9,000 was taken at time of robbery of bank, that \$3,304.23 was taken from cash drawer of a named teller, that remainder was taken from cash drawers of other tellers, that each teller was responsible for his own money, and that money in drawer of each teller could be handled only by him, sustained indictment charging that defendants took from the person and from the immediate, actual possession of the named teller a certain sum of money, to wit \$9,021 in money, and there was no "variance", as against contention that the money in the teller's drawer was not in his "possession" within robbery statute, but was in possession of bank or of officer in charge of the bank. D.C. Code 1929, T. 6, § 34. *Neufield v. U.S.*, 118 F.2d 375, 1941 U.S. App. LEXIS 4014 (1941).

Variance between indictment and proof, as to ownership of property in robbery, is not material, so long as offense is otherwise described with sufficient certainty to identify the act of robbery and to establish that the property was in the immediate actual possession of the person robbed. D.C. Code 1951, § 22-2901. *U.S. v. Mann*, 119 F.Supp. 406, 1954 U.S. Dist. LEXIS 4397 (D.D.C.1954).

Defendant was not convicted of a different crime than that charged in indictment, which specifically alleged that a pistol was involved in the commission of the armed robbery, despite trial judge's failure to include pistol-specific language in his instructions; although instruc-

tions allowed jury to convict defendant if they found that he possessed any "dangerous weapon," there was sufficient testimony regarding defendant's possession of pistol and absolutely no testimony regarding any other type of weapon. *Maddox v. United States*, 745 A.2d 284, 2000 D.C. App. LEXIS 15 (2000).

Proof that defendant drove vehicle in which robbers attempted to flee robbery scene immediately after the offense was committed established, if anything, that defendant was a principal, rather than an accessory after fact of robbery which was charged, and, given fundamental dissimilarity between the offense charged and that arguably proved, reversal of conviction for accessory after the fact was warranted. *Williams v. United States*, 478 A.2d 1101, 1984 D.C. App. LEXIS 469 (1984).

Even assuming that a brown manila envelope, per se, was property of value so as to sustain a conviction of robbery under indictment charging defendant with taking property of value consisting of a brown envelope containing money and, hence, that use of hearsay testimony to establish that envelope contained \$6,000 cash was unnecessary, the variance between the proof and charge would be fatal. D.C. Code § 22-2901. *Harrison v. United States*, 407 A.2d 683, 1979 D.C. App. LEXIS 465 (1979).

Proof of ownership of the stolen property was not required to sustain convictions of armed robbery. D.C. Code §§ 22-2901, 22-3202. *Jones v. United States*, 362 A.2d 718, 1976 D.C. App. LEXIS 349 (1976).

— Joinder of parties or trial, indictment or information.

Where assault with intent to rape committed against two women and purse snatching committed against third woman occurred within short time of each other and in approximately the same location but were not otherwise related, the mere temporal and spacial proximity could not justify characterization of the assault and robbery as different parts of the same series of acts or transactions and joinder of the robbery count with the other charges was improper and conferred upon the district court no jurisdiction over the alleged D.C. Code offense of robbery. 26 U.S.C. (I.R.C.1954) § 5861(d, i); D.C. Code §§ 22-501, 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 8, 8(b), 14, 18 U.S.C.; 18 U.S.C. § 5010(b). *United States v. Jackson*, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

The Government may properly charge in the same indictment offenses against both the federal bank (savings and loan) robbery statute and the District of Columbia armed robbery statute, provided defendant is not ultimately sentenced under two statutes proscribing essentially the same offense. 18 U.S.C. § 2113(a); D.C. Code §§ 22-2901, 22-3202. *United States*

v. Shepard, 515 F.2d 1324, 1975 U.S. App. LEXIS 13657 (C.A.D.C. 1975).

Robbery count charging defendants with taking money, the property of grocery store, and pistol, the property of security guard was not duplicitous but rather charged that one person, the guard, was robbed of the pistol and the money he was guarding, and, in any event, defendants waived any defect by not protesting before trial. D.C. Code §§ 22-2901, 22-3204. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Where offenses of robbery, assault with dangerous weapon, assault on member of police force, unauthorized use of vehicle, and carrying dangerous weapon were based on two or more connected acts constituting part of common scheme and plan, defendants were alleged to have participated in same series of acts constituting offenses and each of defendants aided and abetted offenses charged against other defendants, it was proper for grand jury to join defendants and offenses in the indictment. D.C. Code §§ 22-502, 22-505(a), 22-2204, 22-2901, 22-3204; Fed.Rules Crim.Proc. rule 8(a, b), 18 U.S.C. *United States v. Wilson*, 434 F.2d 494, 1970 U.S. App. LEXIS 8760 (C.A.D.C. 1970).

Crimes of robbery and of attempted robbery are similar in nature and joinder in indictment is permissible. D.C. Code 1961, §§ 22-2901, 22-2902; Fed.Rules Crim.Proc. rule 8(a), 18 U.S.C. *Drew v. United States*, 331 F.2d 85, 1964 U.S. App. LEXIS 6404 (C.A.D.C. 1964).

Where defendant, with two others, was charged with robbery in one count of indictment which included a separate count charging the other two persons with another robbery committed the day before and the two counts and the three defendants were tried at same time, there was no reversible error in joinder of defendants and counts or in joint trial, inasmuch as counsel for defendant quite deliberately, after mature consideration extending over a weekend which intervened during the trial, and after the trial judge had suggested severance, deemed it prudent from standpoint of his client to proceed with the trial and so advised the court. D.C. Code 1951, § 22-2901; Fed.Rules Crim.Proc. rules 8, 14, 18 U.S.C. *Wynn v. U.S.*, 275 F.2d 648, 1960 U.S. App. LEXIS 5345 (C.A.D.C. 1960).

Counts of housebreaking and robbery, to which petitioner pleaded guilty, charged independent crimes, since housebreaking count charged and made necessary proof of entry of dwelling with intent to steal property but proof of entry was not essential to robbery count, whereas robbery charge required proof of taking in particular manner of something of value from victim's person or immediate actual possession, facts that were not essential elements of housebreaking. D.C. Code 1961, §§ 22-1801, 22-2901. *Irby v. United States*, 250 F. Supp.

983, 1965 U.S. Dist. LEXIS 6690 (D.D.C.1965), affirmed by 390 F.2d 432, 129 U.S. App. D.C. 17, 1967 U.S. App. LEXIS 4497 (1967).

Offenses of unauthorized use of a motor vehicle, robbery, and armed robbery were of same or similar character and thus could be joined for trial; crimes were against owner's right of possession, and additional elements distinguishing robbery offenses from unauthorized use of motor vehicle did not undercut degree of similarity. Criminal Rule 8(a); D.C. Code 1981, §§ 22-2901, 22-3202, 22-3815. *Gooch v. United States*, 609 A.2d 259, 1992 D.C. App. LEXIS 128 (1992).

Offenses of robbery, armed robbery, and unauthorized use of motor vehicle could be joined for trial on basis that they were "connected together" in light of evidence that proceeds of robbery were found in trunk of vehicle stolen several days earlier. Criminal Rule 8(a); D.C. Code 1981, §§ 22-2901, 22-3202, 22-3815. *Gooch v. United States*, 609 A.2d 259, 1992 D.C. App. LEXIS 128 (1992).

Robbery counts should not have been tried jointly with burglary counts, and joinder of those counts was violative of rule governing joinder of defendants, where offenses were not directed toward the common goal of obtaining property from others, no evidence was produced that the robbery necessarily led to or caused the burglary, and proof of one did not necessarily overlap substantially upon the other since one crime was stealing coats from acquaintances and other crime was breaking into an empty gas station. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-2901; Criminal Rules 8, 8(a, b). *Ray v. United States*, 472 A.2d 854, 1984 D.C. App. LEXIS 319 (1984).

The two armed robberies with which defendant was charged and which were closely related in time and place were of the same or similar character within meaning of rule permitting initial joinder in single indictment of offenses which are of same or similar character and were therefore properly joined. D.C. Code § 22-2901; D.C. Code SCR, Criminal Rule 8(a). *Winestock v. United States*, 429 A.2d 519, 1981 D.C. App. LEXIS 253 (1981).

Where rape and robbery victims were prostitutes who were abducted or induced into getting into defendant's car in very early hours of morning, and each victim described the car, in varying degrees of particularity consistent with defendant's as a dark blue 1970 Thunderbird, and where circumstances of crime were similar but each crime was separate and distinct, joinder of counts against defendant did not work any prejudice. D.C. Code §§ 22-501, 22-2401, 22-2801, 22-2901, 22-3202, 22-3502. *Bowyer v. United States*, 422 A.2d 973, 1980 D.C. App. LEXIS 385 (1980).

Where each of two robberies was committed with sawed-off rifle, each involved as victim a

delivery truck driver who collected money after each delivery, each driver forced into truck and driven or made to drive to another location while the money was taken from him, the two offenses occurred within five days of each other and, when defendant was removed from police car after arrest, a revolver was found beside seat on side where he had been sitting, joinder of the two robbery charges and charge of carrying dangerous weapon was proper. 18 U.S.C. § 5010(c); D.C. Code §§ 22-502, 22-2901 to 22-3202. *Goins v. United States*, 353 A.2d 298, 1976 D.C. App. LEXIS 490 (1976).

— Juvenile proceedings, indictment or information.

Delinquency adjudications of juvenile defendant for assault and assault with intent to commit robbery, stemming from his participation in gang attack upon pedestrian who was knocked unconscious and whose pockets were searched as he lay unconscious, were both based solely on first count of two-count petition that charged him, first, with armed robbery and second, with armed assault with intent to kill; second charge could only have referred to shooting of victim by another gang member that occurred a brief but appreciable time after group attack, and given lack of evidence that defendant was involved in that shooting at all, and failure of trial court to mention shooting in its findings of fact, adjudication of delinquency against defendant was not based on that incident. D.C. Code 1981, §§ 22-501, 22-504, 22-2901, 22-3202. *In re T.H.B.*, 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

— Ownership and possession of property, indictment or information.

Under indictment charging that defendants took from the possession of named individual money and property of bank, it would be presumed that the individual's possession of the money and property was lawful, and it was not necessary to charge in the indictment that the individual was servant of bank so that it would appear from the averments that his possession was lawful. D.C. Code 1929, T. 6, § 34. *Neufield v. U.S.*, 118 F.2d 375, 1941 U.S. App. LEXIS 4014 (1941).

Ownership of property alleged to have been subject of robbery, need be alleged in indictment only to show that property was in some one else other than accused and to describe the property taken. D.C. Code 1951, § 22-2901. *U.S. v. Mann*, 119 F.Supp. 406, 1954 U.S. Dist. LEXIS 4397 (D.D.C.1954).

An indictment for forcibly taking bank notes from another must state whose property they were. *U.S. v. McNemara*, 26 F.Cas. 1132, 1812 U.S. App. LEXIS 516 (1812).

Insanity, incapacity, or incompetency.

Where pretrial examination had resulted in certification by hospital staff of competency and

superior court judge after hearing had reached like result, district judge was not required to direct, *sua sponte*, further hearing on competency in prosecution for assault with intent to commit rape, and for robbery. D.C. Code §§ 22-501, 22-2801, 22-2901. *United States v. Tremble*, 470 F.2d 1272, 1972 U.S. App. LEXIS 6814 (C.A.D.C. 1972).

1963 robbery conviction was not invalid on ground that, since defendant had been committed to hospital following his 1961 acquittal by reason of insanity, district court was without jurisdiction to try him, in absence of hearing to determine his competency to stand trial in 1963, where prior to both 1961 and 1963 trials defendant was referred to hospital for mental examination resulting, in both instances, in certification by hospital that he was competent to stand trial, and 1963 certification was not objected to by either defendant or government. D.C. Code 1961, §§ 22-2901, 24-301, 24-303. *Green v. United States*, 351 F.2d 198, 1965 U.S. App. LEXIS 5155 (C.A.D.C. 1965).

Statement by attorney for accused in open court with all parties represented that the defense would like to have psychiatrist appointed for accused and that accused's father wanted to testify as to accused's mentality, and that accused had been in asylum, was sufficient as oral motion for examination of mental competency prior to trial, and when neither entertained by court nor required to be placed in writing was permitted to be made orally within federal rule concerning motions, and was sufficient to invoke statute giving right to examination. 18 U.S.C. §§ 2114, 4244; D.C. Code 1940, §§ 22-2901; Fed.Rules Crim.Proc. Rule 47. *Perry v. U.S.*, 195 F.2d 37, 1952 U.S. App. LEXIS 2901 (C.A.D.C.1952).

Instructions.

— Applicability to issues and evidence, instructions.

Trial court properly instructed that defendant's exclusive possession of property recently stolen from robbery victims afforded basis for permissible inference that defendant was one of the robbers unless that possession was satisfactorily explained by the evidence even though prosecution had eyewitness testimony regarding the defendant's acquisition of the property which directly conflicted with explanatory testimony produced by defense. U.S. Const. Amend. 4; D.C. Code § 22-2901. *Pendergrast v. United States*, 416 F.2d 776, 1969 U.S. App. LEXIS 9121 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243, 1969 U.S. LEXIS 1562 (1969).

In prosecution for crimes of robbery, where witness stated that some time after robbery defendant had given him an envelope and asked him to keep it for him and subsequently

envelope was given to police officer and found to contain a pawn ticket showing that a diamond ring had been pawned and complaining witness testified that defendant had forcibly taken ring from his finger, judge properly gave standard charge on subject of possessing recently stolen property despite contention that evidence only permitted an inference of possession of recently stolen property. *McGill v. U.S.*, 270 F.2d 329, 1959 U.S. App. LEXIS 3402 (C.A.D.C. 1959).

In prosecution for armed robbery, defendant was not entitled to instruction on the lesser offense of robbery in light of exculpatory defense he presented and testimony of two eyewitnesses who identified defendant as the individual they saw standing next to victim only a moment after the shooting and testimony of expert that victim was shot from 12 inches away. D.C. Code 1981, §§ 22-2901, 22-3202. *Anderson v. United States*, 490 A.2d 1127, 1985 D.C. App. LEXIS 362 (1985).

In robbery prosecution, there was no error in instruction that it was necessary to establish the property was "taken by force or violence, whether against resistance or by sudden and stealthy seizure or snatching or by putting in fear," despite contention that by including alternative of stealthy seizure the trial court constructively amended the indictment to conform to the evidence, where there was evidence that the money was taken against resistance and by putting in fear during the course of a struggle, though victim neither saw nor felt the money being taken. D.C. Code § 22-2901. *Devone v. United States*, 401 A.2d 971, 1979 D.C. App. LEXIS 356 (1979), writ of certiorari denied by 444 U.S. 876, 100 S. Ct. 160, 62 L. Ed. 2d 104, 1979 U.S. LEXIS 3158 (1979).

Trial judge properly refused to instruct jury on purported lesser included offense of receiving stolen property, in prosecution for armed robbery, in absence of basis for conviction of receiving stolen property. *Irby v. United States*, 342 A.2d 33, 1975 D.C. App. LEXIS 414 (1975).

Jury instruction that provided that the crime of robbery would be established if defendant "took or kept [the victim's rifle] by using force or violence" was proper and did not modify the offense and omit the requirement that government establish that defendant took the gun by the use of actual or threatened use of force; defendant cocked the gun and threatened to kill victim almost immediately after defendant took the gun under the pretense that he would buy it, defendant's intimidation of the victim with the gun prevented any resistance by victim, and defendant ordered the victim outside, where he shot and killed him. *Jacobs v. United States*, 861 A.2d 15, 2004 D.C. App. LEXIS 582 (2004), vacated by 886 A.2d 510, 2005 D.C. App. LEXIS 545 (D.C. 2005).

— Attempts and assaults, instructions.

Armed robbery defendant was not entitled to instruction on lesser-included offense of as-

sault, as there was no dispute that store was robbed at gunpoint, and critical issue was identity of the robber. *Bell v. United States*, 950 A.2d 56, 2008 D.C. App. LEXIS 264 (2008).

Instruction on testimony of an accomplice did not validate or endorse government's position that case involved criminal associates, and thus instruction was proper, in prosecution for felony murder, attempted armed robbery, and related weapons offenses; trial court, in giving instruction, twice referred to "alleged accomplice" rather than simply "accomplice," which was plain reference to government's theory that defendant and alleged accomplice had jointly set out to rob victim, and instruction did not endorse government's theory, but rather, in context, gave jury message to scrutinize carefully the testimony of one who had implicated defendant in crime along with himself. *Byrd v. United States*, 870 A.2d 71, 2005 D.C. App. LEXIS 47 (2005).

Codefendants were not entitled to jury instruction on attempted robbery, as lesser-included offense of robbery, even if jury credited one codefendant's testimony that he merely picked up victim's wallet from the ground, where it was undisputed that codefendant took possession of victim's wallet, and jury would have to convict on the greater charge of robbery if it found the requisite intent to rob, otherwise it would have to acquit on either the greater or the lesser-included charge. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

In prosecution for first-degree felony-murder, second-degree murder, armed robbery, and robbery, evidence provided no rational basis for a lesser charge of assault with a deadly weapon, or simple assault, and court was not required to put case to jury on basis that essentially indulged and even encouraged speculations as to bizarre reconstruction. D.C. Code §§ 22-2401, 22-2901, 22-3202. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

Trial court in prosecution for assault with intent to commit robbery did not err in defining assault as an attempt or effort with force or violence to do injury to person of another, coupled with the "apparent present ability" to carry out such attempt or effort. D.C. Code § 22-501. *Anthony v. United States*, 361 A.2d 202, 1976 D.C. App. LEXIS 334 (1976).

— Definitions of offense, instructions.

Jury was adequately instructed as to interstate nexus element of Hobbs Act charge, as required to convict defendant of aiding and abetting Hobbs Act robbery, where jury was clearly instructed not to return guilty verdict on Hobbs Act count unless it could find that robbery actually affected interstate commerce, and testimony describing restaurant's pattern of interstate transactions elucidated meaning

of this concept. 18 U.S.C. §§ 2, 1951(a), (b)(3). *United States v. Harrington*, 108 F.3d 1460, 1997 U.S. App. LEXIS 5476 (C.A.D.C. 1997).

In prosecution for aiding and abetting Hobbs Act robbery, trial court adequately instructed jury as to interstate commerce element of Hobbs Act count, by referring to codefendant's robbery of restaurant's manager, rather than of restaurant itself; it was abundantly clear that money was not manager's personal property, and it was not plain error to decline to instruct jury against making this unlikely inference. 18 U.S.C. §§ 2, 1951(a), (b)(3). *United States v. Harrington*, 108 F.3d 1460, 1997 U.S. App. LEXIS 5476 (C.A.D.C. 1997).

— Grade or degree of offense, instructions.

In robbery prosecution of pickpocket who allegedly took wallet from purse of lady in line of people outside White House grounds waiting to gain entrance to observe children's annual Easter egg roll, denial of request to instruct jury on lesser included offense of larceny was not abuse of discretion. D.C. Code § 22-2901. *Davis v. United States*, 433 F.2d 1222, 1970 U.S. App. LEXIS 8424 (C.A.D.C. 1970).

Evidence that defendant, who held victim, and his companion, who searched victim, whom they thought had robbed the companion some days before, were merely searching for weapons, was sufficient to permit a possible verdict of assault by defendant while his companion was searching for weapons, and court, in prosecution on charge of assault with intent to commit robbery, should have given charge on lesser included offense of simple assault. *Young v. U.S.*, 309 F.2d 662, 1962 U.S. App. LEXIS 3894 (C.A.D.C. 1962).

Defendant's testimony that he participated in the crimes because he was instructed to do so at gunpoint by his cousin, and that he was afraid of his cousin because "he's shot at people," warranted instruction on the defense of duress, in prosecution for armed robbery, kidnapping while armed, assault, and burglary. *McClam v. United States*, 775 A.2d 1100, 2001 D.C. App. LEXIS 138 (2001).

Jury finding of guilt on lesser-included offense of theft without finding of guilt on robbery charge would have irrationally ignored meaning of "immediate actual possession" within robbery statute or would have reflected bizarre reconstruction of the evidence, and thus, robbery defendant was not entitled to instruction on lesser-included offense of theft; when defendant took bike, owner was approximately two feet away, and bike was within owner's immediate actual possession, at least where owner was aware of attempted taking in setting of force and violence. *Leak v. United States*, 757 A.2d 739, 2000 D.C. App. LEXIS 183 (2000), writ of certiorari denied by 534 U.S. 1054, 122

S. Ct. 644, 151 L. Ed. 2d 562, 2001 U.S. LEXIS 10829, 70 U.S.L.W. 3372 (2001).

Defendant was not entitled to jury instruction on lesser included offense of robbery, in armed robbery prosecution, on theory jury could have concluded defendant's part in robbery ended before codefendant assaulted victim with pipe or on theory defendant had withdrawn from robbery at that time by yelling "stop" as codefendant was assaulting victim with pipe. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

Where defendant did not contend that property had not been stolen from victim's immediate actual possession but maintained, rather, that jury could have found that because he was acting under duress when he took goods from victim, he was not legally responsible for stealing property from victim's immediate actual possession, and further suggested that jury might have believed that he participated only at later point in time by keeping goods or helping to dispose of them, taking advantage of a *fait accompli*, defendant could only have been convicted of acting as accessory after the fact of robbery or of aiding and abetting original offense, and thus defendant was not entitled to requested lesser-included offense instruction on larceny. *Rease v. United States*, 403 A.2d 322, 1979 D.C. App. LEXIS 402 (1979).

Trial court did not err when, in prosecution for attempted robbery, it refused to instruct jury that disorderly conduct was lesser included offense of crime charged. D.C. Code §§ 22-1121(4), 22-2901, 22-2902. *Hawkins v. United States*, 399 A.2d 1306, 1979 D.C. App. LEXIS 326 (1979).

Where there was no evidence creating factual dispute as to element of robbery victim being put in fear, lesser offense instruction on petit larceny was not warranted as larceny was not fairly inferable from the evidence in prosecution for robbery. D.C. Code §§ 22-2202, 22-2901. *Dublin v. United States*, 388 A.2d 461, 1978 D.C. App. LEXIS 529 (1978).

Where testimony of robbery victim that robbers were armed was unequivocal and uncontradicted, and defendant's defense did not place this fact in dispute, instruction on lesser-included offense of robbery, given to jury in prosecution for armed robbery, was improper, that is, had indictment charged only armed robbery, and had defense requested instruction on lesser-included offense of robbery, trial court would properly have refused request on ground that instruction was objectionable as based on speculation without foundation in evidence. D.C. Code §§ 22-2901, 22-3202. *Lightfoot v. United*

States, 378 A.2d 670, 1977 D.C. App. LEXIS 242 (1977).

— Harmless or reversible error, instructions.

Assuming that failure of trial judge to inform defendant's counsel of larceny charge before he summed up constituted error, in situation where defendant was indicted for robbery and assault with a deadly weapon, such failure lacked the prejudice necessary to constitute reversible error where, *inter alia*, defendant's admission in open court established his intention and attempt to trick complainants, so that damage was done when defendant took the stand and it was not likely that any variation in summation would have changed the verdict. D.C. Code §§ 22-502, 22-2201, 22-2901; Fed. Rules Crim. Proc. rule 30, 18 U.S.C. Walker v. *United States*, 418 F.2d 1116, 1969 U.S. App. LEXIS 12640 (C.A.D.C. 1969).

Failure to give jury an instruction on specific intent element of crime of robbery constituted reversible error. *Liles v. United States*, 393 F.2d 669, 1967 U.S. App. LEXIS 4514 (C.A.D.C. 1967).

Convictions of two of three defendants for robbery sustained on grounds that evidence was sufficient and minor misstatements in instructions did not affect substantial rights. *Cooper v. United States*, 357 F.2d 274, 1966 U.S. App. LEXIS 7352 (C.A.D.C. 1966).

Instruction in robbery prosecution, wherein there was no direct evidence that complaining witness' wallet had been stolen but witness testified that he had felt a slight jostle and had been told that two people were running down street, that verdict would be relatively simple to arrive at once jury decided which of witnesses were telling truth, was plain error requiring reversal, there being no instruction that different inferences might be drawn from complaining witness' testimony even if it were believed. D.C. Code 1961, § 22-2901; Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. *Miller v. United States*, 320 F.2d 767, 1963 U.S. App. LEXIS 4967 (C.A.D.C. 1963).

Trial court's instructions in prosecution for armed robbery of a senior citizen, which permitted jury to convict defendant on both lesser-included offenses of robbery of a senior citizen and assault with a dangerous weapon (ADW) even if they acquitted defendant of greater armed robbery charge, did not constitute plain error; defendant objected to prosecution's request for an instruction that would have clarified the relationship between armed robbery, robbery and ADW, robbery and ADW were not alternative offenses, and evidence supported all of the offense for which instructions were given. *McClain v. United States*, 871 A.2d 1185, 2005 D.C. App. LEXIS 154 (2005).

Trial court's erroneous refusal to instruct jury immediately that codefendant's prior inconsistent statement denying that codefendant knew defendant could not be used as evidence against defendant required reversal in prosecution for aiding armed robbery, even though trial court instructed jury that statement could only be used to evaluate codefendant's credibility; prosecutor's rebuttal closing argument stated, at the end of assessment of codefendant's credibility, that one was not supposed to give up friend helping in armed robbery and then began discussion of evidence against defendant; and this argument implied that defendant was guilty because codefendant had lied. D.C. Code 1981, §§ 22-2901, 22-3202. *Hordge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

Trial court's erroneous failure to give requested instruction that consent is a defense to charge of assault with intent to commit sodomy was harmless since there was neither direct nor persuasive evidence in record to suggest that complainant consented to defendant's behavior, and in view of jury's rejection of findings of consent to kidnapping and rape, offenses which took place both before and after the intervening sexual assault. D.C. Code 1981, §§ 22-503, 22-2101, 22-2801, 22-2901, 22-3502, 23-1327(a). *Jenkins v. United States*, 506 A.2d 1120, 1986 D.C. App. LEXIS 304 (1986), writ of certiorari denied by 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99, 1986 U.S. LEXIS 3765, 55 U.S.L.W. 3234 (1986).

— In general.

Trial court's instruction in robbery prosecution that jury might infer guilt if evidence afforded no satisfactory explanation for defendant's possession of robbery victim's recently stolen property was proper and did not transfer burden of persuasion from government to defendant. *Pendergrast v. United States*, 416 F.2d 776, 1969 U.S. App. LEXIS 9121 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243, 1969 U.S. LEXIS 1562 (1969).

Trial court's instruction to jury in robbery prosecution that if defendant's explanation of possession of robbery victim's property was, in jury's opinion, truthful, consistent, apparently honest, not contradicted, was same at all times and had indicia of truthfulness, possession by defendant might not be basis for inference of guilt was not error. *Pendergrast v. United States*, 416 F.2d 776, 1969 U.S. App. LEXIS 9121 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243, 1969 U.S. LEXIS 1562 (1969).

Model instruction proposed for instruction on inference of guilt of robbery from defendant's unexplained possession of property recently stolen in robbery. U.S. Const. Amend. 4; D.C.

Code § 22-2901. *Pendergrast v. United States*, 416 F.2d 776, 1969 U.S. App. LEXIS 9121 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243, 1969 U.S. LEXIS 1562 (1969).

In prosecution for embezzlement, stealing and purloining of property of District of Columbia, while judge did speak of elements of property value and wrongful taking in his charge on robbery counts, such was inadequate to cover the shortcomings of the charge since the taking, constituting an element of robbery, was substantially different from a larceny taking, and trial judge did not refer jury to those portions of his earlier charge. D.C. Code § 22-2206. *Mitchell v. United States*, 394 F.2d 767, 1968 U.S. App. LEXIS 7676 (C.A.D.C. 1968).

An instruction that defendant was criminally responsible if he could have controlled impulse to rob was error. *Campbell v. U.S.*, 307 F.2d 597, 1962 U.S. App. LEXIS 5544 (C.A.D.C. 1962).

Although defendant claimed that armed robbery victim owed him \$30 refund for sale of some adulterated narcotics, where defendant allegedly took over \$500 from victim, he was not entitled to instruction on "claim of right" defense. D.C. Code § 22-2901. *Rhodes v. United States*, 354 A.2d 863, 1976 D.C. App. LEXIS 511 (1976).

— Intent, instructions.

Defendant charged with robbery of money which he took from another in good faith belief that he was entitled to the money should have been granted, as requested, instructions relating to such belief, specific intent essential to robbery, and necessity for proof of such intent beyond a reasonable doubt. *Richardson v. United States*, 403 F.2d 574, 1968 U.S. App. LEXIS 6475 (C.A.D.C. 1968).

Specific intent requisite to commission of offense of robbery depends upon a state of mind, not a legal fact, and, therefore, a legally enforceable right to property taken by accused is not prerequisite to an instruction on claim of right in robbery prosecution. *Richardson v. United States*, 403 F.2d 574, 1968 U.S. App. LEXIS 6475 (C.A.D.C. 1968).

Robbery prosecution instruction on intent, that "when you do a thing on purpose, you do that which you intend to do", was clearly erroneous, since crime required specific intent to deprive victim of property. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 348 F.2d 772, 1965 U.S. App. LEXIS 5354 (C.A.D.C. 1965).

Although trial court's instructions improperly authorized the jury to find defendant guilty of aiding and abetting armed robbery without proof that defendant herself had the essential mens rea to commit the crime, it was not reversible error because the erroneous jury instruction did not have a reasonable probabil-

ity of affecting the outcome of defendant's trial; reasonable juror could conclude from defendant's behavior that she shared the principals' specific intent to rob victim, and thus was guilty of aiding and abetting the armed robbery. *Lancaster v. United States*, 975 A.2d 168, 2009 D.C. App. LEXIS 251 (2009).

— Issues relating to jury trial, instructions.

In its context and under all the circumstances of criminal case, trial judge's statement, in course of his response to jury's note of their inability to agree on verdict, that "You have got to reach a decision in this case" was coercive. D.C. Code 1961, §§ 22-501, 22-2901. *Jenkins v. U.S.*, 85 S.Ct. 1059, 1965 U.S. LEXIS 1484 (U.S. Dist. Col. 1965).

Where jury during deliberations sent questions to judge concerning felony-murder count, inquiring as to timing of formation of intent to rob, and trial court merely reread the murder statute and the standard instruction, and jury could have been left with impression that coincidence in time between murder and robbery was sufficient to support felony-murder conviction, there was error which could not be held harmless. D.C. Code § 22-2401, 22-2901. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Viewed in context of whole charge, trial court's statements refusing to accept note that jury was deadlocked after only two hours deliberation and that jury should resume deliberations the next day were not coercive or an improper comment upon the evidence to jury which found defendant guilty on robbery count and not guilty on count charging assault with intent to commit robbery. D.C. Code 1961, §§ 22-501, 22-2901. *Jenkins v. United States*, 330 F.2d 220, 1964 U.S. App. LEXIS 6405 (C.A.D.C. 1964), reversed by 380 U.S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957, 1965 U.S. LEXIS 1484 (1965).

In prosecution for burglary and robbery and assault with a dangerous weapon, appearance in jury room of bullet which had no relationship to case did not necessitate declaration of mistrial, in view of trial court's instructions to jury to disregard. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 22-3204. *Evans v. United States*, 392 A.2d 1015, 1978 D.C. App. LEXIS 327 (1978).

Where trial judge at prosecution of defendant for robbery at gunpoint, upon disclosure of numerical split within jury, directed a hung-jury instruction toward particular juror who was holding out and intimidated that she was guilty of either perjury or negligence in her response to questions on voir dire and that she was not complying with her oath as a juror, and also failed to use any ameliorating language in his instruction to effect that any change in vote

had to be a conscientious one, verdict transgressed limits of the Winters charge and, therefore, was coercive and constituted prejudicial error. D.C. Code §§ 22-2901, 22-3202. *Jackson v. United States*, 368 A.2d 1140, 1977 D.C. App. LEXIS 417 (1977).

Where jury was given deadlock instruction after it indicated upon two hours deliberation that it was unable to return verdict, jury again concluded that it could not reach verdict on armed robbery count after deliberations next morning, court announced that jury would be required to deliberate further after lunch, and jury returned guilty verdict on robbery charges after one hour of further deliberation, trial court's ordering of continued deliberation was not coercive. D.C. Code §§ 22-2901, 22-3202. *Johnson v. United States*, 360 A.2d 502, 1976 D.C. App. LEXIS 319 (1976).

After having given "Winters instruction" to apparently deadlocked jury in prosecution for armed robbery, robbery, and assault with dangerous weapon, sending jury back for deliberation still another time for "a short period after lunch," following subsequent report that jury was still "hung," did not in effect coerce verdict. D.C. Code §§ 22-502, 22-2901, 22-3202. *Thompson v. United States*, 354 A.2d 848, 1976 D.C. App. LEXIS 510 (1976).

Where jury had commenced its deliberations in prosecution for armed robbery, assault with a dangerous weapon, receiving stolen property, and carrying a pistol without a license, when it presented to the court a question concerning the armed robbery count, the court did not abuse its discretion by giving, in the face of defendant's objection but in the absence of a request to present argument, a supplemental instruction on aiding and abetting. D.C. Code §§ 22-502, 22-2205, 22-2901, 22-3202, 22-3204. *Atkinson v. United States*, 322 A.2d 587, 1974 D.C. App. LEXIS 243 (1974).

— Necessity and sufficiency, instructions.

Explanation of penalty for offense is required only for charge of first-degree murder; in every other instance, sentencing is solely the province of the court, and not of jury. D.C. Code §§ 22-502, 22-2401, 22-2403, 22-2901, 22-3202, 22-3204. *United States v. Caldwell*, 543 F.2d 1333, 1974 U.S. App. LEXIS 5417 (C.A.D.C. 1974), writ of certiorari denied by 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97, 1976 U.S. LEXIS 1234 (1976).

Variance between court's instruction that jurors were no longer concerned with three counts on which motion for judgments of acquittal had been granted and "redbook" instruction was not substantial. D.C. Code §§ 22-1801(a), 22-2801, 22-2901, 22-3502. *United States v. Thornton*, 498 F.2d 749, 1974 U.S. App. LEXIS 8356 (C.A.D.C. 1974).

Refusal, in criminal prosecution, to instruct that testimony of accomplices, who testified for government after having been granted immunity, should be considered with caution was reversible error. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; 18 U.S.C. § 6002. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Viewing court's charge in its entirety clearly showed that instruction on specific intent was not omitted in prosecution for armed robbery, assault with a dangerous weapon, and carrying a dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3204. *United States v. Gaither*, 440 F.2d 262, 1971 U.S. App. LEXIS 11869 (C.A.D.C. 1971).

Reading robbery statute, which defined several patterns of behavior as robbery in single convoluted sentence and did not clearly set forth elements government must prove, and reading of indictment which was in language similar to statute but replaced disjunctives with conjunctives, did not satisfy requirement that jury be given clear statement of each element government must prove. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 348 F.2d 772, 1965 U.S. App. LEXIS 5354 (C.A.D.C. 1965).

Robbery statute does not set forth all essential elements of offense and therefore, reading robbery statute to jury afforded insufficient guidance as to nature of offense and burden on government to prove every essential element thereof. D.C. Code 1961, § 22-2901. *Byrd v. United States*, 342 F.2d 939, 1965 U.S. App. LEXIS 6866 (C.A.D.C. 1965).

In view of substantial evidence tending to show that defendant was too drunk to form requisite intent to rob, it was reversible error for trial court to refuse to allow issue to go to jury, though it was not theory of defense. D.C. Code 1961, § 22-2901. *Womack v. United States*, 336 F.2d 959, 1964 U.S. App. LEXIS 4644 (C.A.D.C. 1964).

Instructions which may have implied that jury could infer guilt from circumstances without first resolving conflicts in testimony over whether circumstances had actually occurred were not plain error in view of charge considered as whole. Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C.; D.C. Code 1961, § 22-2901. *Williams v. United States*, 321 F.2d 744, 1963 U.S. App. LEXIS 5331 (C.A.D.C. 1963), writ of certiorari denied by 375 U.S. 898, 84 S. Ct. 176, 11 L. Ed. 2d 126, 1963 U.S. LEXIS 381 (1963).

Trial court in armed robbery prosecution could sua sponte suggest instruction on lesser included offense of robbery and give it in response to prosecutor's statement that it seemed appropriate unless the court thought otherwise; the prosecutor's statement indicated affirmative agreement. *Hawthorne v. United*

States, 829 A.2d 948, 2003 D.C. App. LEXIS 532 (2003).

Trial court properly refused to instruct jury on larceny as lesser included offense of robbery, where defendant's conduct would have constituted robbery even under his version of facts in which he only decided to take victim's property after fatally stabbing him. D.C. Code 1981, § 22-2901. *Ulmer v. United States*, 649 A.2d 295, 1994 D.C. App. LEXIS 197 (1994).

Government's change of theory, in prosecution of defendant for aiding and abetting armed robbery, from allegation that defendant was getaway driver, to allegation that he helped plan robbery, did not constitute impermissible variance; evidence and instructions did not introduce new facts or broaden base for possible conviction beyond aiding and abetting, and petit jury was not asked to consider evidence that was not before grand jury. *Ingram v. United States*, 592 A.2d 992, 1991 D.C. App. LEXIS 156 (1991), writ of certiorari denied by 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757, 1991 U.S. LEXIS 7189, 60 U.S.L.W. 3435 (1991).

Trial court did not err in instructing jury on theory of aiding and abetting where instruction explained that each participant in joint criminal venture could be held accountable as principal, even though defendant did not personally commit each act constituting armed robbery offenses. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

In prosecution for first-degree felony-murder, second-degree murder, armed robbery and robbery, evidence was insufficient to require trial court to instruct jury on defendant's theory of case that a second, later beating of victim took place by persons other than defendant. D.C. Code §§ 22-2401, 22-2901, 22-3202. *Day v. United States*, 390 A.2d 957, 1978 D.C. App. LEXIS 485 (1978).

In disposition of issue in connection with trial court's refusal to give requested lesser-included offense instruction, Court of Appeals was controlled by state of the evidence in the record rather than abstract reading and comparison of statutes involved. D.C. Code §§ 22-1121, 22-2901. *Jones v. United States*, 374 A.2d 854, 1977 D.C. App. LEXIS 449 (1977).

In determining whether trial court's refusal to give requested lesser-included offense instruction on disorderly conduct was reversible error in prosecution for attempted robbery, question was whether disorderly conduct was necessarily established by proof of attempted robbery. D.C. Code §§ 22-1121, 22-2901. *Jones v. United States*, 374 A.2d 854, 1977 D.C. App. LEXIS 449 (1977).

Testimony of defendant, who categorically denied that he bumped or jostled either complainant or her companion, who denied that his

hand was ever inside or near complainant's purse or handbag and insisted that he was never closer than one foot to either woman, not only negated essential elements of disorderly conduct but was also completely exculpatory of either offense, and thus trial court did not err in refusing to give requested lesser-included offense instruction in prosecution for attempted robbery. D.C. Code §§ 22-1121, 22-2901. *Jones v. United States*, 374 A.2d 854, 1977 D.C. App. LEXIS 449 (1977).

— **Presentation and reservation of grounds for review, instructions.**

Omission of an instruction that voluntary narcosis could negate specific intent to commit the robbery was not plain error, where defense counsel never requested such an instruction, where he previously admitted that defendant's actions indicated that he was not under the influence of narcotics when he confessed, where counsel indicated his satisfaction with the instructions as given, and where the evidence on the issue was not sufficient to require the court to give such an instruction in the absence of a request therefor. 18 U.S.C. § 2113(a); D.C. Code §§ 22-2901, 22-3202. *United States v. Shepard*, 515 F.2d 1324, 1975 U.S. App. LEXIS 13657 (C.A.D.C. 1975).

Under circumstances that defense counsel did not object to instruction given when trial court granted motion for judgment of acquittal on three counts and that jury had been instructed not to be influenced with respect to innocence or guilt of defendant by any ruling made during course of trial, there was no error in the instruction given. D.C. Code §§ 22-1801(a), 22-2801, 22-2901, 22-3502. *United States v. Thornton*, 498 F.2d 749, 1974 U.S. App. LEXIS 8356 (C.A.D.C. 1974).

Failure, in criminal prosecution, to give an accomplice instruction with regard to accomplices who testified for government was not plain error where nonaccomplice testimony corroborated accomplice testimony to significant extent against one accused and to lesser extent against another and where accomplices did not appear to have extraordinary disposition to prevaricate. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 30, 52(b), 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Absent waiver of instruction, failure, in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, to give immediate limiting instruction as to admissibility where testimony of arresting officer was admitted to impeach defendant's testimony that he had not stated that codefendant "lived across the street" was plain error requiring reversal, though general instruction on impeachment evidence was given in very

long charge. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Instruction on identification in robbery trial did not constitute plain error. D.C. Code § 22-2901; Fed.Rules Crim.Proc. rule 52, 18 U.S.C. *United States v. Carter*, 482 F.2d 738, 1973 U.S. App. LEXIS 8836 (C.A.D.C. 1973).

Record in prosecution on charge of robbery by fear failed to show that trial judge's identity instruction, which erroneously included statement that defense did not deny that robbery took place, was plain error warranting reversal by reviewing court even though no objection was made in trial court. D.C. Code § 22-2901; Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *United States v. Todd*, 463 F.2d 302, 1972 U.S. App. LEXIS 11073 (C.A.D.C. 1972).

Giving of unobjected to instruction in robbery prosecution on reasonable doubt that was couched in language identical with recommended model instruction of District of Columbia Junior Bar Association was not plain error. D.C. Code § 22-2901; Fed.Rules Crim.Proc. rule 30, 18 U.S.C. *United States v. Baber*, 447 F.2d 1267, 1971 U.S. App. LEXIS 8861 (C.A.D.C. 1971), writ of certiorari denied by 404 U.S. 957, 92 S. Ct. 324, 30 L. Ed. 2d 274, 1971 U.S. LEXIS 452 (1971).

Failure to give instruction on circumstantial evidence to effect that unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, verdict must be not guilty was not plain error in robbery case. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.; D.C. Code 1961, § 22-2901. *Williams v. United States*, 321 F.2d 744, 1963 U.S. App. LEXIS 5331 (C.A.D.C. 1963), writ of certiorari denied by 375 U.S. 898, 84 S. Ct. 176, 11 L. Ed. 2d 126, 1963 U.S. LEXIS 381 (1963).

Had defendant, who was charged with taking billfold from pocketbook, but who, upon search conducted immediately after alleged robbery, was not found to have billfold, requested charge on lesser included offense of attempted robbery, its denial would have been reversible error, but failure to give instruction was not plain error. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.; D.C. Code 1961, § 22-2901. *Williams v. United States*, 321 F.2d 744, 1963 U.S. App. LEXIS 5331 (C.A.D.C. 1963), writ of certiorari denied by 375 U.S. 898, 84 S. Ct. 176, 11 L. Ed. 2d 126, 1963 U.S. LEXIS 381 (1963).

Trial court's failure to sua sponte instruct jury as to limited purpose of other crimes evidence was not error, let alone plain error, in murder case in which Government witness testified on redirect examination about prior assault in which defendant pointed apparent murder weapon at her and pulled the trigger; evidence of assault was admitted as evidence of defendant's prior gun possession, which was

proof that defendant possessed the means to commit the murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Instruction that jury could find defendant guilty of armed robbery if it found that, at time offense was committed, defendant was armed with or had readily available a pistol and/or a knife was not plainly erroneous on ground that, because some jurors could convict on basis of accomplice's pistol, while others could convict on basis of defendant's knife, lack of jury unanimity was possible, where trial court also instructed jury to consider each offense separately, armed robbery and assault, applicable evidence in connection therewith, and return a unanimous verdict. D.C. Code 1981, § 22-2901. *Gordon v. United States*, 466 A.2d 1226, 1983 D.C. App. LEXIS 473 (1983).

Where indictment charged defendant with both armed robbery and robbery, but it was undisputed that perpetrators of robbery of which defendant was charged were armed, trial judge erred in instructing jury on lesser-included offense of robbery; however, conviction for robbery would not be overturned for "plain error" where defendant did not object to robbery instruction before jury retired to deliberate. D.C. Code §§ 22-2901, 22-3202. *Lightfoot v. United States*, 378 A.2d 670, 1977 D.C. App. LEXIS 242 (1977).

Where instruction told jury six times that specific intent was necessary element of robbery or armed robbery, trial court defined specific intent and explained difference between specific and general intent, court subsequently made misstatement that armed robbery was crime requiring general intent, and no objection was raised, misstatement, when viewed in light of instruction as a whole, did not preclude fair deliberation by jury on elements of armed robbery charge and was not plain error. D.C. Code SCR, Criminal Rules 30, 52(b); D.C. Code §§ 22-2901, 22-3202. *Johnson v. United States*, 360 A.2d 502, 1976 D.C. App. LEXIS 319 (1976).

— Province of jury, instructions.

In prosecution for robbery and assault, court's statement in instruction to jury, that "one of the persons charged here" had succeeded in getting pocketbook of one complaining witness went beyond permissible comment on evidence, where identification was issue for jury. D.C. Code 1961, §§ 22-502, 22-2901. *Battle v. United States*, 345 F.2d 438, 1965 U.S. App. LEXIS 6265 (C.A.D.C. 1965).

— Requests for instructions.

Armed robbery of van and of tools and money inside van were not legally or factually separate incidents and, therefore, trial court was not required, sua sponte, to give special una-

nimity instruction; defendant was charged with one robbery of one victim that consisted of taking van and its contents, defendant did not raise separate defenses, and there was no indication of jury confusion. D.C. Code 1981, §§ 22-2901, 22-3202. *Simms v. United States*, 634 A.2d 442, 1993 D.C. App. LEXIS 304 (1993).

Joint or separate trial of charges.

Refusal to grant severance in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, was not prejudicial to defendant due to fact that evidence placing a codefendant at scene of crime was quantitatively and qualitatively greater than evidence against defendant where evidence against defendant was both substantial and compelling, jury was specifically instructed to determine guilt of each defendant by considering only his own conduct and evidence which applied to him and where verdicts demonstrated that jury fulfilled its obligation under charge. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 8(b), 14, 18 U.S.C. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Where count of indictment charging defendant with carrying pistol on day of his arrest was dismissed for failure of proof before case was submitted to jury and indictment was retyped, omitting count, defendant was not prejudiced by court's refusal to sever such properly joined count from counts charging felony murder, first-degree burglary and armed robbery. D.C. Code §§ 22-1801(a), 22-2401, 22-2901; Fed.Rules Crim.Proc. rule 8(a), 18 U.S.C. *United States v. Joyner*, 492 F.2d 650, 1974 U.S. App. LEXIS 10133 (C.A.D.C. 1974), writ of certiorari denied by 419 U.S. 852, 95 S. Ct. 94, 42 L. Ed. 2d 83, 1974 U.S. LEXIS 2566 (1974).

In view of fact that scene of armed robbery and assaults on January 17 was different from that of armed robbery and assault on January 11 and assaults on January 16, the victims were different, and only common factor was that in each case the offender was a man wearing a fur coat and fur hat, and that there was no evidence of a common scheme or plan embracing commission of all of the offenses, it was prejudicial error to join trial of charges relating to offenses on January 17 with trial on other counts alleging offenses on January 11 and January 16, notwithstanding Government's contention that evidence of each offense was simple and distinct so that jury could not possibly have been confused. D.C. Code §§ 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rule 14, 18 U.S.C. *United States v. Carter*, 475 F.2d 349, 1973 U.S. App. LEXIS 12198 (C.A.D.C. 1973).

There was prejudice in joinder of crimes of robbery and attempted robbery and separate

trials should have been granted, where the similarities were not so close that proof of one crime would establish proof of the other if there were separate trials, and the jury was confused and was unable to treat the evidence relevant to each charge separately and distinctly. D.C. Code 1961, §§ 22-2901, 22-2902; Fed. Rules Crim. Proc. rules 8(a), 14, 18 U.S.C. *Drew v. United States*, 331 F.2d 85, 1964 U.S. App. LEXIS 6404 (C.A.D.C. 1964).

Refusal to sever robbery counts arising from three incidents was not abuse of discretion; evidence that all incidents took place within reasonable geographic proximity between 9 and 10 p.m. over nine-day period, that perpetrators drove up, robbed isolated or vulnerable persons while threatening to use knife or gun, and drove away, and that vehicle was small, light-colored hatchback showed reasonable probability that same persons committed all three robberies, and any striking differences were cured by accomplice's testimony implicating defendant in all three incidents. *Ifelowo v. United States*, 778 A.2d 285, 2001 D.C. App. LEXIS 161 (2001).

Trial judge did not abuse his discretion in refusing to grant severance to defendant respecting obstruction of justice charge in prosecution for armed robbery, possession of firearm during commission of crime of violence, carrying pistol without license, and obstruction of justice, despite contention that defendant wished to testify respecting obstruction of justice charge and not other charges, where defendant's proposed testimony would not have been altogether exculpatory, and judge indicated his readiness to place reasonable restrictions on any cross-examination of defendant regarding armed robbery, provided such could be accomplished without unfairness to prosecution. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3204, 22-3204(a), (a)(1). *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

Offense of carrying dangerous weapon could be tried with burglary and robbery charges, where proof of the robberies and burglaries included substantially all of the proof of the weapons charge; although crimes were not similar, they were sufficiently connected to warrant joinder. Criminal Rules 8, 8(a); D.C. Code 1981, §§ 22-1801(a, b), 22-2101, 22-2901, 22-3209, 22-3811, 22-3812(a), 22-3901. *Coleman v. United States*, 619 A.2d 40, 1993 D.C. App. LEXIS 6 (1993).

The offenses of armed robbery and carrying a dangerous weapon were not sufficiently similar to justify joinder under rule, even though the same gun may have been used in both offenses, in that the two crimes share only a single element, and the armed robbery involved an alleged theft at gunpoint of a gold chain from an acquaintance, while the carrying of a dangerous weapon involved the possession of a BB

gun in a public restroom the following day. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3204; Criminal Rules 8, 8(a). *Roper v. United States*, 564 A.2d 726, 1989 D.C. App. LEXIS 188 (1989).

In a prosecution for armed robbery and carrying a dangerous weapon in which the two charges were improperly joined, there was not clear and convincing evidence that the defendant had committed the armed robbery, and thus evidence of the armed robbery would not have been admissible at separate trials on the weapons charge and the misjoinder was not harmless error, where the defendant was acquitted of the armed robbery charge. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Roper v. United States*, 564 A.2d 726, 1989 D.C. App. LEXIS 188 (1989).

Reversal was required due to misjoinder of charges connected with armed robbery of two vending trucks and misjoinder of those charges with charge against defendant's brother for being accessory after fact, receiving stolen property, and obstructing justice; trial was essentially swearing contest in which identifications by government witnesses were met by contradictory testimony from alibi witnesses; no physical evidence linked defendants to either robbery; identifications were impeached by discrepancies and inconsistencies in description of defendants; statements of defendant's brother implicating one defendant in second robbery were admitted; and prosecutor's closing argument tried to link offenses together. D.C. Code 1981, §§ 22-106, 22-722(a)(3), 22-2101, 22-2901, 22-3202; Criminal Rules 8(b), 14. *Morris v. United States*, 548 A.2d 1383, 1988 D.C. App. LEXIS 189 (1988).

Two robbery incidents prosecuted against defendant in same trial, which were proved by prosecution's use of four witnesses testifying as to first robbery and then use of nine witnesses testifying as to second robbery, which were defended by claim of misidentification as to first robbery and denial of commission of any crime as to second robbery, which prosecutor argued as distinct offenses, which led trial court to instruct jury at beginning and end of trial to view robberies as separate and distinct incidents, involved sufficiently distinct and separate evidence as to each robbery, were not confused in mind of jury to prejudice of defendant, and, therefore, did not need to be severed. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Defendant's statement that defendant would become embarrassed and confounded by having to present separate defenses to robbery charges for two separate incidents and that defendant would testify as to one case but not other, but which did not reveal content of defendant's

testimony, was not convincing showing that defendant had both important testimony to give concerning one count and strong need to refrain from testifying on other robbery count and, therefore, did not establish prejudice to defendant which would justify severance of prosecutions. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Where robbery and felony-murder, although unrelated as to place, were so closely related in time as to almost constitute continuing transaction and evidence of robbery would have been admissible in separate trial for felony-murder to show motive, intent, absence of accident and common scheme or plan to rob, trial court did not abuse its discretion in denying severance of robbery and felony-murder counts. D.C. Code §§ 22-2401, 22-2901, 22-3204; D.C. Code SCR, Criminal Rule 14. *Calhoun v. United States*, 369 A.2d 605, 1977 D.C. App. LEXIS 421 (1977).

Joint or separate trials of codefendants.

Grant of severance was not required on ground that defendant could have called codefendant to testify that defendants were not together when homicide and robbery occurred where there was no intimation that codefendant would have been willing to testify at defendant's trial, and if codefendant were to testify, Government's impeaching statement which was inculpatory of defendant would probably have surfaced. D.C. Code §§ 22-2401, 22-2901. *United States v. Bolden*, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Fact that there was conflict in accused's defenses, in that codefendants relied on separate alibi defenses and defendant admitted his presence at scene of offenses and in that such defendant's efforts to discredit testimony that he and a codefendant knocked out victim assertedly undermined such codefendant's alibi defense and fact that defendant did not testify and thus codefendants were precluded from cross-examining him did not so prejudice codefendants as to render refusal to grant severance an abuse of discretion where damaging implications of defendant's defense were corroborated by substantial testimony. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Denial of defendant's pretrial motion for severance, in bank robbery prosecution in which defendant's brother was a codefendant, did not constitute abuse of discretion, where there were no statements by defendant's brother received in evidence against defendant, and at defendant's request jury was instructed that fact that defendants were brothers in and of

itself should not lead them to conclude that they acted in concert in robbing the bank. 18 U.S.C. § 2113(a); 18 U.S.C. § 292(c); D.C. Code §§ 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rule 8, 18 U.S.C. *United States v. Hopkins*, 464 F.2d 816, 1972 U.S. App. LEXIS 8848 (C.A.D.C. 1972).

Refusal to grant a severance for trial purposes as to defendant tried for several crimes including first-degree murder arising out of two separate robberies was prejudicial to defendant because there was not only the danger that evidence with respect to two robberies would cumulate in jurors' minds and tend to prove defendant guilty of each, but also because the evidence as to one of the robberies was so weak that its primary usefulness was to support government's case as to robbery which resulted in the murder. D.C. Code 1961, §§ 22-502, 22-2401, 22-2403, 22-2901; Fed.Rules Crim.Proc. rules 8(a), 14, 16, 18 U.S.C. *Gregory v. United States*, 369 F.2d 185, 1966 U.S. App. LEXIS 5327 (C.A.D.C. 1966).

Defendant and co-defendant were not entitled to severance of trial for armed robbery based on claim that defenses were incompatible; both testified that there was aborted drug deal but not robbery, there was no clear and substantial contradiction between their defenses merely because co-defendant's counsel chose during closing argument to seize upon eyewitness testimony that co-defendant did not participate in robbery, even if robbery occurred, or because defendant presented witness who testified that defendant and co-defendant were together prior to robbery. *Van Kuhn v. United States*, 900 A.2d 691, 2006 D.C. App. LEXIS 301 (2006).

Even if defendant's and codefendant's defenses conflicted, defendant was not prejudiced by the conflict, so as to warrant severance of defendants, in prosecution for various offenses including first-degree murder and armed robbery; there was enough independent evidence of defendant's guilt so that trial court could reasonably find with substantial certainty that conflict in defenses alone would not sway jury to defendant guilty. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202; Criminal Rule 14. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Even assuming that defendant and codefendant had antagonistic defenses to armed robbery charge, where independent evidence of defendant's guilt was overwhelming and defendant did not demonstrate that alleged conflict in defenses in itself created danger that jury would unjustifiably infer defendant's guilt, any possible prejudice which may have resulted from joint trial was not such as to warrant reversal. D.C. Code §§ 22-2901, 22-3202, 23-311, 23-313; D.C. Code SCR, Criminal Rule 14.

Clark v. United States, 367 A.2d 158, 1976 D.C. App. LEXIS 438 (1976).

Jurisdiction.

Even if joinder of D.C. Code offense of robbery with charges of possession of unregistered firearm, possession of firearm not identified by serial number, assault with intent to commit rape while armed and assault with a dangerous weapon was proper under rule pertaining to joinder of defendants, district court divested itself of jurisdiction over the robbery count when it granted defendants' pretrial motion to sever the robbery charge in order to avoid the possibly prejudicial atmosphere of a single trial. 26 U.S.C. (I.R.C.1954)s 5861(d, i); D.C. Code §§ 22-501, 22-502, 22-2901, 22-3202; Fed.Rules Crim.Proc. rules 8, 8(b), 14, 18 U.S.C.; 18 U.S.C. § 5010(b). United States v. Jackson, 562 F.2d 789, 1977 U.S. App. LEXIS 12056 (C.A.D.C. 1977).

In view of defendant's concession that he approached complainant in his car within district, rode with complainant into Maryland and returned with him to district, and in view of fact that defendant was overheard by officer threatening complainant with injury if he did not remain silent while they were all at intersection concededly within district line, trial court did not lack jurisdiction of offenses of armed robbery, assault with dangerous weapon and mayhem and malicious disfigurement. D.C. Code §§ 11-923(b)(1), 22-502, 22-506, 22-2901, 22-3202; D.C. Code SCR, Criminal Rule 12(b)(2). Adair v. United States, 391 A.2d 288, 1978 D.C. App. LEXIS 567 (1978).

Juvenile proceedings, generally.

Where complaining witness, who charged 15-year-old juvenile with burglary and robbery, could only have been considered presumptively hostile to juvenile's interest at hearing to determine whether probable cause existed of juvenile's delinquency, complainant's testimony could properly have been compelled only if meaningful proffer were made showing that her testimony would negate probable cause, and thus it was not abuse of discretion for trial court to refuse to continue probable cause hearing or to issue subpoena to order complainant to appear, absent such proffer. D.C. Code §§ 22-1801(a), 22-2901. In re R.D.S., 359 A.2d 136, 1976 D.C. App. LEXIS 291 (1976).

Merger of offenses.

Convictions of assault with a dangerous weapon merged with armed robbery convictions connected with same robbery of drugstore and would thus be set aside. United States v. Toy, 482 F.2d 741, 1973 U.S. App. LEXIS 8806 (C.A.D.C. 1973).

Where armed robberies and assaults with a dangerous weapon were committed against same persons, latter offenses merged into for-

mer, and convictions on assault charges could not stand, though a remand for resentencing was not required, where defendant had been given separate sentences, and all sentences were set to run concurrently. D.C. Code §§ 22-502, 22-2901, 22-3202. United States v. Toy, 482 F.2d 741, 1973 U.S. App. LEXIS 8806 (C.A.D.C. 1973).

Where evidence in proof of count II which charged defendant under District of Columbia robbery and crime of violence statutes with robbing post office custodian of money showed that defendant actually consummated the same robbery he was charged with attempting in count I under federal mail robbery statute, defendant could not be convicted of both the attempt and the completed robbery since Congress did not intend that a statute drawn to proscribe attempt should also support a separate conviction for completed offense when defendant is charged with and convicted of substantially the same crime he is charged with attempting. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3202. United States v. Spears, 449 F.2d 946, 1971 U.S. App. LEXIS 11849 (C.A.D.C. 1971).

The part of federal mail robbery statute prohibiting assault was intended by Congress to prohibit certain kinds of attempts to rob and cannot support an independent conviction when a defendant is charged with and convicted of committing, in violation of robbery statute applicable in District of Columbia, the same crime he is charged with attempting. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3202. United States v. Spears, 449 F.2d 946, 1971 U.S. App. LEXIS 11849 (C.A.D.C. 1971).

Where helper on truck was detained and transported against his will to a different location, several miles away from scene where truck was hijacked, and purpose of detention, to facilitate success of hijacking, was to secure benefit to hijackers, two separate and distinct crimes were committed, i.e., kidnapping and armed robbery of contents of truck, and offenses did not merge. D.C. Code §§ 22-2101, 22-2901, 22-3202. United States v. Wolford, 444 F.2d 876, 1971 U.S. App. LEXIS 11155 (C.A.D.C. 1971).

Lesser offense of entry with intent to rob merged into completed bank robbery when latter offense was proved. 18 U.S.C. § 2113(a). Marshall v. United States, 436 F.2d 155, 1970 U.S. App. LEXIS 7223 (C.A.D.C. 1970).

Convictions of defendant on three charges of entering savings and loan associations with intent to rob were not permissible where defendant was convicted of actual taking or robbery, since "entering" convictions merged into completed robberies. 18 U.S.C. § 2113(a, g); D.C. Code § 22-2901. Bryant v. United States, 417 F.2d 555, 1969 U.S. App. LEXIS 11179 (C.A.D.C. 1969).

Once each of defendant's and codefendant's convictions for two counts of armed robbery merged, each of their related convictions for two counts of possession of a firearm during a crime of violence also merged for double jeopardy purposes, as they were based on the two armed robbery charges. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Robbery conviction with respect to victim of fatal shooting should be vacated, upon merger of convictions for first-degree premeditated murder and first-degree felony murder with robbery as underlying felony, only if the trial court determined on remand that premeditated murder was the murder conviction that should be vacated. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Wharton's Rule, as exception to general rule that conspiracy and completed substantive offense are discrete crimes for which separate sanctions may be imposed, does not preclude conviction in a single trial of conspiracy to commit armed robbery and the substantive offense of armed robbery or its lesser-included offense of attempted armed robbery. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Robbery is not a lesser included offense of assault with intent to rob; robbery requires proof of a fact that is not an element of the other offense, namely, a taking of something of value from someone else's possession. *Persall v. United States*, 812 A.2d 953, 2002 D.C. App. LEXIS 746 (2002), remanded by 859 A.2d 634, 2004 D.C. App. LEXIS 458 (D.C. 2004).

Convictions of felony murder and armed robbery merged for sentencing purposes. *Welch v. United States*, 807 A.2d 596, 2002 D.C. App. LEXIS 536 (2002), writ of certiorari denied by 537 U.S. 1132, 123 S. Ct. 914, 154 L. Ed. 2d 821, 2003 U.S. LEXIS 380, 71 U.S.L.W. 3473 (2003).

Defendant's conviction for armed robbery did not merge with his conviction for armed carjacking; each of the two crimes required proof of factual element which the other did not. D.C. Code 1981, §§ 22-2901, 22-2903(a)(1). *Pixley v. United States*, 692 A.2d 438, 1997 D.C. App. LEXIS 71 (1997).

Despite common victim, kidnapping count did not merge with armed robbery count, since the two crimes had different elements; kidnapping required proof that victim was seized or detained which armed robbery did not, and armed robbery required proof that property of value was taken, which kidnapping did not. D.C. Code 1981, §§ 22-2101, 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon (ADW) counts

from same criminal incident, since burglary required proof of element that other crimes did not, and kidnapping, armed robbery and assault with dangerous weapon all required proof of elements that burglary did not. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Possession of firearm during crime of violence (PFCV) count did not merge with any kidnapping "while armed" count, burglary while armed count, armed robbery count, or assault with dangerous weapon (ADW) count from same criminal incident. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(b). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Armed robbery count did not merge with assault with dangerous weapon counts (ADW) from same criminal incident, since armed robbery count concerned different victim from identifiable victims of ADW counts. D.C. Code 1981, §§ 22-502, 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

First-degree burglary while armed count did not merge with armed robbery count or with assault with dangerous weapon (ADW) count, since each required proof of element the other did not. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2901, 22-3202. *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Armed robbery count did not merge with carrying pistol without license (CPWL) count from same criminal incident, as each statute required proof of element that other did not and each provision served distinct societal interest. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3214(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Armed robbery count did not merge with possession of prohibited weapon (PPW) count, since robbery required proof of taking which PPW did not, and PPW required possession of specifically prohibited weapon which armed robbery did not. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3214(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Convictions for second-degree murder while armed and armed robbery merged with conviction for felony murder while armed. D.C. Code 1981, §§ 22-2401, 22-2403, 22-2901, 22-3202. *Gresham v. United States*, 654 A.2d 871, 1995 D.C. App. LEXIS 32 (1995), writ of certiorari denied by 516 U.S. 854, 116 S. Ct. 155, 133 L. Ed. 2d 99, 1995 U.S. LEXIS 5969, 64 U.S.L.W. 3243 (1995).

Conviction for possession of firearm during crime of violence did not merge with predicate convictions for armed robbery, burglary while armed, and assault with intent to commit robbery while armed. D.C. Code 1981, § 22-

3204(b). *Poole v. United States*, 630 A.2d 1109, 1993 D.C. App. LEXIS 212 (1993), writ of certiorari denied by 513 U.S. 855, 115 S. Ct. 160, 130 L. Ed. 2d 98, 1994 U.S. LEXIS 6092, 63 U.S.L.W. 3261 (1994), writ of certiorari denied by 513 U.S. 858, 115 S. Ct. 166, 130 L. Ed. 2d 103, 1994 U.S. LEXIS 6136, 63 U.S.L.W. 3261 (1994).

Defendant's conviction for unauthorized use of motor vehicle did not merge with his robbery conviction, and his theft conviction did not merge with burglary conviction, where each conviction required a different element of proof. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b), 22-3815. *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

Offenses of attempted armed robbery and assault with dangerous weapon merged; both were committed against same victim and achieved by same action of placing gun against victim's stomach and demanding his money. D.C. Code 1981, §§ 22-502, 22-2901. *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Once defendant's conviction for assault with dangerous weapon merged with conviction for attempted armed robbery, his related convictions for possession of firearm during crime of violence or dangerous offense also merged, as they concerned violations of same statute by same actions of placing gun against victim's stomach and demanding his money, and there was no indication of legislative intent to allow multiple sentences in such circumstances. D.C. Code 1981, §§ 22-502, 22-2901, 22-3204(b). *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Assault with dangerous weapon was lesser included offense of armed robbery because all elements of assault with dangerous weapon were included in armed robbery and assault was committed to effect robbery; therefore, conviction for assault with dangerous weapon merged into conviction for armed robbery and double jeopardy clause precluded punishment for both defenses. U.S. Const. Amend. 5; D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Norris v. United States*, 585 A.2d 1372, 1991 D.C. App. LEXIS 26 (1991).

As long as assault was committed for purposes of effecting robbery, conviction for assault with dangerous weapon merges into conviction for armed robbery and absent intent to kill, degree of assault is irrelevant. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Norris v. United*

States, 585 A.2d 1372, 1991 D.C. App. LEXIS 26 (1991).

Asportation of victim was not integral part of robbery, rather than separate offense of kidnapping, so as to merge into robbery offense; actions of forcing victim into alley, away from street where bystanders might have seen and interfered, exposed victim to more danger and decreased risk that defendants would be caught, and the forcible detention of victim, which began before and continued after victim's valuables were forcibly removed, could not be deemed detention approximately coextensive or necessary incident to crime of robbery. D.C. Code 1981, §§ 22-2101, 22-2901. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

While not every robbery gives rise to responsibility for kidnapping, kidnapping does not necessarily merge into robbery when committed during closely related incidents. D.C. Code 1981, §§ 22-2101, 22-2901. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

Kidnapping charges merged with robbery charges where defendant approached victims in apartment building hallway, pointed a gun at them, directed them to a laundry room, robbed them, and directed them to storage room where they remained for approximately five minutes before they escaped. *Vines v. United States*, 540 A.2d 1107, 1988 D.C. App. LEXIS 67 (1988).

Armed assault with intent to rob victim did not merge with armed robbery of assault victim's husband where victim was frightened into abandoning control of property upon sighting armed man so that assault was complete before husband appeared to assert his control over property. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

Felony-murder conviction and conviction for underlying robbery were merged. D.C. Code 1981, §§ 22-2401, 22-2901. *Garris v. United States*, 491 A.2d 511, 1985 D.C. App. LEXIS 375 (1985).

Conviction of robbery merged with conviction of felony-murder and, hence, was subject to being reversed. D.C. Code 1981, §§ 22-1801(a), 22-2401, 22-2901. *Graves v. United States*, 490 A.2d 1086, 1984 D.C. App. LEXIS 586 (1984), writ of certiorari denied by 474 U.S. 1064, 106 S. Ct. 814, 88 L. Ed. 2d 788, 1986 U.S. LEXIS 2427, 54 U.S.L.W. 3461 (1986).

Defendants' convictions for one count of armed robbery merged with their convictions for felony-murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Derrington v. United States*,

488 A.2d 1314, 1985 D.C. App. LEXIS 329 (1985), writ of certiorari denied by 486 U.S. 1009, 108 S. Ct. 1738, 100 L. Ed. 2d 201, 1988 U.S. LEXIS 2187, 56 U.S.L.W. 3789 (1988).

Assault with dangerous weapon was lesser-included offense of robbery while armed and two offenses merged where they both arose out of same act of defendant. *Leftwitch v. United States*, 460 A.2d 993, 1983 D.C. App. LEXIS 378 (1983).

Convictions of rape, robbery, and burglary, which underlay felony-murder convictions, merged into those felony-murder convictions and, accordingly, convictions of rape, robbery, and burglary would be vacated. D.C. Code 1981, §§ 22-1801, 22-2401, 22-2801, 22-2901, 22-3502. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

Offense of carrying pistol without license does not merge into offense of armed robbery. D.C. Code §§ 22-2901, 22-3202, 22-3204. *Rouse v. United States*, 402 A.2d 1218, 1979 D.C. App. LEXIS 371 (1979).

Convictions for first-degree burglary, robbery and assault with a dangerous weapon merged with more serious offenses, i.e., burglary in first degree while armed and armed robbery, and case was accordingly remanded with instructions to vacate convictions and related sentences for the first-mentioned convictions. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 22-3204. *Evans v. United States*, 392 A.2d 1015, 1978 D.C. App. LEXIS 327 (1978).

Although defendant's robbery and assault with a dangerous weapon convictions had to be vacated, defendant's conviction of possession of prohibited weapon, which required proof of specific intent to use weapon unlawfully against another, an element not present in armed robbery, robbery, or assault with a dangerous weapon, did not merge into his armed robbery conviction. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3214(b). *Woody v. United States*, 369 A.2d 592, 1977 D.C. App. LEXIS 420 (1977).

Where assault with dangerous weapon offense was submitted to jury on specific instruction that it could convict on assault with dangerous weapon charge only if it found that separate and apart from pointing the gun at complaining witness, the complaining witness was beaten with the gun, and jury returned verdict of guilty, assault with dangerous weapon was not a lesser included offense within the armed robbery, offenses did not merge, and punishment for both did not constitute cumulative punishment. D.C. Code §§ 22-502, 22-2901, 22-3203. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

A count charging assault with a dangerous weapon is merged with a count charging armed robbery. D.C. Code §§ 22-502, 22-2901, 22-

3202. *Smith v. United States*, 312 A.2d 781, 1973 D.C. App. LEXIS 406 (1973).

Nature and elements of robbery.

Nature and elements of related offenses— In general.

Robbery incorporates elements of assault with those of larceny, that is, frightening person by force or violence, or intimidation so that person hands over property. *United States v. Ray*, 21 F.3d 1134, 1994 U.S. App. LEXIS 8342 (C.A.D.C. 1994).

There is no statutory requirement for either robbery or assault with a dangerous weapon, that there be a specific intent to commit the other. D.C. Code 1961, §§ 22-501, 22-502, 22-1801, 22-2901, 22-3102, 22-3202. *United States v. Suggs*, 269 F. Supp. 732, 1967 U.S. Dist. LEXIS 8793 (D.D.C.1967).

— Assault with intent to rob, nature and elements of related offenses.

Elements of assault with intent to commit robbery are that defendant assaulted complainant and that, at time of assault, defendant had specific intent to commit robbery. D.C. Code 1981, § 22-501. *Singleton v. United States*, 488 A.2d 1365, 1985 D.C. App. LEXIS 338 (1985).

Assault which comprises an essential element of offense of assault with intent to commit robbery is common-law assault. D.C. Code § 22-501. *Anthony v. United States*, 361 A.2d 202, 1976 D.C. App. LEXIS 334 (1976).

— Degrees, nature and elements of robbery.

Unless defendant is in possession of dangerous weapon capable of placing lives in jeopardy, defendant must, during commission of bank robbery, in some manner display object reasonably perceived as capable of inflicting bodily harm to be convicted of aggravated bank robbery. 18 U.S.C. § 2113(d). *United States v. Ray*, 21 F.3d 1134, 1994 U.S. App. LEXIS 8342 (C.A.D.C. 1994).

When defendant has not displayed dangerous weapon or ostensibly dangerous one, defendant may nevertheless be convicted under aggravated bank robbery statute if he or she in fact had actual firearm and used it by threatening others with it. 18 U.S.C. § 2113(d). *United States v. Ray*, 21 F.3d 1134, 1994 U.S. App. LEXIS 8342 (C.A.D.C. 1994).

Where defendants approached victim and positioned themselves on either side of him and one said, "Let me have it," while one stuck a pistol against victim's ribs, and where victim attempted to toss envelope containing money to a stranger and one of the defendants immediately picked up the envelope and ran, joined by the other defendant, defendant's act of picking up the envelope, if it did not constitute a taking from the "person" of the victim, at least consti-

tuted taking from victim's "immediate actual possession" within robbery statute. D.C. Code §§ 22-2901, 22-3202. *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

Federal bank robbery statute establishes comprehensive scheme for prosecuting and punishing persons who rob federally-insured banks, and scheme subdivides the offense into a series of steps, a continuum running from entry with intent to rob, to robbery by force and violence, to robbery with aid of a dangerous weapon, to robbery resulting in death or kidnapping; scheme provides penalty for each step of offense and increases penalty as offense becomes more aggravated. 18 U.S.C. § 2113(a, d). *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

Armed robbery does not require the use of or intent to use a weapon in commission of robbery; it requires mere availability of weapon. D.C. Code § 22-3203(a). *Washington v. United States*, 366 A.2d 457, 1976 D.C. App. LEXIS 408 (1976).

— Different offenses in same transaction, nature and elements of related offenses.

Where, during course of robbery of market, defendant robbed the property of the store owners and robbed a store employee of his own property, his wallet, the episode was not a "unitary transaction" but involved two distinct offenses. D.C. Code §§ 22-2901, 22-3202. *United States v. Diggs*, 522 F.2d 1310, 1975 U.S. App. LEXIS 12115 (C.A.D.C. 1975).

The Government was entitled to charge in the same indictment offenses against both federal bank robbery statute and District of Columbia armed robbery statute for the same bank robbery; but the defendant could not ultimately be sentenced under two statutes proscribing essentially the same offense. 18 U.S.C. § 2113(a); D.C. Code §§ 22-2901, 22-3202. *United States v. Diggs*, 522 F.2d 1310, 1975 U.S. App. LEXIS 12115 (C.A.D.C. 1975).

The federal savings and loan robbery statute does not preclude a prosecution under District of Columbia law for the robbery of an institution falling within the jurisdiction of the federal statute. 18 U.S.C. §§ 2113(a), 3231; D.C. Code §§ 22-2901, 22-3202. *United States v. Shepard*, 515 F.2d 1324, 1975 U.S. App. LEXIS 13657 (C.A.D.C. 1975).

In the absence of any contrary expression of congressional intent, it cannot be implied that Congress chose to allow dual prosecutions of bank or savings and loan robberies throughout the rest of the United States but prohibited the Government from ever electing to prosecute under local rather than federal law when the bank or savings and loan association is located in the District of Columbia. 18 U.S.C.

§ 2113(a); D.C. Code §§ 22-2901, 22-3202. *United States v. Shepard*, 515 F.2d 1324, 1975 U.S. App. LEXIS 13657 (C.A.D.C. 1975).

Assault with dangerous weapon upon motel clerk was lesser included offense of armed robbery of same person, and conviction of former could not stand as conviction for another offense. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Lee*, 509 F.2d 400, 1974 U.S. App. LEXIS 5476 (C.A.D.C. 1974), writ of certiorari denied by 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765, 1975 U.S. LEXIS 1180 (1975).

Although a violation of the District of Columbia armed robbery statutes and a violation of the federal mail robbery statute required different elements of proof, and although, in the instant case, concurrent sentences were imposed, the conviction of defendants on both charges, arising from a single transaction, was improper, necessitating remand to the trial court with instructions to vacate the judgment on one of the counts and to resentence on the other count. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3202. *United States v. Lee*, 509 F.2d 400, 1974 U.S. App. LEXIS 5476 (C.A.D.C. 1974), writ of certiorari denied by 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765, 1975 U.S. LEXIS 1180 (1975).

Assault with dangerous weapon was lesser included offense in armed robbery offense, and additional convictions for assault with dangerous weapon would accordingly be vacated where defendant had been convicted on three armed robbery counts. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Assault with dangerous weapon was lesser included offense of armed robbery; thus, defendants could not be convicted of both three counts of armed robbery and three counts of assault with a deadly weapon and convictions of assault would be reversed. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. McKinley*, 485 F.2d 1059, 1973 U.S. App. LEXIS 7985 (C.A.D.C. 1973).

Where robbery constituted a unitary transaction, defendant could not properly be convicted and sentenced on two robbery counts. 18 U.S.C. § 2113(a); 18 U.S.C. § 292(c); D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Hopkins*, 464 F.2d 816, 1972 U.S. App. LEXIS 8848 (C.A.D.C. 1972).

Trial court lacked jurisdiction to convict defendant, who had been indicted only for robbery, of assault with dangerous weapon (an offense not necessarily included in robbery) even though defendant failed to object to dangerous-weapon charge. Fed. Rules Crim. Proc. rule 31(c), 18 U.S.C.; D.C. Code, 1961, §§ 22-502, 22-2901. *Crosby v. United States*, 339 F.2d 743, 1964 U.S. App. LEXIS 3783 (C.A.D.C. 1964).

Ancient distinction that robbery offends person and burglary habitation has not been obliterated by Congress with respect to District of Columbia even where robbery inside dwelling follows closely on heels of housebreaking of that dwelling. D.C. Code 1961, §§ 22-1801, 22-2901. *Irby v. United States*, 250 F. Supp. 983, 1965 U.S. Dist. LEXIS 6690 (D.D.C.1965), affirmed by 390 F.2d 432, 129 U.S. App. D.C. 17, 1967 U.S. App. LEXIS 4497 (1967).

Predicate felonies of armed robbery significantly overlapped, and therefore defendant's separate convictions for possession of a firearm during the commission of a crime of violence (PFCV) merged into one, where defendant pointed his gun at all three victims initially, then turned the gun on one victim in an attempt to force him into a vehicle, and finally pointed it at another victim when victim attempted to intervene, but each PFCV charges was based on a count of armed robbery, not a separate assault. *Hampton v. United States*, 10 A.3d 137, 2010 D.C. App. LEXIS 731 (2010).

Assault with a dangerous weapon (ADW) is a lesser included offense of armed robbery when the assault is committed in order to effectuate the robbery. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Under statute providing that no person shall possess pistol or any other firearm while committing crime of violence or dangerous crime, where defendant's convictions for assault with dangerous weapon and attempted armed robbery merge to become one "crime of violence or dangerous crime," there can be only one associated offense of possession of firearm during crime of violence. D.C. Code 1981, §§ 22-502, 22-2901, 22-3204(b). *Morris v. United States*, 622 A.2d 1116, 1993 D.C. App. LEXIS 79 (1993), writ of certiorari denied by 510 U.S. 899, 114 S. Ct. 270, 126 L. Ed. 2d 221, 1993 U.S. LEXIS 6183, 62 U.S.L.W. 3252 (1993).

Defendant could be convicted of two separate counts of robbery where defendant pointed pistol at two women while accomplices removed cash from cash boxes on counter of store, even though property was not taken from person of either woman, where separate acts of violence were required to prevent women from retaining control of property for which they were responsible. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

Where complainant was initially accosted and robbed on well-lighted street in front of her home and she was taken over 200 yards to darkened secluded spot and spent approximately one hour with defendant, asportation was not integral part of rape, and defendant could be convicted both for kidnapping and for rape, as well as robbery. D.C. Code 1981, §§ 22-2101, 22-2801, 22-2901, 22-3202. *Boyd v.*

United States, 473 A.2d 828, 1984 D.C. App. LEXIS 328 (1984).

Convictions of both attempted robbery while armed and of assault with a dangerous weapon, arising out of same incident, were proper in view of fact that each offense clearly required proof of a fact that other did not because offenses were directed against different victims. D.C. Code 1981, §§ 22-502, 22-2402, 22-3202. *Adams v. United States*, 466 A.2d 439, 1983 D.C. App. LEXIS 483 (1983).

Conviction for assault with dangerous weapon could not stand in view of defendant's conviction for armed robbery arising out of same incident. *Harling v. United States*, 460 A.2d 571, 1983 D.C. App. LEXIS 374 (1983).

Offense of assault with a deadly weapon must be set aside as a lesser included offense of armed robbery only when conviction for armed robbery arose out of same act of defendant. D.C. Code §§ 22-502, 22-2901, 22-3202. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

Conviction of assault with a deadly weapon would not be set aside as a lesser included offense of armed robbery, where jury's conviction of assault with a deadly weapon of necessity included finding that assault occurred after conclusion of all earlier crimes, including armed robbery. D.C. Code §§ 22-502, 22-2901, 22-3202. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

Incident in which robbers took money in cash register from sales clerk and took money orders and food stamps from sales clerk's purse involved separate transactions on which conviction of two counts of armed robbery could be based. D.C. Code §§ 22-2901, 22-3202. *Jones v. United States*, 362 A.2d 718, 1976 D.C. App. LEXIS 349 (1976).

Where, in course of armed robbery, shotgun was pointed at two distinct individuals at different times, there was no error in entering separate judgments of conviction of armed robbery and assault with dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *Borrero v. United States*, 332 A.2d 363, 1975 D.C. App. LEXIS 324 (1975).

It was improper to convict defendant both for assault with a dangerous weapon and armed robbery where the assault was a necessary part of the evidence needed to support the count of armed robbery. D.C. Code §§ 22-502, 22-2901, 22-3202. *Taylor v. United States*, 324 A.2d 683, 1974 D.C. App. LEXIS 259 (1974).

Housebreaking and robbery convictions can stand together since robbery and burglary statutes which codify common law protect distinct societal interests. D.C. Code §§ 22-1801(a), 22-

2901, 22-3202. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

— **Force, nature and elements of robbery.**

The force used to remove money from victim's pocket is sufficient "force or violence" within statute defining "robbery" as a taking by "force or violence," whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear. D.C. Code 1929, T. 6, § 34. *Spencer v. U.S.*, 116 F.2d 801, 1940 U.S. App. LEXIS 2756 (1940).

Under District of Columbia statute, "stealthy seizure" is considered a form of "force or violence." 18 U.S.C. § 924(e), (e)(2)(B), (e)(2)(B)(i); D.C. Code 1981, § 22-2901. *United States v. Mathis*, 739 F. Supp. 15, 1990 U.S. Dist. LEXIS 5642 (1990), affirmed in part and reversed in part by 963 F.2d 399, 295 U.S. App. D.C. 296, 1992 U.S. App. LEXIS 8608 (1992), appeal dismissed by 3 F.3d 1577, 303 U.S. App. D.C. 293, 1993 U.S. App. LEXIS 29688 (1993).

To satisfy the force requirement in a charge of robbery by stealthy seizure, government need only demonstrate actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person. *Leak v. United States*, 757 A.2d 739, 2000 D.C. App. LEXIS 183 (2000), writ of certiorari denied by 534 U.S. 1054, 122 S. Ct. 644, 151 L. Ed. 2d 562, 2001 U.S. LEXIS 10829, 70 U.S.L.W. 3372 (2001).

Defendant's taking victim's wallet from the ground after an alleged struggle, as opposed to taking it from victim's person, did not defeat robbery charge; to satisfy the "force" requirement, the government need only demonstrate the actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

To satisfy "force" requirement in charge of robbery by stealthy seizure, government need only demonstrate actual physical taking of property from person of another, even though without his knowledge and consent, and though property be unattached to his person. D.C. Code 1981, § 22-2901. *Ulmer v. United States*, 649 A.2d 295, 1994 D.C. App. LEXIS 197 (1994).

The gravamen of the offense of armed robbery is that something is taken from a person by force. D.C. Code 1981, §§ 22-2901, 22-3202. *Roper v. United States*, 564 A.2d 726, 1989 D.C. App. LEXIS 188 (1989).

One of the essential elements of robbery is that taking of property be accomplished by force or by putting victim in fear. D.C. Code 1981 §§ 22-2901, 22-3202. *United States v.*

Bradford, 482 A.2d 430, 1984 D.C. App. LEXIS 505 (1984).

Although the slightest moving of an object from its original location may constitute an asportation, for the purpose of establishing robbery, the combined requirement of taking and carrying away demonstrates that force or violence used during a sequence of actions that includes but is not limited to the initial seizure is sufficient to make out the crime of robbery. *Jacobs v. United States*, 861 A.2d 15, 2004 D.C. App. LEXIS 582 (2004), vacated by 886 A.2d 510, 2005 D.C. App. LEXIS 545 (D.C. 2005).

— **In general.**

Where defendant and accomplice confronted corner grocery store proprietor and his wife with a gun and obtained \$15 from proprietor's pocket and \$35 from cash register, \$19 of which was delivered by wife at husband's direction, defendant could be convicted for robbing wife as well as proprietor. *Barringer v. United States*, 399 F.2d 557, 1968 U.S. App. LEXIS 7749 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 1057, 89 S. Ct. 697, 21 L. Ed. 2d 698, 1969 U.S. LEXIS 2827 (1969).

"Robbery" is a crime against possession. D.C. Code §§ 22-2901, 22-3202. *Jones v. United States*, 362 A.2d 718, 1976 D.C. App. LEXIS 349 (1976).

— **Intent, nature and elements of robbery.**

Intent to steal is material element necessary to offense of robbery. D.C. Code § 22-3202. *United States v. Robinson*, 475 F.2d 376, 1973 U.S. App. LEXIS 11290 (C.A.D.C. 1973).

One cannot be guilty of robbery unless he has specific intent to take property of another. *Richardson v. United States*, 403 F.2d 574, 1968 U.S. App. LEXIS 6475 (C.A.D.C. 1968).

Defendant who believed in good faith that he was entitled to money which he took from another lacked requisite specific intent for crime of robbery. *Richardson v. United States*, 403 F.2d 574, 1968 U.S. App. LEXIS 6475 (C.A.D.C. 1968).

Requisite specific intent for robbery is lacking in regard to forceful taking of money under color of a liquidated debt. *Richardson v. United States*, 403 F.2d 574, 1968 U.S. App. LEXIS 6475 (C.A.D.C. 1968).

Robbery requires specific intent to deprive victim of property. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 348 F.2d 772, 1965 U.S. App. LEXIS 5354 (C.A.D.C. 1965).

Specific intent to steal is an element of robbery. D.C. Code 1981, § 22-2901. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Intent to commit robbery does not require that defendant announce his intent. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by

474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

Although District of Columbia robbery statute does not mention specific intent, it must be read as referring to the common-law crime of robbery of which a necessary element is specific intent to take property of another. D.C. Code § 22-2901. *United States v. Owens*, 332 A.2d 752, 1975 D.C. App. LEXIS 312 (1975).

— **Kidnapping, nature and elements of related offenses.**

The forcible detention and carrying away of victim, during which he was transported, via automobile, for 25 blocks and which began before and continued after he was forced to yield his money and other valuables, was not a detention approximately coextensive with or a necessary incident to the armed robbery offense, and, thus, there had been a separate kidnapping offense of which defendant could be convicted in addition to her conviction of armed robbery. D.C. Code §§ 22-2101, 22-2901, 22-3202. *Sinclair v. United States*, 388 A.2d 1201, 1978 D.C. App. LEXIS 490 (1978), writ of certiorari denied by 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77, 1979 U.S. LEXIS 517 (1979).

— **Larceny, nature and elements of related offenses.**

While "larceny" remains an offense against possession, "robbery" is basically a crime against the person. D.C. Code §§ 22-2201, 22-2901. *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

If evidence in armed robbery prosecution did not warrant findings that the \$500 involved was taken from victim's person or immediate actual possession, then jury could only have properly found defendants guilty of the lesser included offense of grand larceny. D.C. Code §§ 22-2201, 22-2901. *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

"Larceny" is an offense against the possession, whereas "robbery" is an offense against the person. *Neufield v. U.S.*, 118 F.2d 375, 1941 U.S. App. LEXIS 4014 (1941).

"Robbery" is distinguished from larceny in that robbery is a crime against possession by a person whereas larceny is a crime against mere possession. D.C. Code 1981, §§ 22-2901, 22-3202. *United States v. Bradford*, 482 A.2d 430, 1984 D.C. App. LEXIS 505 (1984).

— **Property subject of robbery, nature and elements of robbery.**

"Possession" as used in robbery statute does not mean strict legal ownership, but rather "custody or control" in a colloquial sense. D.C. Code § 22-2901. *United States v. Dixon*, 469

F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

A thing is within one's "immediate actual possession" for purposes of robbery statute so long as it is within such range that such person could, if not deterred by violence or fear, retain actual physical control over it. D.C. Code § 22-2901. *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

The word "possession" in robbery statute is not used in strict larcenous sense, but is used in a colloquial sense, meaning nothing more than custody or control. D.C. Code 1929, T. 6, Sec. 34. *Neufield v. U.S.*, 118 F.2d 375, 1941 U.S. App. LEXIS 4014 (1941).

Possession may continue for purposes of robbery even though owner is prevented by force from effectively exercising that possession. *Leak v. United States*, 757 A.2d 739, 2000 D.C. App. LEXIS 183 (2000), writ of certiorari denied by 534 U.S. 1054, 122 S. Ct. 644, 151 L. Ed. 2d 562, 2001 U.S. LEXIS 10829, 70 U.S.L.W. 3372 (2001).

A robbery can be argued even where a man and his trousers are separated, and the latter are cleaned out while the former is otherwise occupied, his mind far away from thoughts of his pants. *Jefferson v. United States*, 474 A.2d 147, 1984 D.C. App. LEXIS 367 (1984).

— **Stealth, nature and elements of robbery.**

Under statute defining robbery as a taking against resistance or by sudden or stealthy seizure or snatching or by putting in fear, conviction for "robbery" may be had though victim did not have knowledge of the theft at the time, since "stealth" necessarily connotes lack of knowledge on part of victim. D.C. Code 1929, T. 6, § 34. *Spencer v. U.S.*, 116 F.2d 801, 1940 U.S. App. LEXIS 2756 (1940).

Stealthy theft without putting in fear or violence held robbery under statute (Code, § 810 [D.C. Code 1929, T. 6, § 34]). *Turner v. U.S.*, 16 F.2d 535, 1926 U.S. App. LEXIS 3898 (1926).

Robbery statute did not require that victim of robbery by stealth be ignorant of fact that he was being robbed. D.C. Code 1981, § 22-2901. *Noaks v. United States*, 486 A.2d 1177, 1985 D.C. App. LEXIS 314 (1985).

— **Taking from person or presence of another, nature and elements of robbery.**

Dead man is a "person" within robbery statute; accordingly, there can be a robbery even if the victim was dead before property was taken. *United States v. Butler*, 455 F.2d 1338, 1971 U.S. App. LEXIS 7080 (C.A.D.C. 1971).

Victim of homicide, even though dead, was "person" within robbery statute under circumstances where time interval between stabbing and taking of money from her body was short, and even if intent of taking money did not occur

until after she was dead perpetrator could properly be convicted of robbery. D.C. Code 1951, §§ 22-2401, 22-2901. *Carey v. U.S.*, 296 F.2d 422, 1961 U.S. App. LEXIS 3480 (C.A.D.C. 1961).

"Immediate actual possession," within statute defining robbery as a taking from the "immediate actual possession" of another, refers to an area within which victim could reasonably be expected to exercise some physical control over his property. D.C. Code 1929, T. 6, § 34. *Spencer v. U.S.*, 116 F.2d 801, 1940 U.S. App. LEXIS 2756 (1940).

A thing is within one's "immediate actual possession," for purposes of robbery, so long as it is within such range that person, if not deterred by violence or fear, could retain actual physical control over it. *Winstead v. United States*, 809 A.2d 607, 2002 D.C. App. LEXIS 601 (2002).

Robbery would still exist even though victim was either dead or unconscious at time defendant decided to take his property. D.C. Code 1981, § 22-2901. *Ulmer v. United States*, 649 A.2d 295, 1994 D.C. App. LEXIS 197 (1994).

Conviction for armed robbery requires showing of taking of property of value while armed from immediate actual possession of another against his will by force or violence or by putting in fear; immediate actual possession refers to area within which victim can reasonably be expected to exercise some physical control over property. D.C. Code 1973, §§ 22-2901, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

— Taking generally, nature and elements of robbery.

The purpose of Congress in enacting the robbery statute for District of Columbia was to expand the common-law definition of robbery so that it would comprehend the taking by sudden or stealthy seizure or snatching. D.C. Code 1929, T. 6, Sec. 34. *Neufeld v. U.S.*, 118 F.2d 375, 1941 U.S. App. LEXIS 4014 (1941).

It is not robbery to snatch a watch from the pocket of the owner, where the watch is fastened to the owner's neck by a ribbon, and the ribbon is broken by the first attempt of the prisoner to obtain the watch, and where the owner is not put in fear at the time the watch is taken. *U.S. v. Sims*, 27 F.Cas. 1080, 1835 U.S. App. LEXIS 324 (1835).

Victims' throwing money to floor at defendants' direction satisfied taking and asportation requirements for armed robbery, even though defendants never touched the money. D.C. Code 1981, § 22-2901. *Newman v. United States*, 705 A.2d 246, 1997 D.C. App. LEXIS 189 (1997).

Element distinguishing robbery from larceny is that, in robbery, property taken must have been within victim's immediate actual possession,

while in contrast larceny is crime against possession, not immediate possession by a person. *Rease v. United States*, 403 A.2d 322, 1979 D.C. App. LEXIS 402 (1979).

New trial.

Denial of motion for new trial made after conviction for robbery and based on newly discovered evidence bearing only upon the credibility of a witness for prosecution was not abuse of discretion. Fed. Rules Crim. Proc. rule 33, 18 U.S.C.; D.C. Code 1951, § 22-2901. *Wilkins v. U.S.*, 228 F.2d 37, 1955 U.S. App. LEXIS 3641 (C.A.D.C. 1955).

Where, prior to trial, court granted accused's motion that he be examined by three psychiatrists, one of whom was of his own choosing, and all three concluded that he was of sound mind, and no claim was made during trial that accused had been of unsound mind at time of offense, trial court did not abuse its discretion in declining to hear testimony of psychiatrist, offered on motion for new trial, that accused had been of unsound mind at time of offense. D.C. Code 1940, §§ 22-2901, 22-3202, 22-3204. *Wagstaff v. U.S.*, 198 F.2d 955, 1952 U.S. App. LEXIS 3264 (C.A.D.C. 1952).

On motion for new trial of prosecution for robbery, conspiracy to commit robbery, and for carrying a deadly weapon without a license, trial court had discretion not to require production of arrest record of a witness for prosecution which defendant claimed existed where such alleged record had not been properly subpoenaed during trial. D.C. Code 1940, §§ 22-2901, 22-3204; 18 U.S.C. § 371. *Bundy v. U.S.*, 193 F.2d 694, 1951 U.S. App. LEXIS 2938 (C.A.D.C. 1951).

Refusal of defendant's motion for new trial after conviction of robbery on basis of newly discovered evidence discrediting only prosecuting witness was not abuse of discretion, where it appeared that alleged newly discovered evidence consisting of police record of prosecuting witness could have been procured by defendant before trial, and further that such evidence was not of such a nature that new trial would properly produce an acquittal. D.C. Code 1940, § 22-2901; Fed. Rules Crim. Proc. rule 33, 18 U.S.C. *Thompson v. U.S.*, 188 F.2d 652, 1951 U.S. App. LEXIS 3089 (C.A.D.C. 1951).

Trial court abused its discretion in summarily denying defendant's motion for a new trial without a hearing to determine if defendant's claims of fear and intimidation by co-defendant were credible, in prosecution for armed robbery; while defendant's motion should have been more detailed and included affidavits, it did present a colorable claim, in that it clearly set out that defendant was afraid to truthfully testify about his own innocence, and that it was co-defendant's influence that kept defendant from testifying, and defense counsel expressed

that he was "gravely" concerned that his client was wrongfully convicted. *Lyons v. U.S.*, 833 A.2d 481, 2003 D.C. App. LEXIS 618 (2003).

Denial of defendants' motions for new trial that were predicated on alleged newly discovered evidence in form of letter from co-defendant claiming that defendants had nothing to do with charged events was not abuse of discretion in prosecution for offenses including murder and armed robbery; evidence of defendants' guilt was strong, and credibility of co-defendant would have been seriously undermined at new trial by impeaching evidence. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Trial court erred in denying defendant's motion for new trial, following convictions for kidnapping while armed, armed robbery, assault with intent to commit rape while armed, and possession of firearm during crime of violence, which motion was based on newly discovered evidence consisting of handwritten affidavit from alleged participant in crimes, who stated that defendant did not participate, where government conceded its one ground for opposing motion, that is, untimeliness, and trial court's remaining reasons for denying motion without evidentiary hearing were not asserted by government in trial court and were unpersuasive. *Arrington v. United States*, 804 A.2d 1068, 2002 D.C. App. LEXIS 483 (2002).

Defendant was not entitled to new trial based on newly discovered evidence of reluctant witness who allegedly would have testified that he saw some of Government witnesses attempting to lower a body over a balcony of apartment building where victim was killed, where testimony would not have refuted the substantial evidence, including evidence of defendant's own behavior following the murder, that it was defendant who robbed and shot victim himself. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Persons liable, generally.

That offense was committed by someone and that defendant assisted or participated in commission of such offense are essential elements of aiding and abetting offense. *United States v. Harris*, 435 F.2d 74, 1970 U.S. App. LEXIS 7752 (C.A.D.C. 1970), writ of certiorari denied by 402 U.S. 986, 91 S. Ct. 1675, 29 L. Ed. 2d 152, 1971 U.S. LEXIS 2081 (1971).

Although an unarmed accomplice may be found guilty of armed robbery as an aider and abettor, such a theory of liability requires proof beyond a reasonable doubt that the use of the weapon was either known or "reasonably foreseeable" to the unarmed participant. *Abdus-Price v. United States*, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

As the jury was instructed on an aiding and abetting theory, all of the acts committed by defendant in taking victim's wallet could be imputed to codefendant, in robbery prosecution. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

To establish aiding and abetting of codefendant's armed robbery of victim so as to support conviction of defendant for armed robbery, prosecution was obliged to prove that codefendant in some sort associated himself with the venture, that he participated in it as something that he wished to bring about, that he sought by his action to make it succeed. D.C. Code 1981, §§ 22-2901, 22-3202. *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

Evidence was insufficient to support finding that codefendant's armed robbery of victim, who was attempting to purchase handgun, would follow in ordinary course of events, or was natural and probable consequence of planned handgun sale, so as to support defendant's conviction for armed robbery as aider and abettor, despite fact that codefendant robbed victim after defendant told victim to see codefendant respecting handgun purchase; armed robbery was qualitatively different from handgun purchase and possible finding that defendant should have known it was conceivable codefendant might rob victim was insufficient to support conviction. D.C. Code 1981, §§ 22-2901, 22-3202. *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

To prove that defendant aided and abetted armed robbery, government was required to establish beyond reasonable doubt that armed robbery had been committed and that defendant knowingly participated in the robbery. D.C. Code 1981, § 22-105. *Kelly v. United States*, 639 A.2d 86, 1994 D.C. App. LEXIS 35 (1994).

Evidence would not support conviction of defendant for robbery, either as participant or as aider or abettor, even though defendant was present at scene, may have drawn attention to victim's necklace, and left with robbers; no known case imposed duty of rescue upon defendant as inadvertent witness, particularly when one of robbers was apparently carrying handgun, and evidence did not indicate that defendant facilitated robbers' getaway. D.C. Code 1981, § 22-2901. *Acker v. United States*, 618 A.2d 688, 1992 D.C. App. LEXIS 351 (1992).

To be convicted as accomplice of armed robbery, it must have been reasonably foreseeable to accomplice that some type of weapon would be required. D.C. Code 1981, §§ 22-2901, 22-3202. *Ingram v. United States*, 592 A.2d 992, 1991 D.C. App. LEXIS 156 (1991), writ of certiorari denied by 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757, 1991 U.S. LEXIS 7189, 60 U.S.L.W. 3435 (1991).

Defendant could not be convicted as an accessory after the fact where act which purportedly aided principal's escape occurred during immediate flight from scene of the robbery and while principal was being pursued. *Fields v. United States*, 484 A.2d 570, 1984 D.C. App. LEXIS 543 (1984), writ of certiorari denied by 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501, 1985 U.S. LEXIS 1693, 53 U.S.L.W. 3777 (1985).

Fact that defendant's active participation in the robbery may have occurred after the armed portion of the robbery occurred did not preclude a finding that he was guilty of armed robbery on an aiding and abetting theory. *Johnson v. United States*, 434 A.2d 415, 1981 D.C. App. LEXIS 343 (1981).

An instruction under the aiding and abetting statute is not necessary in order for the acts of one principal in furtherance of a crime to be imputed to another principal; hence, fact that defendant may have only held gun during armed robbery of supermarket did not require finding that since he did not physically commit all elements of the offense he could not be held legally responsible for the acts of the other individual, who seized the cash from the safe, unless he was found to have aided and abetted such individual. D.C. Code §§ 22-105, 22-502, 22-2901 to 22-3202. *Hazel v. United States*, 353 A.2d 280, 1976 D.C. App. LEXIS 486 (1976).

Although defendant may only have held gun during course of armed robbery of supermarket, acts of his accomplice in taking money from the safe would be imputed to defendant, as a coprincipal, by virtue of fact that defendant himself committed one of the necessary elements of the crime. D.C. Code §§ 22-2901 to 22-3202. *Hazel v. United States*, 353 A.2d 280, 1976 D.C. App. LEXIS 486 (1976).

An aider and abetter of an armed robbery is not guilty of a lesser included offense but is a principal to the robbery. D.C. Code § 22-105. *Atkinson v. United States*, 322 A.2d 587, 1974 D.C. App. LEXIS 243 (1974).

Plea.

As respects allegation of defendant, charged with armed robbery and carrying dangerous weapon, that his absence from status hearing, at which defense counsel was served with information revealing Government's intention to seek additional punishment under recidivist statute, deprived defendant of meaningful right to participate in plea bargaining, evidence established that counsel fully advised his client; furthermore, there was no absolute right to bargain. D.C. Code §§ 22-2901, 22-3202, 22-3202(a)(2), 22-3204, 23-111. *Smith v. United States*, 356 A.2d 650, 1976 D.C. App. LEXIS 533 (1976).

Post-conviction bail.

Federal Bail Reform Act, rather than District

of Columbia Code bail provisions, is applicable where a defendant, convicted in federal court of a District of Columbia Code offense, presents a motion for release pending appeal in federal courts of District of Columbia. 18 U.S.C. §§ 3146, 3148, 3772; D.C. Code §§ 22-502, 22-2901, 22-3202, 23-1325, 23-1325(c); Fed.Rules App.Proc. rules 9, 9(c), 18 U.S.C.; Fed.Rules Crim.Proc. rules 46, 46(c), 18 U.S.C. *United States v. Brown*, 483 F.2d 1314, 1973 U.S. App. LEXIS 8492 (C.A.D.C. 1973).

Appellant, convicted of robbery and assault with a deadly weapon, whose appeal presented a substantial claim that he was wrongfully identified, would be released on personal recognition on certain enumerated conditions which were so structured as to allow for a maximum amount of supervision over appellant while still allowing for his freedom from incarceration. D.C. Code §§ 22-502, 22-2901; 18 U.S.C. §§ 3146, 3148, 3150. *Banks v. United States*, 414 F.2d 1150, 1969 U.S. App. LEXIS 12256 (C.A.D.C. 1969).

Preliminary proceeding.

Where victim tentatively identified defendant from photograph shown him about a month after crime of robbery but police waited seven months thereafter before arresting defendant though defendant was living at his mother's apartment and working, as police were aware, a few blocks from his home, defendant was entitled to a full pretrial hearing in which government would be given an opportunity to justify seven-month delay in defendant's arrest and in which defendant would be given opportunity to show extent to which delay prejudiced him. D.C. Code 1967, § 22-2901. *Jones v. United States*, 402 F.2d 639, 1968 U.S. App. LEXIS 6161 (C.A.D.C. 1968).

Failure of United States Commissioner to assign counsel to defendant at preliminary proceeding and use at trial of testimony that defendant had confessed to police after the preliminary hearing had been continued for four weeks could not serve as a basis for reversal of conviction where neither point had been raised in district court, no objection had been made upon introduction of the defendant's oral confession, and no relief had been asked below. D.C. Code 1961, § 22-2901; Fed.Rules Crim.Proc. rules 5(b), 52(b), 18 U.S.C.; U.S. Const. Amends, 5, 6. *Moon v. U.S.*, 317 F.2d 544, 1962 U.S. App. LEXIS 3236 (C.A.D.C. 1962).

In prosecution for crimes including felony-murder, there was sufficient evidence of intent to steal or rob murder victim's property. D.C. Code 1981, §§ 22-2201, 22-2204, 22-2401, 22-2901. *Garris v. United States*, 465 A.2d 817, 1983 D.C. App. LEXIS 455 (1983), writ of certiorari denied by 465 U.S. 1012, 104 S. Ct.

1013, 79 L. Ed. 2d 243, 1984 U.S. LEXIS 967, 52 U.S.L.W. 3551 (1984).

Presumptions and burden of proof.

— Defenses, presumptions and burden of proof.

In prosecution for rape and robbery, the defendant did not have the obligation of making out a complete defense. *McKenzie v. U.S.*, 126 F.2d 533, 1942 U.S. App. LEXIS 4206 (1942).

— In general.

Robbery conviction requires proof of taking from person of another by sudden or stealthy seizure or snatching, or by putting in fear. D.C. Code 1961, § 22-2901. *Hunt v. United States*, 316 F.2d 652, 1963 U.S. App. LEXIS 6026 (C.A.D.C. 1963).

To support a robbery conviction, the government must prove that there was (1) a felonious taking, (2) accompanied by an asportation [or carrying away], of (3) personal property of value, (4) from the person of another or in his presence, (5) against his will, (6) by violence or by putting him in fear, (7) and *animo furandi*, the intention to steal. *Jacobs v. United States*, 861 A.2d 15, 2004 D.C. App. LEXIS 582 (2004), vacated by 886 A.2d 510, 2005 D.C. App. LEXIS 545 (D.C. 2005).

To obtain a conviction for robbery, the government must prove that a defendant: (1) took property of some value; (2) from the actual possession of the complainant; (3) using force or violence; and (4) carried the property away; (5) with the specific intent to steal it. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

In order to establish robbery, government must prove that defendant took property of some value, from immediate possession of complainant, using force or violence, including stealthy seizure or snatching and carried property away with specific intent to steal it. D.C. Code 1981, § 22-2901. *Pixley v. United States*, 692 A.2d 438, 1997 D.C. App. LEXIS 71 (1997).

To support a charge of robbery, government's proof must include evidence that defendant took property from complainant without a right to do so and with specific intent to steal it. *Beck v. U.S.*, 402 A.2d 418, 1979 D.C. App. LEXIS 372 (1979).

In prosecution for commission of crime of violence while armed with a dangerous or deadly weapon, it is not required that Government prove that gun used in an armed offense was loaded or operable, and testimony that object which appeared to be gun was involved is sufficient to show use of dangerous weapon. D.C. Code §§ 22-2901, 22-3202. *Meredith v. United States*, 343 A.2d 317, 1975 D.C. App. LEXIS 225 (1975).

— Intent, presumptions and burden of proof.

Jury may infer intent to rob from totality of

the evidence. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

Intent to commit robbery may be inferred not only from words uttered by suspect, but also from suspect's conduct or from the totality of the evidence. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

Jury may infer intent to rob from totality of the evidence. *Singleton v. United States*, 488 A.2d 1365, 1985 D.C. App. LEXIS 338 (1985).

— Juvenile proceedings, presumptions and burden of proof.

Uncontroverted testimony afforded ample basis for trier of fact to draw reasonable and permissible inference that the juvenile was involved as aider and abettor in the criminal conduct of robbing and assaulting another juvenile notwithstanding there was contradictory testimony by complaining witness. D.C. Code §§ 22-105, 22-502, 22-2901. *In re W.*, 294 A.2d 174, 1972 D.C. App. LEXIS 237 (1972).

Purposes and legislative intent.

District of Columbia's robbery statute was unambiguously designed to protect persons. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *Davis v. United States*, 498 A.2d 242, 1985 D.C. App. LEXIS 490 (1985).

Questions of law and fact.

— Credibility of witnesses, questions of law and fact.

Question of credibility of complaining witness was for jury, in robbery prosecution in which defendant contended that complaining witness' testimony was inherently incredible. *United States v. Anderson*, 498 F.2d 1038, 1974 U.S. App. LEXIS 8529 (C.A.D.C. 1974), affirmed by 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99, 1975 U.S. LEXIS 78 (1975).

Trial counsel acted within its discretion in armed robbery prosecution in limiting defense counsel's inquiry into whether alleged victim was incarcerated during the four years in which he claimed he had been working for a municipal employer; that line of inquiry was a collateral attack on credibility that had no bearing on alleged victim's credibility or lack thereof as a witness with respect to alleged robbery, and the defense had ample opportunity to cast doubt on his credibility or establish witness bias in its other lines of inquiry. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Testimony of eyewitness to attempted robbery and homicide was not inherently incredible as matter of law, and presented credibility issue for jury, notwithstanding that eyewitness had deliberately lied to defense investigators

with regard to his age and background and had given differing estimates of distance from scene of crime and discrepant versions of nature of confrontation, in view of other evidence which corroborated trial testimony. *Coleman v. United States*, 515 A.2d 439, 1986 D.C. App. LEXIS 518 (1986), writ of certiorari denied by 481 U.S. 1006, 107 S. Ct. 1631, 95 L. Ed. 2d 205, 1987 U.S. LEXIS 1574, 55 U.S.L.W. 3675 (1987).

Whether or not witness made truly independent identification of defendant was factually a matter of credibility which was reasonably reserved to jury by trial judge, in prosecution for armed robbery, robbery and assault with a dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *Hill v. United States*, 367 A.2d 110, 1976 D.C. App. LEXIS 436 (1976).

— Defenses, questions of law and fact.

Evidence upon question whether defendant was not guilty of robbery by reason of insanity was sufficient to raise jury question. D.C. Code 1961, § 22-2901. *Campbell v. U.S.*, 307 F.2d 597, 1962 U.S. App. LEXIS 5544 (C.A.D.C. 1962).

In prosecution for robbery and carrying a dangerous weapon wherein government's testimony on issue of insanity was offered by a number of lay witnesses and a qualified psychiatrist, and on part of defendant there was opposing testimony both lay and psychiatric, issue of insanity was for jury. D.C. Code 1951, §§ 22-2901, 22-3204. *Niport v. U.S.*, 263 F.2d 901, 1959 U.S. App. LEXIS 4439 (C.A.D.C. 1959).

Whether defendant was merely present at scene of burglary and robbery at time of offense, but did not participate in it, was jury question. D.C. Code §§ 22-1801(a), 22-2901, 22-3202. *Franey v. United States*, 382 A.2d 1019, 1978 D.C. App. LEXIS 419 (1978).

— In general.

Discrepancies between witnesses concerning their recollections as to robber's facial appearance and clothing and defendant's appearance as shown by photograph taken on night of his arrest did not render identification evidence so inconsistent as to mandate postverdict judgment of acquittal. *U.S. v. Singleton*, 702 F.2d 1159, 1983 U.S. App. LEXIS 29661 (C.A.D.C. 1983).

Credibility of robbery victim's identification was matter for the jury where the trial court detected no appreciable likelihood of error in her attempt at identifying defendant. *United States v. Jackson*, 509 F.2d 499, 1974 U.S. App. LEXIS 5687 (C.A.D.C. 1974).

"Pickpocketing," or robbery by stealth, is a crime which, by its very nature, is difficult of proof; unexplained possession plus suspicious circumstances can be submitted to sound discretion of jury. D.C. Code § 22-2901. *Davis v.*

United States, 433 F.2d 1222, 1970 U.S. App. LEXIS 8424 (C.A.D.C. 1970).

Whether defendant was one of holdup men in robbery of shoe store was question for jury in robbery and assault with dangerous weapon prosecution. D.C. Code §§ 22-502, 22-2901. *United States v. York*, 426 F.2d 1191, 1969 U.S. App. LEXIS 10675 (C.A.D.C. 1969).

Manner in which defendant came into possession of robbery victim's property was question for jury in robbery prosecution. U.S. Const. Amend. 4; D.C. Code § 22-2901. *Pendergrast v. United States*, 416 F.2d 776, 1969 U.S. App. LEXIS 9121 (C.A.D.C. 1969), writ of certiorari denied by 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243, 1969 U.S. LEXIS 1562 (1969).

In robbery prosecution, government made out a case sufficient to go to the jury. D.C. Code § 22-2901. *Macklin v. United States*, 409 F.2d 174, 1969 U.S. App. LEXIS 8886 (C.A.D.C. 1969).

In robbery prosecution, issue of identity of defendant was one of fact which trial court properly submitted to jury. D.C. Code 1940, § 22-2901. *Thompson v. U.S.*, 188 F.2d 652, 1951 U.S. App. LEXIS 3089 (C.A.D.C. 1951).

In prosecution for rape and robbery, where pistol which victim stated assailant used, clothing which she said he had stolen and money which he had taken were not found in possession of defendant, neighbors testified to good character of defendant and to his having a night job at which he worked regularly, and thorough examination by police failed to shake statement of defendant that he had never seen the prosecuting witness before, such circumstances were important enough to be called to the attention of the jury to be weighed together with evidence in support of legal presumption of innocence. *McKenzie v. U.S.*, 126 F.2d 533, 1942 U.S. App. LEXIS 4206 (1942).

In robbery prosecution, where evidence showed that at time of robbery bank was an operating concern in District of Columbia and bank teller testified that he ascertained that money was missing, that approximately \$9,030 was missing throughout the bank, and that the deficit in his drawer was \$3,304.23 in the shape of cash, the jury was entitled to draw reasonable inferences from the facts proved and to take language at its ordinary meaning and could take the words "money," "cash" and "dollars" to mean what they ordinarily mean in the context of business in the District, that is, money or currency issued by lawful authority and intended to pass and circulate as such, and to mean money having value. D.C. Code 1929, T. 6, §§ 34, 362. *Neufeld v. U.S.*, 118 F.2d 375, 1941 U.S. App. LEXIS 4014 (1941).

Whether defendant took victim's wallet presented question for the jury, in robbery prosecution. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

Surviving victim's testimony that gunman used word "wallet" and that he was about to transfer his billfold to his assailant when gun went off was sufficient to enable jury to consider count of attempted armed robbery. *Towles v. United States*, 496 A.2d 560, 1985 D.C. App. LEXIS 436 (1985), vacated by 497 A.2d 793, 1985 D.C. App. LEXIS 513 (D.C. 1985), affirmed by 521 A.2d 651, 1987 D.C. App. LEXIS 311 (D.C. 1987).

Although defendant contended that plausible interference could be drawn that allegedly stolen wallet was lost, evidence, including testimony by decoy officer that wallet was in his pocket, was sufficient, viewed in light most favorable to the Government, to present question for jury. *Jefferson v. United States*, 474 A.2d 147, 1984 D.C. App. LEXIS 367 (1984).

In proceeding in which defendants were convicted of attempted armed robbery and other offenses, evidence that defendants had crossed the line from preparation to attempt was sufficient to warrant submission of that issue to jury. *Jones v. United States*, 386 A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

Evidence as to defendant's identification as perpetrator of armed robbery was sufficient to create jury question despite asserted discrepancies in description of defendant given by robbery victim and his actual physical appearance. D.C. Code §§ 22-2901, 22-3302. *Anderson v. United States*, 364 A.2d 143, 1976 D.C. App. LEXIS 371 (1976).

Question whether defendants who each had his hand in pocket with protruding bulges aimed at victim's midsection and who attempted to rob victim were guilty of assault with intent to commit robbery was for jury. D.C. Code § 22-501. *Anthony v. United States*, 361 A.2d 202, 1976 D.C. App. LEXIS 334 (1976).

Whether defendant and his accomplice intended to deprive off-duty security officer for apartment complex of some property at time he was forced at gunpoint to submit to successive searches by accomplice during robbery of rental office of complex was jury question, in prosecution for assault with intent to commit robbery while armed, even though nothing was taken from victim and robbers apparently only intended to assure themselves that the security officer was not armed while they were engaged in stealing money of rental company in contradiction to money or valuables of individual employees. *Dowtin v. United States*, 330 A.2d 749, 1975 D.C. App. LEXIS 303 (1975).

— Sufficiency of evidence to bring to jury, questions of law and fact.

Evidence in prosecution for robbery and felony-murder was sufficient to send case to the jury. D.C. Code §§ 22-2401, 22-2901. *United*

States v. Bolden, 514 F.2d 1301, 1975 U.S. App. LEXIS 14122 (C.A.D.C. 1975).

Testimony of operator of coin-operated laundry and dry cleaning establishment that he had seen defendant many times before robbery, that room was well lighted, and that he had opportunity to observe robber for about 30 seconds, was sufficient for jury on issue of identity in armed robbery prosecution. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Inge*, 494 F.2d 1102, 1974 U.S. App. LEXIS 9695 (C.A.D.C. 1974).

Trial court did not abuse discretion in sending robbery cases to jury on the uncorroborated testimony of a single witness. D.C. Code § 22-2901. *United States v. Telfaire*, 469 F.2d 552, 1972 U.S. App. LEXIS 8925 (C.A.D.C. 1972).

Evidence that defendant was seen entering getaway car, carrying a gun, some ten minutes before robbery, accompanied by one of confessed active perpetrators, that someone drove getaway car, and that defendant was seen with two of active robbers one day later was sufficient to take to jury aiding and abetting case against defendant for entering bank with intent to commit robbery therein, bank robbery, armed robbery, and assault with a dangerous weapon. 18 U.S.C. § 2113(a); D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Parker*, 442 F.2d 779, 1971 U.S. App. LEXIS 11966 (C.A.D.C. 1971).

Evidence in prosecution for robbery mademissible case. *Sera-Leyva v. United States*, 409 F.2d 160, 1969 U.S. App. LEXIS 8885 (C.A.D.C. 1969).

Conflicting evidence in robbery prosecution was sufficient for jury. D.C. Code 1961, § 22-2901. *Trimble v. United States*, 369 F.2d 950, 1966 U.S. App. LEXIS 4971 (C.A.D.C. 1966).

In prosecution for robbery and bribery, evidence of defendant's guilt was sufficient to take the case to the jury. *Davis v. U.S.*, 235 F.2d 25, 1956 U.S. App. LEXIS 3813 (C.A.D.C. 1956).

Although facts strongly suggested desire to complete illegal sale of drugs, there was insufficient evidence for jury to find specific intent to rob, as required for convictions of felony-murder while armed, assault with intent to commit robbery while armed, and attempted robbery while armed. D.C. Code 1981, §§ 22-501, 22-2401, 22-2902, 22-3202. *Jones v. United States*, 516 A.2d 929, 1986 D.C. App. LEXIS 519 (1987), writ of certiorari denied by 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848, 1987 U.S. LEXIS 2179, 55 U.S.L.W. 3776 (1987).

While victim of armed robbery could not actually see defendant taking money from safe, fact that \$350 in cash ordinarily placed in safe by night manager as matter of daily routine before going off duty was found to be missing after defendant had gained access to safe, was sufficient evidence to warrant jury inference that defendant had removed it. D.C. Code 1981,

§§ 22-2201, 22-2901, 22-3202. *Colbert v. United States*, 471 A.2d 258, 1984 D.C. App. LEXIS 302 (1984).

Evidence in prosecution for armed robbery was sufficient for jury. D.C. Code §§ 22-2901, 22-3202. *Glass v. United States*, 395 A.2d 796, 1978 D.C. App. LEXIS 369 (1978).

Evidence supported submission to jury of case in which defendants were charged with armed kidnapping, armed rape, armed robbery and carrying pistol without a license. D.C.C.E §§ 22-2101, 22-2801, 22-2901, 22-3202, 22-3204. *Smith v. United States*, 389 A.2d 1356, 1978 D.C. App. LEXIS 399 (1978), writ of certiorari denied by 439 U.S. 1048, 99 S. Ct. 726, 58 L. Ed. 2d 707, 1978 U.S. LEXIS 4242 (1978).

Evidence in prosecution for kidnapping and armed robbery was sufficient to withstand both defendant's motion for acquittal after Government rested and her motion for acquittal after both sides had rested. D.C. Code §§ 22-2101, 22-2901, 22-3202. *Sinclair v. United States*, 388 A.2d 1201, 1978 D.C. App. LEXIS 490 (1978), writ of certiorari denied by 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77, 1979 U.S. LEXIS 517 (1979).

Whether occupants of automobile, in which coat and money taken in armed robbery were found, were guilty of the robbery was question for trier of fact; thus motion for judgment of acquittal was properly denied. *Irby v. United States*, 342 A.2d 33, 1975 D.C. App. LEXIS 414 (1975).

Submission of robbery case to jury was warranted by evidence even though one eyewitness picked person other than defendant in lineup held approximately eight months after the incident. *Marshall v. United States*, 340 A.2d 805, 1975 D.C. App. LEXIS 423 (1975).

Review.

— Determination and disposition, review.

A remand was necessary to determine whether the district court denied probation on ground that the Federal Probation Act, forbidding probation in the case of an offense punishable by death or life imprisonment, applied to a conviction in the district court solely of an offense under the District of Columbia Code, or on ground that, by reference to the terms of the Code under which probation was sentencing option available, it was within its discretion under all the circumstances to deny probation. 18 U.S.C. § 2255; 18 U.S.C. § 3651; D.C. Code 1973, §§ 11-502(3), 22-2901, 22-3202; 26 U.S.C. § 5861(d). *United States v. Garnett*, 653 F.2d 558, 1981 U.S. App. LEXIS 14304 (C.A.D.C. 1981).

Where concurrent sentences imposed on each conviction for assault with a dangerous weapon were adjudged to run concurrently with bur-

glary and armed robbery convictions, no remand for resentencing was necessary on vacation of convictions for assault with a dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Kearney*, 498 F.2d 61, 1974 U.S. App. LEXIS 8584 (C.A.D.C. 1974).

Where trial court denied defendant's motion for an order for a lineup at which he could test ability of two witnesses to identify him in unsuggestive circumstances and, though there was no misstatement as such, prosecutor's statements gave impression that there were two eyeball witnesses for each of the robberies, and prosecutor failed to say there was only one witness from each robbery, and person who failed to identify defendant at lineup was only person who witnessed both robberies and the only government witness to first robbery was "prodded" to make an identification at a palpably over-suggestive showup, interest of justice would best be served by remanding case to trial court for further determination of what ought to be done. D.C. Code § 22-2901. *United States v. Caldwell*, 465 F.2d 669, 1972 U.S. App. LEXIS 8924 (C.A.D.C. 1972).

Conviction for robbery and assault with a dangerous weapon was remanded for determination whether new trial was warranted on ground of ineffective assistance of counsel where counsel was not appointed until almost one year after offense, counsel was appointed slightly more than one month before trial, although counsel's failure to appear on date case was first set was allegedly due to misunderstanding case was not removed from ready calendar, and it was alleged that counsel had inadequate time in which to obtain specified physical evidence and interview specified witnesses. D.C. Code §§ 22-2901, 22-502. *United States v. Weaver*, 422 F.2d 711, 1970 U.S. App. LEXIS 11108 (C.A.D.C. 1970).

Where evidence was sufficient to sustain conviction of unauthorized use of automobile but court had doubts as to its sufficiency to support convictions for robbery and for transporting stolen vehicle across state line in violation of Dyer Act, sentence of youthful offenders under Federal Youth Corrections Act would be affirmed in interest of justice as judgment entered following conviction of unauthorized use but limited to that conviction. D.C. Code §§ 22-2204, 22-2901; 18 U.S.C. §§ 2312, 5010(b), 5017; 18 U.S.C. § 2106. *Kee v. United States*, 418 F.2d 465, 1969 U.S. App. LEXIS 13035 (C.A.D.C. 1969).

Allegations of lack of probable cause for defendants' arrest were not sufficient to warrant remand for hearing on that issue, where only attack on arrest related to reliability of informant upon whose lead defendants were arrested for robbery and informant's reliability had been established at a hearing in a related case. D.C. Code 1961, § 22-2901; Fed. Rules

Crim.Proc. rule 5(a), 18 U.S.C. *Cooper v. United States*, 331 F.2d 776, 1963 U.S. App. LEXIS 3524 (C.A.D.C. 1963), writ of certiorari denied by 379 U.S. 865, 85 S. Ct. 131, 13 L. Ed. 2d 68, 1964 U.S. LEXIS 758 (1964).

Where at time of sentence upon robbery conviction defendant stated to court that he was "under a psychiatrist for one year" in 1935, that he "had a mental disorder from 1952," that he was "under a doctor in the state prison at Trenton" in 1952, and that all but 63 days of the past 31 years, since he was 19 years old, he had spent in various prisons, and court imposed the maximum penalty without responding to defendant's request for a mental examination prior to sentence, case would be remanded to district court for reconsideration of the sentence. D.C. Code 1961, §§ 22-2901, 24-101, 24-106, 24-301; Fed.Rules Crim.Proc. rule 32(c), 18 U.S.C. Leach v. United States, 320 F.2d 670, 1963 U.S. App. LEXIS 5479 (C.A.D.C. 1963), affirmed by 353 F.2d 451, 122 U.S. App. D.C. 280, 1965 U.S. App. LEXIS 4082 (1965).

Where defendant, who had been sentenced on first indictment from two to six years, on each of four counts in second indictment from one to three years, with such sentences to take effect consecutively with one another and with sentence on first indictment, and on third indictment from one to three years concurrently with the other sentences, had actually pleaded guilty only to one count in each of the three indictments, Court of Appeals would set aside sentence on second indictment except as to one sentence from one to three years, and, as to first indictment, district court could resentence defendant in view of fact that existing sentence was a general one covering two counts. 18 U.S.C. § 2255; D.C. Code 1951, §§ 22-2901, 22-2902. *Campbell v. U.S.*, 258 F.2d 160, 1958 U.S. App. LEXIS 4604 (C.A.D.C. 1958).

Though jury was not warranted on evidence in failing to entertain reasonable doubt that except for diseased mental condition defendant would have committed robberies, Court of Appeals would not direct that defendant be acquitted by reason of insanity, but would remand for new trial, where testimony of expert who had not testified at second trial would be available at retrial, resolvable ambiguities existed in testimony, and dearth of prosecution's nonmedical testimony, might be overcome. D.C. Code 1951, §§ 14-308, 22-2901, 24-301. *Douglas v. U.S.*, 239 F.2d 52, 1956 U.S. App. LEXIS 4124 (C.A.D.C. 1956).

Denial of defendant's motion for new trial of armed robbery case was properly before the Court of Appeals for review; case was twice remanded to the trial court to determine admissibility of voice exemplars proffered by defendant, and defendant's contention was that police's tape of the robbery was improperly admitted on ground he was not allowed to

submit his own tape for comparison purposes, and this argument was not available until after the trial court's order on second remand. *Taylor v. United States*, 759 A.2d 604, 2000 D.C. App. LEXIS 221 (2000).

Although defendant was convicted of first-degree burglary while armed, first-degree burglary, armed robbery, robbery and assault with dangerous weapon, convictions for three lesser offenses of first-degree burglary, robbery and assault with dangerous weapon must be vacated on basis that they were lesser included offenses of first-degree burglary while armed and armed robbery. D.C. Code §§ 22-502, 22-1801(a), 22-2901, 22-3202. *Franey v. United States*, 382 A.2d 1019, 1978 D.C. App. LEXIS 419 (1978).

Even if codefendant was granted a new trial on ground of insanity and was acquitted on that ground, defendant's conviction for aiding and abetting felony-murder would not be reversed for that reason, where killing was committed by codefendant in furtherance of a robbery. D.C. Code §§ 22-2401, 22-2901. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

— In general.

Appeal from robbery conviction of defendant, who alleged, inter alia, error in admission of defense witness' robbery conviction, in admission of defense witness' prior statement, and in giving of certain instruction on reasonable doubt, and that evidence was insufficient to sustain conviction, was appropriate for disposition without oral argument, notwithstanding contention that there was constitutional right to oral argument on appeal. D.C. Code § 22-2901; U.S. Dist. Ct. Rules, Dist. of Col. General Rule 11(e); U.S. Const. Amend. 5. *United States v. Baber*, 447 F.2d 1267, 1971 U.S. App. LEXIS 8861 (C.A.D.C. 1971), writ of certiorari denied by 404 U.S. 957, 92 S. Ct. 324, 30 L. Ed. 2d 274, 1971 U.S. LEXIS 452 (1971).

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of congress; but if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *Odemns v. United States*, 901 A.2d 770, 2006 D.C. App. LEXIS 352 (2006).

Evidence in prosecution for robbery was not sufficient to conclude that there was breach of such substance of agreement between prosecutor and defense counsel that lineup identification would only be used on two unrelated charges so as to require Court of Appeals to

take hold of situation under supervisory power. D.C. Code § 22-2901. *Dublin v. United States*, 388 A.2d 461, 1978 D.C. App. LEXIS 529 (1978).

— Juvenile proceedings, review.

Where prosecution of juvenile in juvenile court proceeded before judge without jury, court did not commit reversible error when it refused to grant juvenile separate trial after hearing witness testify that juvenile's correspondent had implicated him in correspondent's statements about burglary for which juvenile was being tried. D.C. Code §§ 22-501, 22-1801, 22-2901. *In re W.*, 370 A.2d 1333, 1977 D.C. App. LEXIS 430 (1977).

In proceeding in which juvenile was adjudged to have committed robbery, refusal to strike testimony of complaining witness when police officer was unable to produce his notes of an interview with witness was not reversible error, in that such "rough" and "almost illegible" notes did not constitute a "statement" within purview of Jencks Act. D.C. Code § 22-2901; 18 U.S.C. §§ 3500, 3500(e)(1, 5). *In re A.B.H.*, 343 A.2d 573, 1975 D.C. App. LEXIS 233 (1975).

— Presentation and reservation of grounds for review.

Contention that it was improper for defendant to be convicted and sentenced on both counts I which charged under federal mail robbery statute with assaulting post office custodian with intent to rob him, and count II under District of Columbia robbery and crime of violence statute with robbing the custodian because the assault charged in count I "merged" with completed robbery charged in count II would be considered by Court of Appeals even though issue was not raised in trial court. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3201, 22-3202. *United States v. Spears*, 449 F.2d 946, 1971 U.S. App. LEXIS 11849 (C.A.D.C. 1971).

Question concerning defendants' financial condition in prosecution for robbery, though error, did not require reversal where one defendant did not object at trial and other defendant did not object that it resulted in prejudice until after line of questioning had been completed. D.C. Code § 22-2901. *Davis v. United States*, 409 F.2d 453, 1969 U.S. App. LEXIS 8887 (C.A.D.C. 1969).

Issues as to whether trial court erred in permitting prosecutor to impeach defendant with cross-examination respecting prior conviction of assault and in permitting prosecutor to impeach defense witness with cross-examination respecting her chastity would not be noticed for the first time on appeal from conviction for assault with intent to commit robbery. D.C. Code §§ 22-501, 22-2901. *Green v. United*

States, 397 F.2d 643, 1968 U.S. App. LEXIS 7151 (C.A.D.C. 1968).

Case wherein defendant was convicted of robbery, resting upon admission of evidence claimed on appeal to have been inadmissible, was not one calling for exercise of reviewing court's discretion under rule permitting reversal for plain error not brought to attention of trial court. Fed.Rules Crim.Proc. rule 52(b); D.C. Code 1961, § 22-2901. *Baxter v. United States*, 337 F.2d 547, 1964 U.S. App. LEXIS 4643 (C.A.D.C. 1964).

Where there was no suggestion of coercion, with respect to defendant's oral admissions to the police or any factor making it appropriate for the appellate court to reach the question of admissibility despite the absence of objection, the matter was not reviewable. D.C. Code 1951, § 22-2901. *Gilliam v. U.S.*, 257 F.2d 185, 1958 U.S. App. LEXIS 4467 (C.A.D.C. 1958).

Defendant, who specifically objected to first two prosecution witnesses on ground that each witness could not remember anything, preserved for review issue that prosecutor should not have called both witnesses in prosecution for armed robbery, assault with intent to kill while armed, assault with dangerous weapon, assault with intent to commit robbery while armed, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Defendant's failure to raise before trial court in support of motion to sever two robbery prosecutions justified decision of Court of Appeals not to consider arguments. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; Criminal Rule 8(a). *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Ordinarily, question for review would have been whether, viewing evidence in light most favorable to Government, prosecution had produced sufficient evidence from which reasonable minds could find guilt beyond a reasonable doubt, but where defendant failed to make a motion for judgment of acquittal at trial, Court of Appeals' review of his armed robbery conviction was limited to whether there had been a "manifest error" or "serious injustice." D.C. Code §§ 22-2901, 22-3202. *Fitzhugh v. United States*, 415 A.2d 548, 1980 D.C. App. LEXIS 304 (1980).

In prosecution wherein defendant and codefendant were charged with armed robbery and evidence against both defendants was essentially the same, and both men offered defense of alibi, court would not have had to sever trial even if defense counsel had requested it, and failure to sever trial sua sponte did not amount to plain error. D.C. Code §§ 22-2901, 22-3202. *Cunningham v. United States*, 408 A.2d 1240, 1979 D.C. App. LEXIS 508 (1979).

— Scope of review.

Where concurrent sentences raised substan-

tial question, whether Congress intended Federal sentence to be cumulative to sentence for state violation for what was factually same offense, Federal sentence would be vacated without deciding question, since this course would not result in overriding needs of government, and interests of justice would be served by avoiding substantial time and effort required for deciding question and by devoting limited resources of courts confronted with ever-mounting dockets to determination of issues that must be decided. D.C. Code § 22-2901; 18 U.S.C. §§ 2112, 5010(c); 18 U.S.C. § 2106. *United States v. Hooper*, 432 F.2d 604, 1970 U.S. App. LEXIS 10426 (C.A.D.C. 1970).

Court of Appeals would decline to apply the plain error standard of review to defendant's claim that evidence was insufficient to support robbery conviction, though defendant never asked for a judgment of acquittal, where codefendant at trial objected to the sufficiency of the evidence, the evidence presented was the same as to both codefendants under an aiding and abetting theory, and the trial court fully considered the issue. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

Where defendant made unsuccessful motion to acquit him of armed robbery, arguing that government had failed to prove that anything of value was taken in gang attack upon victim, entry of a verdict finding him guilty as aider and abettor of lesser included offense of assault with intent to commit robbery accomplished same result; thus, any assertion of error in denial of motion to acquit was moot. D.C. Code 1981, §§ 22-501, 22-2901, 22-3202. *In re T.H.B.*, 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Claimed error in imposing consecutive sentences for robbery and felony-murder and in imposing additional consecutive sentences was rendered moot by resentencing during pendency of appeal. D.C. Code 1973, §§ 22-2401, 22-2901, 22-3202, 22-3202(a)(2). *Turner v. United States*, 443 A.2d 542, 1982 D.C. App. LEXIS 307 (1982).

Fact that defendant's theory of defense in prosecution for armed robbery was inconsistent with defendant's request for instruction on lesser included offense of petit larceny did not bar appellate consideration of whether refusal to give instruction on lesser offense was error. D.C. Code §§ 22-2202, 22-2901. *Dublin v. United States*, 388 A.2d 461, 1978 D.C. App. LEXIS 529 (1978).

— Standard of review, review.

Sentence of 210 months for possession of firearm and ammunition by convicted felon as armed career criminal was not plain error based on defendant's claim that, under law of District of Columbia, prior conviction for robbery was not necessarily violent offense since it

could have involved theft achieved through stealth or snatching; defendant's sentence was result of plea agreement pursuant to which government agreed to dismissal of other charges punishable by 25 years in prison. *United States v. Whichard*, 304 Fed.Appx. 887, 2008 U.S. App. LEXIS 25645 (C.A.D.C. 2008).

Search and seizure.

Where defendant's car fitted description given by accomplice and another witness and was found in vicinity of defendant who met description given by the accomplice, and where defendant voluntarily surrendered his keys to police and they fitted car, tying car to evidence of its use, there was probable cause for seizure of the car, and police could either seize and hold car or make immediate warrantless search, and where it was difficult to make detailed search of car where it was found, subsequent search at station house, 24 hours later, was reasonable; police had duty to act as quickly as possible to obtain evidence that might exonerate or incriminate, and there were thus exigent circumstances. D.C. Code §§ 22-2901, 22-3202. *United States v. Lee*, 509 F.2d 400, 1974 U.S. App. LEXIS 5476 (C.A.D.C. 1974), writ of certiorari denied by 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765, 1975 U.S. LEXIS 1180 (1975).

Where officer had probable cause to arrest defendant for crime of robbery, trial court correctly refused to suppress victim's wallet, which was found by police in police car in which defendant was being transported upon his apprehension shortly after crime. D.C. Code § 22-2901. *United States v. Horton*, 440 F.2d 253, 1971 U.S. App. LEXIS 11392 (C.A.D.C. 1971).

In prosecution for robbery, defendant was not entitled to suppression of gun which was taken from defendant's automobile after his arrest by police upon a warrant. D.C. Code 1951, § 22-2901. *Bennett v. U.S.*, 249 F.2d 505, 1957 U.S. App. LEXIS 4027 (C.A.D.C. 1957).

Exigency existed justifying police officers breaking into residence using battering ram only five seconds after they knocked and announced that they were police officers executing search warrant, where police officers arrived at residence knowing that defendant was suspected of committing as many as 12 robberies using Uzi-type weapon, that defendant had used weapon to take human shield to insure safe escape after committing latest robbery, that Uzi had been seen on premises within past 24 hours, and officers' knock and announcement of their authority and purpose was met with silence even though they had seen lights and heard voices inside home. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3204(b), 23-524, 23-524(a), 33-565(g); U.S. Const.Amend. 4; 18 U.S.C. § 3109. *Culp v. United States*, 624 A.2d 460, 1993 D.C. App. LEXIS 114 (1993).

Test for whether exigent circumstances existed justifying officers breaking into residence only five seconds after they knocked and announced their authority and purpose is how reasonable and experienced officer would respond under same circumstances. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3204(b), 23-524, 23-524(a), 33-565(g); U.S. Const. Amend. 4; 18 U.S.C. § 3109. *Culp v. United States*, 624 A.2d 460, 1993 D.C. App. LEXIS 114 (1993).

Sentence and punishment.

Remand was required for reconsideration of whether prior conviction for attempted robbery under District of Columbia law was properly classified as "crime of violence" for purposes of Sentencing Guidelines provision governing base offense levels for firearm offenses, given that defendant had pleaded guilty to attempted robbery as lesser included offense and statutory definition of attempted robbery included nonviolent conduct; district court erred in relying solely on indictment to determine conviction's classification. U.S.S.G. §§ 2K2.1, 4B1.2(1), 18 U.S.C.; D.C. Code 1981, §§ 22-2901, 22-2902. *United States v. Hill*, 131 F.3d 1056, 1997 U.S. App. LEXIS 35965 (C.A.D.C. 1997).

Inasmuch as assault with a dangerous weapon is included in armed robbery, and defendant was convicted of both offenses, judgments and sentences for assault with a dangerous weapon were required to be vacated. *United States v. Anderson*, 490 F.2d 785, 1974 U.S. App. LEXIS 10723 (C.A.D.C. 1974).

Trial court did not err in refusing sentencing under Youth Corrections Act to defendant who had past history of crime, who showed no remorse at murder, and who had previously been sentenced under the Act but escaped from custody. 18 U.S.C. § 5005 et seq.; D.C. Code §§ 22-2401, 22-2901. *United States v. Butler*, 481 F.2d 531, 1973 U.S. App. LEXIS 9158 (C.A.D.C. 1973).

Where 20-year-old defendant's prior sentence was served without services of youth center, section 5010(e) report indicated that defendant's feeling of inadequacy lay with his inability, due to lack of marketable skills, to support himself and his family, reasons suggested in report for imposition of adult sentence for robbery without a weapon were that defendant was a "rather street-wise individual" and that he had failed to prove himself because he was on Youth Act probation when arrested and trial judge failed to state any independent reasons for imposing adult sentence, sentence was required to be vacated and case remanded for reconsiderations of Youth Corrections Act treatment; section 5010(e) report failed to provide adequate reasons for denial of such treatment. 18 U.S.C. § 5010(a-e); D.C. Code § 22-2901. *United States v. Phillips*, 479 F.2d 1200, 1973 U.S. App. LEXIS 9907 (C.A.D.C. 1973).

Court of Appeals would consider claim that it was improper for defendant to be convicted and sentenced on both counts I which charged under federal mail robbery statute the assault of post office custodian with intent to rob him, and count II which charged under District of Columbia statutes the robbing of custodian, notwithstanding fact that defendant received concurrent sentences, because of possible harmful effect on defendant of myriad collateral consequences of an improper double felony conviction and desirability of having such issue settled. 18 U.S.C. § 2114; D.C. Code §§ 22-2901, 22-3201, 22-3202. *United States v. Spears*, 449 F.2d 946, 1971 U.S. App. LEXIS 11849 (C.A.D.C. 1971).

Prior conviction under District of Columbia's pick-pocketing statute was violent felony under statute requiring 15-year mandatory minimum term on subsequent conviction for possession of firearm by felon, even though pick-pocketing conviction resulted from stealthy seizure of another's property rather than use of physical force; risk of confrontation was great. 18 U.S.C. § 924(e), (e)(2)(B)(ii); D.C. Code 1981, § 22-2901. *United States v. Mobley*, 818 F. Supp. 164, 1993 U.S. Dist. LEXIS 5319 (1993), affirmed by 40 F.3d 688, 1994 U.S. App. LEXIS 33131, 142 A.L.R. Fed. 733 (4th Cir. Va. 1994).

Where 21-year-old defendant had had number of contacts with authorities, had been continuously involved in program designed to assist him in making proper social adjustment and had not responded, had been arrested on felony-murder, second-degree murder, armed robbery and robbery charges while on probation for another charge seven months earlier and social worker at children's center had recommended that his commitment to the department be set aside and defendant apparently had been on drugs for some time, it was more appropriate to sentence defendant, on guilty plea to robbery charge, under the applicable penalty provision rather than under the Federal Youth Corrections Act. D.C. Code § 22-2901; 18 U.S.C. § 5005 et seq. *United States v. Ward*, 337 F. Supp. 185, 1971 U.S. Dist. LEXIS 10738 (1971).

Order resentencing defendant to 61 years to life for numerous crimes related to robbery of jewelry store was not an abuse of discretion; the sentence was within the statutory limits, and there was no evidence that the new sentence was based on false or misleading evidence. *Saunders v. United States*, 975 A.2d 165, 2009 D.C. App. LEXIS 241 (2009), writ of certiorari denied by 558 U.S. 1083, 130 S. Ct. 815, 175 L. Ed. 2d 572, 2009 U.S. LEXIS 8837, 78 U.S.L.W. 3340 (2009), dismissed by 859 F. Supp. 2d 78, 2012 U.S. Dist. LEXIS 65371 (D.D.C. 2012).

Statute imposing increased penalty for conviction of assault with intent to commit robbery does not require that person assaulted and

intended robbery victim be the same. D.C. Code 1981, § 22-501. *Moore v. United States*, 508 A.2d 924, 1986 D.C. App. LEXIS 319 (1986).

Armed robbery and assault with intent to commit robbery while armed were armed "crimes of violence" within statute prescribing mandatory minimum sentence for such crimes. D.C. Code §§ 22-3201, 33-3202, 22-3202(a)(2). *United States v. Hilliard*, 366 A.2d 437, 1976 D.C. App. LEXIS 413 (1976).

Under statute providing for punishment of one who commits crime of violence while "armed with or having readily available any pistol or firearm (or imitation thereof) or other dangerous or deadly weapon," an "imitation" or blank pistol is to be considered a "dangerous or deadly weapon." D.C. Code §§ 22-2901, 22-3202. *Meredith v. United States*, 343 A.2d 317, 1975 D.C. App. LEXIS 225 (1975).

Trial court's clearly stated reasons for not sentencing juvenile defendant to Federal Youth Corrections Act sentence, which included specific finding that defendant would not benefit from programs available under Act, constituted rational determination that defendant would not derive rehabilitative benefit from Act, and satisfied its requirements. D.C. Code §§ 22-2901, 22-3202; 18 U.S.C. §§ 5005 et seq., 5010(e). *Lawrence v. United States*, 318 A.2d 890, 1974 D.C. App. LEXIS 401 (1974).

Speedy trial.

Right to speedy trial of defendant, charged with armed robbery, assault with dangerous weapon, and of carrying a pistol without a license, was not impinged by nine-month delay extending from his indictment to his trial where, during the first two months defendant was still at large and police were doing their best to locate him, where defendant did not press a speedy trial right until five months after he was arrested, and where record was sufficient to sustain finding that defendant suffered no prejudice to his defense which could be attributed to the delay at the postarrest stage of the prosecution. U.S. Const. Amend. 6; D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Parish*, 468 F.2d 1129, 1972 U.S. App. LEXIS 7437 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690, 1973 U.S. LEXIS 3259 (1973).

Record was devoid of any indication that delay in arresting defendant, which occurred ten months after date of the offenses, was the product of any deliberate effort by police to gain an advantage, record furnished abundant evidentiary support for finding that a reasonable endeavor was made to locate defendant and, in addition, record sustained additional finding that, in any event, defendant was not harmed by the delay, in prosecution for armed robbery, assault with a dangerous weapon, and for carrying a pistol without a license. U.S. Const.

Amends. 5, 6; D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Parish*, 468 F.2d 1129, 1972 U.S. App. LEXIS 7437 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690, 1973 U.S. LEXIS 3259 (1973).

On record, defendant suffered no prejudice as result of pretrial delay in presenting coherent and comprehensive alibi defense, and accused was not denied his Sixth Amendment right to speedy trial by 17-month delay between first arrest and trial on charges of armed robbery and felony-murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202; U.S. Const. Amend. 6. *Tribble v. United States*, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

Delay of 13 months between defendant's arrest and his robbery trial did not deny him his constitutional right to speedy trial, in light of fact that defense counsel requested or consented to four and one-half months of delay, that five months involved normal pretrial steps, that defense requested or consented to continuances shortly after each of defendant's pro se motions to dismiss for lack of speedy trial, that no witnesses were unavailable or unable to recall events due to delay, that defendant was incarcerated for another offense and that he was given consecutive sentence for the robbery. D.C. Code § 22-2901; U.S. Const. Amends. 6, 14. *Bowman v. United States*, 385 A.2d 28, 1978 D.C. App. LEXIS 461 (1978).

Absent any adequate reason for 13-month delay between defendant's arrest and robbery trial, Court of Appeals would assume that the delay was presumptively prejudicial. D.C. Code § 22-2901; U.S. Const. Amends. 6, 14. *Bowman v. United States*, 385 A.2d 28, 1978 D.C. App. LEXIS 461 (1978).

Validity.

Statute providing increased punishment for acts committed "prior to the date of enactment of this Act" was not on its face ex post facto. D.C. Code §§ 22-1801, 22-1801(a), 22-2901; U.S. Const. art. 1, § 9, cl. 3. *United States v. Casson*, 434 F.2d 415, 1970 U.S. App. LEXIS 10177 (C.A.D.C. 1970).

The robbery statute is valid. D.C. Code 1940, § 22-2901. *Pope v. Huff*, 141 F.2d 727, 1944 U.S. App. LEXIS 3782 (1944).

Verdict and findings of fact.

Assault with dangerous weapon was lesser included offense of principal offense of armed robbery; accordingly, defendant could not be convicted of lesser offense in addition to greater. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Inge*, 494 F.2d 1102, 1974 U.S. App. LEXIS 9695 (C.A.D.C. 1974).

Where jury returned a verdict of guilty on each of four counts of robbery while armed involving different victims it was error to re-

ceive verdicts from the jury on the four counts of assault with a dangerous weapon, a lesser included offense, with respect to the same victims. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Johnson*, 475 F.2d 1297, 1973 U.S. App. LEXIS 11465 (C.A.D.C. 1973).

Where first jury returned verdict of not guilty of armed robbery but was unable to agree as to whether defendant was an unarmed robber and mistrial was declared, the acquittal of armed robbery was not an acquittal of unarmed robbery charge and double jeopardy prohibition did not preclude retrial of unarmed robbery charge. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Scott*, 464 F.2d 832, 1972 U.S. App. LEXIS 8719 (C.A.D.C. 1972).

Convictions for both robbery and second degree murder could stand even if they were inconsistent where the conviction of robbery was consistent with the evidence and the conviction of second degree murder was also consistent with the evidence. D.C. Code 1961, §§ 22-2403, 22-2901. *Jackson v. U.S.*, 313 F.2d 572, 1962 U.S. App. LEXIS 3288 (C.A.D.C. 1962).

Where person, who had committed two hotel robberies on same day, was adjudicated to be of unsound mind about three months thereafter and committed to hospital from which he was discharged as recovered 18 months later, and uncontradicted testimony of two psychiatrists who had examined him and of hospital psychiatrist relating to fact of his diseased mind on day of robberies strongly tended to establish that fact, jury conviction would be set aside, though lay testimony concerning conduct of person at and shortly after robberies may have tended to establish its normality. D.C. Code 1951, §§ 22-2901, 24-301. *Douglas v. U.S.*, 239 F.2d 52, 1956 U.S. App. LEXIS 4124 (C.A.D.C. 1956).

In appropriate case there is duty to set aside verdict of guilty and to direct verdict of not guilty by reason of insanity; though this duty is to be performed with caution because of deference due jury in resolving factual issues. D.C. Code 1951, §§ 22-2901, 24-301. *Douglas v. U.S.*, 239 F.2d 52, 1956 U.S. App. LEXIS 4124 (C.A.D.C. 1956).

Under statute, attempted robbery or actual robbery is possible without assault, and acquittal of assault with intent to rob does not require acquittal of attempted robbery. D.C. Code 1940, §§ 22-2901, 22-2902. *Pope v. Huff*, 141 F.2d 727, 1944 U.S. App. LEXIS 3782 (1944).

Juvenile court was authorized to find juvenile defendant guilty of assault with intent to rob, as lesser included offense of armed robbery for which he was charged; such a finding was not, and could not have been, dependent on defense request that "instruction" on lesser included offense be given, given absence of juries at juvenile proceedings. D.C. Code 1981,

§§ 22-501, 22-2901, 22-3202; Juvenile Rule 31(c). *In re T.H.B.*, 670 A.2d 895, 1996 D.C. App. LEXIS 6 (1996).

Trial court which individually polled jurors as to whether they agreed with announced guilty verdict as to last eight counts was not required to individually poll each juror with respect to agreement to each count and did not abuse discretion in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In proceeding in which defendant was convicted of armed robbery, it had been within province of jurors to resolve inconsistencies with respect to victim's identification of defendant; no manifest error or serious injustice was shown in regard to sufficiency of Government's evidence of identity. D.C. Code §§ 22-2901, 22-3202. *Fitzhugh v. United States*, 415 A.2d 548, 1980 D.C. App. LEXIS 304 (1980).

Where foreman requested to approach bench when asked whether jury had reached verdict with respect to armed robbery charge, court denied request, foreman then announced that jury had reached guilty verdict, jury poll yielded unanimous verdicts, and no objection was raised, denial of jury foreman's request to approach bench did not constitute plain error. D.C. Code SCR, Criminal Rules 30, 52(b); D.C. Code §§ 22-2901, 22-3202. *Johnson v. United States*, 360 A.2d 502, 1976 D.C. App. LEXIS 319 (1976).

Weight and sufficiency of evidence.

— Assault with intent to rob, weight and sufficiency of evidence.

Evidence sustained determination that assaults with dangerous weapons upon persons other than bank tellers, committed in connection with bank robbery, were separate assaults rather than a single group assault. D.C. Code § 22-502. *United States v. Cooper*, 504 F.2d 260, 1974 U.S. App. LEXIS 6885 (C.A.D.C. 1974).

Evidence including testimony of policeman and victims that there was a gun and that a voiced threat was made to shoot one victim was sufficient to justify jury in findings that gun was dangerous and that the offense of assault with intent to rob was committed while armed with a dangerous weapon as alleged in indictment. D.C. Code § 22-3202. *United States v. Prater*, 462 F.2d 292, 1972 U.S. App. LEXIS 10401 (C.A.D.C. 1972).

Evidence sustained conviction for assault with intent to rob. *Harris v. U.S.*, 299 F.2d 931, 1962 U.S. App. LEXIS 5840 (C.A.D.C. 1962).

Evidence was sufficient to show requisite intent in prosecution for assault with intent to commit robbery. D.C. Code 1951, § 22-501. *Oden v. U.S.*, 295 F.2d 546, 1961 U.S. App. LEXIS 3482 (C.A.D.C. 1961).

Evidence that assaults of two victims were used to effectuate robbery of third victim could not support convictions for assault with intent to commit robbery of first two victims, as charged in indictment. D.C. Code 1981, §§ 22-501, 22-502, 22-3202. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

Intent to rob can be established when government has presented facts that suffice as circumstantial evidence to warrant inference of intent of robbery, subject to being negated by some other explanation by defendant; there is no requirement that defendant announce his intent. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

Evidence was sufficient to sustain conviction of assault with intent to commit robbery for incident wherein three assailants accosted victim in alley, even though assailants did not specifically indicate that they intended to rob victim, where two assailants were brandishing pistols and confronted victim saying, "this is it," and victim was shot while attempting to escape. D.C. Code 1981, §§ 22-501, 22-3202. *Owens v. United States*, 497 A.2d 1086, 1985 D.C. App. LEXIS 477 (1985), writ of certiorari denied by 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900, 1986 U.S. LEXIS 1161, 54 U.S.L.W. 3484 (1986).

Testimony by alleged assault victim that defendant was trying to get to his wallet, and corroborating testimony by police officer at the scene, was sufficient to support conviction for assault with intent to commit robbery. D.C. Code 1981, § 22-501. *Singleton v. United States*, 488 A.2d 1365, 1985 D.C. App. LEXIS 338 (1985).

Evidence was sufficient to support juvenile court's finding that juvenile participated as an aider and abettor in assault with intent to commit robbery on a school teacher. D.C. Code §§ 11-1551(a)(1)(A), 22-105, 22-501. In *re Reeder*, 264 A.2d 893, 1970 D.C. App. LEXIS 210 (App. 1970).

— Circumstantial evidence, weight and sufficiency of evidence.

Evidence, though based on circumstances, sustained conviction for assault and robbery. *Thompson v. United States*, 405 F.2d 1106, 1968 U.S. App. LEXIS 4768 (C.A.D.C. 1968).

Circumstantial evidence was insufficient to sustain conviction for robbery of wallet from victim's purse, although it presented jury question on larceny charge. *Hunt v. United States*, 316 F.2d 652, 1963 U.S. App. LEXIS 6026 (C.A.D.C. 1963).

Although no direct evidence was introduced in rape case to establish that defendant was in fact armed with dangerous weapon during incident, complainant's insistence that defendant did have a knife permitted trial court and jury to find that he did, and thus permitted conviction for armed rape, under rule that reasonable inferences must be drawn in favor of the government. D.C. Code 1981, §§ 22-2801, 22-2901, 22-3202. *Boyd v. United States*, 473 A.2d 828, 1984 D.C. App. LEXIS 328 (1984).

Circumstantial evidence may be equally as probative as direct evidence, especially in connection with armed robbery charge where defendant is shown to be in possession of property recently stolen. D.C. Code 1973, §§ 22-2901, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

Although primarily circumstantial, the evidence was sufficient to establish beyond a reasonable doubt defendants' guilt of murder, assault, armed robbery, burglary and conspiracy. D.C. Code §§ 22-105a, 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Christian v. United States*, 394 A.2d 1, 1978 D.C. App. LEXIS 346 (1978), writ of certiorari denied by 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315, 1979 U.S. LEXIS 2203 (1979).

In robbery prosecution based on alleged pickpocketing episode, testimony of eyewitness and of expert witness, and circumstantial evidence, was sufficient to support convictions. D.C. Code § 22-2901. *Hooks v. United States*, 373 A.2d 909, 1977 D.C. App. LEXIS 325 (1977).

Evidence, mostly circumstantial, supported defendants' conviction for felony-murder allegedly perpetrated during robbery. D.C. Code §§ 22-2401, 22-2901, 22-3204. *Calhoun v. United States*, 369 A.2d 605, 1977 D.C. App. LEXIS 421 (1977).

— Conclusiveness of evidence on party introducing it, weight and sufficiency of evidence.

Defendant's testimony that robbery victim had sold defendant poor quality marijuana and that defendant was merely asking for product he was owed or money back did not entitle defendant to instruction on claim of right, where defendant claimed that he did not display pistol, use any force, or take any money away from victim. D.C. Code 1981, §§ 22-2901, 22-3202. *Hordge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

— Corroboration, weight and sufficiency of evidence.

Uncorroborated testimony of complainant is sufficient to support verdict of guilty in robbery case. *Jones v. United States*, 361 F.2d 537, 1966 U.S. App. LEXIS 6361 (C.A.D.C. 1966).

Evidence including accomplices' testimony, which was corroborated in part by other evidence, was sufficient to sustain conviction for robbery. *Cross v. United States*, 353 F.2d 454, 1965 U.S. App. LEXIS 4111 (C.A.D.C. 1965).

Evidence sustained conviction of robbery even if it were assumed that there was no corroboration of the testimony of accomplice. *Bishop v. U.S.*, 243 F.2d 32, 1957 U.S. App. LEXIS 2882 (C.A.D.C. 1957).

One could be convicted of robbery on uncorroborated testimony of complainant. D.C. Code 1940, § 22-2901. *Thompson v. U.S.*, 188 F.2d 652, 1951 U.S. App. LEXIS 3089 (C.A.D.C. 1951).

— Dangerous or deadly weapon, weight and sufficiency of evidence.

Evidence, including testimony of identification witness, was sufficient to sustain conviction of armed robbery and assault with deadly weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Jones*, 517 F.2d 176, 1975 U.S. App. LEXIS 13243 (C.A.D.C. 1975).

In prosecution for armed robbery and assault with deadly weapon, evidence that a weapon was used in robbery was sufficient. *United States v. DeCoster*, 487 F.2d 1197, 1973 U.S. App. LEXIS 7660 (C.A.D.C. 1973).

Evidence sustained conviction of armed robbery, assault with dangerous weapon, possession of prohibited weapon, a sawed-off shotgun, and possession of unregistered firearm. *United States v. Thomas*, 485 F.2d 1012, 1973 U.S. App. LEXIS 8265 (C.A.D.C. 1973).

Evidence that *inter alia*, defendant and two other men entered store together, that they conversed together until other customers left the store, that defendant did not lie on the floor when one of the codefendants, with a gun, announced a "stick-up" and said "To the floor.", and that defendant moved from near the door to near the cash register after a codefendant ordered store employee to open it was sufficient to support defendant's conviction for armed robbery and assault with a dangerous weapon, and conflicting testimony of defendant and his codefendants whereby they all sought to establish that defendant and one of his codefendants were innocent bystanders did not destroy the permissible inference of defendant's guilt. D.C. Code §§ 22-105, 22-502, 22-2901, 22-3202. *United States v. Lumpkin*, 448 F.2d 1085, 1971 U.S. App. LEXIS 9452 (C.A.D.C. 1971).

Evidence, including permissible inference jury was permitted to draw from fact that defendant was found within an hour of larceny in exclusive possession of recently stolen truck, supported convictions of kidnapping of truck helper, armed robbery and assault with a dangerous weapon. D.C. Code §§ 22-502, 22-2101, 22-2901, 22-3202. *United States v. Wolford*, 444

F.2d 876, 1971 U.S. App. LEXIS 11155 (C.A.D.C. 1971).

Evidence sustained robbery and assault with dangerous weapon convictions of defendant who was identified by victims as robber who used sawed-off shotgun and who was observed in area where robbery occurred shortly before and shortly after robbery. *United States v. Randolph*, 443 F.2d 729, 1970 U.S. App. LEXIS 5865 (C.A.D.C. 1970).

Conviction for robbery and assault with dangerous weapon was not vitiated by failure of police to fingerprint pistol. *Harling v. United States*, 401 F.2d 392, 1968 U.S. App. LEXIS 6335 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 1068, 89 S. Ct. 725, 21 L. Ed. 2d 711, 1969 U.S. LEXIS 2750 (1969).

Evidence sustained conviction for house-breaking, impersonation of police officer, assault with dangerous weapon and robbery. *Parker v. United States*, 391 F.2d 457, 1967 U.S. App. LEXIS 5317 (C.A.D.C. 1967).

Defendant aided and abetted armed robbery, as required to support conviction for same, even though defendant did not carry weapon during robbery; defendant had actual knowledge that codefendants would be using firearms during robbery, in that he met with codefendants prior to robbery and was involved in plan to rob liquor store using firearms, and he actively participated in armed robbery along with three visibly armed codefendants. *Fox v. United States*, 11 A.3d 1282, 2011 D.C. App. LEXIS 24 (2011).

Defendant's conduct in putting his hand in his pocket and uttering the words "stay back or I'll shoot" during the course of an attempt to steal money established the "armed" enhancement to a crime of violence or a dangerous crime, in prosecution for armed robbery; defendant verbally brandished a weapon and his gestures were consistent with possessing a weapon, and jury could have permissibly inferred from such circumstantial evidence that defendant had a weapon, or imitation thereof, in his pocket during the robbery. *Smith v. United States*, 777 A.2d 801, 2001 D.C. App. LEXIS 156 (2001).

Testimony of robbery victims was sufficient proof that defendant carried a pistol, and, as it was reasonable to assume that pistol directed at victims in a menacing manner was loaded and operable, there was sufficient evidence that pistol involved in armed burglary, robbery and assaults was in fact operable. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3204. *Morrison v. United States*, 417 A.2d 409, 1980 D.C. App. LEXIS 324 (1980).

Evidence of a defendant's intent to commit offenses of attempted armed robbery, conspiracy and two counts of assault with deadly weapon was sufficient to sustain his convictions of such offenses. *Jones v. United States*, 386

A.2d 308, 1978 D.C. App. LEXIS 515 (1978), writ of certiorari denied by 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181, 1979 U.S. LEXIS 3472 (1979).

Evidence was sufficient to support defendant's conviction of six counts of armed kidnapping, five counts of armed rape, two counts of armed robbery, and one count each of assault with a deadly weapon and armed assault with intent to commit sodomy. D.C. Code §§ 22-502, 22-2101, 22-2801, 22-2901, 22-3202, 22-3502. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

Evidence, including testimony that shotgun shells similar to those used in gun used in armed robbery were found in defendant's automobile, was sufficient to sustain convictions of armed robbery and assault with dangerous weapon. D.C. Code §§ 22-502, 22-2901, 22-3202. *Borrero v. United States*, 332 A.2d 363, 1975 D.C. App. LEXIS 324 (1975).

Evidence in prosecution resulting in convictions of codefendants for second-degree burglary, armed robbery, and assault with dangerous weapon was sufficient to establish involvement of one codefendant as an aider and abettor. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

Evidence was sufficient to sustain conviction for assault with a deadly weapon charged as separate and distinct from armed robbery offense. D.C. Code §§ 22-502, 22-2901, 22-3202. *Dixon v. United States*, 320 A.2d 318, 1974 D.C. App. LEXIS 215 (1974).

— Degree or classification of offense, weight and sufficiency of evidence.

As required to sustain aggravated bank robbery convictions, that perpetrator of each of seven robberies for which defendant was convicted did use gun to endanger life of another was supported by evidence that, in five robberies he stated orally or in writing that he had gun, in course of at least three of those five robberies perpetrator also made gestures appearing to support his claim, during sixth robbery he kept hand in pocket and threatened to blow teller's head off, and during seventh robbery he passed teller note and lifted his coat, revealing brown object that teller understood to be handle of gun. 18 U.S.C. § 2113(d). *United States v. Levi*, 45 F.3d 453, 1995 U.S. App. LEXIS 1258 (C.A.D.C. 1995), writ of certiorari denied by 515 U.S. 1133, 115 S. Ct. 2560, 132 L. Ed. 2d 813, 1995 U.S. LEXIS 3975, 63 U.S.L.W. 3873 (1995).

Statement by perpetrator during bank robbery that he has gun is by itself sufficient evidence to convict of aggravated bank robbery, unless contradicted by overwhelming evidence. 18 U.S.C. § 2113(d). *United States v. Levi*, 45

F.3d 453, 1995 U.S. App. LEXIS 1258 (C.A.D.C. 1995), writ of certiorari denied by 515 U.S. 1133, 115 S. Ct. 2560, 132 L. Ed. 2d 813, 1995 U.S. LEXIS 3975, 63 U.S.L.W. 3873 (1995).

Evidence was sufficient to support convictions on count of armed bank robbery, a federal offense, as well as count of armed robbery, a District of Columbia offense. 18 U.S.C. § 2113(a, d); D.C. Code §§ 22-2901, 22-3202. *United States v. Johnson*, 589 F.2d 716, 1978 U.S. App. LEXIS 7184 (C.A.D.C. 1978).

Evidence that victim had \$231 in his pocket and was carrying four or five packages when he was confronted by two men who held gun on him and went through his pockets and that victim told policemen that he had been robbed was insufficient to support armed robbery conviction. D.C. Code §§ 22-2901, 22-3201, 22-3202. *United States v. McGill*, 487 F.2d 1208, 1973 U.S. App. LEXIS 7109 (C.A.D.C. 1973).

Complaining witness' testimony that he was robbed at gunpoint was sufficient to sustain conviction for armed robbery even though weapon used was not put in evidence. *United States v. Stevenson*, 443 F.2d 661, 1970 U.S. App. LEXIS 6166 (C.A.D.C. 1970).

Defendant's conviction for armed robbery was supported by evidence that defendant knew of, and had interest in, large amount of money that victim was carrying in his sock, that defendant and victim went into bedroom and closed door, that defendant shot victim, and that when witness discovered victim dead in bedroom, victim's pant leg was pulled up, his sock was down, and his money was gone. D.C. Code 1981, §§ 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

Evidence supported finding that gun was a "pistol," meaning that it had a barrel less than 12 inches in length, as charged in indictment and defined in jury instructions in prosecution for armed robbery; gun used by defendant was small enough so that its handle was obscured, it could be held in one hand, and someone standing only a foot away with arms extended could point the gun directly at a victim. D.C. Code 1981, § 22-3201. *Maddox v. United States*, 745 A.2d 284, 2000 D.C. App. LEXIS 15 (2000).

Evidence was sufficient to establish that robbery of which defendant was convicted was committed while coconspirator was armed with a pipe; coconspirator had used pipe to subdue earlier victim, and held it threateningly when victim was attacked. *Akins v. United States*, 679 A.2d 1017, 1996 D.C. App. LEXIS 119 (1996).

Evidence that defendant displayed gun prior to robbery of first victim, then shot second victim within minutes of his robbery was sufficient to establish that defendant, during second victim's robbery, had actual possession of gun,

and supported conviction of defendant and co-conspirator of robbing victim while armed with a pistol. *Akins v. United States*, 679 A.2d 1017, 1996 D.C. App. LEXIS 119 (1996).

Convictions for multiple charges arising out of armed robbery of apartment building were supported by the identification of defendants by victims and police officers, and testimony that the defendants' weapons were operational. D.C. Code 1981, §§ 22-502, 22-1801(a), 22-2101, 22-2901, 22-3202, 22-3204(a, b), 22-3214(a). *Hanna v. United States*, 666 A.2d 845, 1995 D.C. App. LEXIS 202 (1995).

Finding that robbery defendant was armed with "firearm or imitation firearm" was supported by eyewitness testimony; despite witness' lack of familiarity with handguns, she insisted that silver object she saw in defendant's hand was gun. D.C. Code 1981, §§ 22-3202, 22-3204(b). *Bates v. United States*, 619 A.2d 984, 1993 D.C. App. LEXIS 23 (1993).

Victim's testimony that defendant reached into coat and pulled out a little gun that looked like a .22 at time of robbery was sufficient to support conviction for armed robbery. *Singley v. United States*, 548 A.2d 780, 1988 D.C. App. LEXIS 183 (1988).

Evidence supported conviction of defendant for armed robbery of parking lot attendant, even though defendant threw money at attendant and threw gun between cars as security guards approached in lot. D.C. Code 1981, §§ 22-2901, 22-3202. *Hordge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

Jury in armed robbery prosecution could conclude that weapons were operable, based on evidence that defendants displayed those weapons during robbery to back up their demands and thus intended that victims believe they were capable of being discharged. D.C. Code 1981, § 22-3202(a). *Bartley v. United States*, 530 A.2d 692, 1987 D.C. App. LEXIS 424 (1987).

Although no one actually saw weapon during commission of robbery, testimonial evidence was sufficient to permit jury to infer that at least one defendant was armed and to sustain convictions for armed robbery and armed assault with intent to commit robbery; store owner plainly believed that "extremely hard" object thrust into his ribs was a gun, an inherently dangerous weapon which gave his assailant apparent ability to inflict great bodily harm. *Paris v. United States*, 515 A.2d 199, 1986 D.C. App. LEXIS 430 (1986).

Even if object thrust into side of store owner turned out not to be loaded gun, circumstantial evidence would still have been sufficient for jury to conclude that defendants were armed with dangerous weapon during commission of robbery; therefore, evidence was sufficient to sustain convictions for armed robbery and

armed assault with intent to commit robbery. *Paris v. United States*, 515 A.2d 199, 1986 D.C. App. LEXIS 430 (1986).

Evidence, including admission by defendant that he and codefendant robbed two men at first location between 8:00 and 9:00 p.m., testimony by coparticipant that he drove defendant and codefendant to second area where they left car while coparticipant waited for them, testimony by victim at second location that he was robbed by individuals, including man subsequently identified as codefendant, plus testimony by coparticipant that defendant and codefendant subsequently returned to his car together and divided proceeds from two robberies, supported finding that defendant committed armed robbery and attempted robbery at second location. *Perkins v. United States*, 473 A.2d 841, 1984 D.C. App. LEXIS 357 (1984).

Evidence in prosecution for armed robbery sustained conviction. *Watts v. United States*, 449 A.2d 308, 1982 D.C. App. LEXIS 406 (1982).

In prosecution for armed robbery, evidence that defendant planned robbery and transported principals to laundromat and that codefendant was one of participants was sufficient to sustain their convictions. D.C. Code 1973, §§ 22-2901, 22-3202. *Hilton v. United States*, 435 A.2d 383, 1981 D.C. App. LEXIS 358 (1981).

Where defendant pointed gun at sales clerk and demanded money, evidence on issue of whether clerk's telling defendant to go ahead and take the money resulted from fear and was not willful was sufficient to sustain conviction for armed robbery, even though defendant was previously acquainted with clerk. D.C. Code §§ 22-2901, 22-3202. *Bean v. United States*, 409 A.2d 1064, 1979 D.C. App. LEXIS 524 (1979).

Evidence that victim normally carried money, that pockets of both of murdered men had been rifled and change was strewn around bodies and that after defendant had ransacked dresser in bedroom codefendant complained "Man, I thought it was supposed to be more stuff than this in this apartment," supported conviction for armed robbery thus refuting joint contentions that essential elements of taking and asportation of property of value had not been proven. D.C. Code § 22-2901. *Ellis v. United States*, 395 A.2d 404, 1978 D.C. App. LEXIS 570 (1978), writ of certiorari denied by 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280, 1979 U.S. LEXIS 2309 (1979).

In prosecution for armed robbery, evidence supported defendants' convictions, since victim's identification of defendant, and other evidence construed most favorably to Government, would permit a reasonable jury to find both defendants guilty beyond a reasonable doubt; fact that evidence against codefendant

was wholly circumstantial did not affect such conclusion. D.C. Code §§ 22-2901, 22-3202. *Ellis v. United States*, 395 A.2d 404, 1978 D.C. App. LEXIS 570 (1978), writ of certiorari denied by 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280, 1979 U.S. LEXIS 2309 (1979).

Evidence was sufficient to support convictions for armed robbery. *Byrd v. United States*, 388 A.2d 1225, 1978 D.C. App. LEXIS 483 (1978).

Evidence was for jury in armed robbery prosecution. *Singletary v. United States*, 383 A.2d 1064, 1978 D.C. App. LEXIS 433 (1978).

Evidence, in prosecution of defendant for robbery at gunpoint, was sufficient to support defendant's conviction. D.C. Code §§ 22-2901, 22-3202. *Jackson v. United States*, 368 A.2d 1140, 1977 D.C. App. LEXIS 417 (1977).

— **Description, value and ownership of property, weight and sufficiency of evidence.**

Evidence supported conclusion that victim of carjacking was in immediate possession of vehicle, as required for conviction under District of Columbia law, even though he was some distance away from automobile unlocking door of credit union defendants were about to rob when a defendant drive vehicle into parking lot and parked it, and defendants subsequently used vehicle for getaway purposes; except for intimidation being applied, victim could have easily regained physical control of automobile. D.C. Code 1981, §§ 22-105, 22-3901. *United States v. Gilliam*, 167 F.3d 628, 1999 U.S. App. LEXIS 3012 (C.A.D.C. 1999), writ of certiorari denied by 526 U.S. 1164, 119 S. Ct. 2060, 144 L. Ed. 2d 225, 1999 U.S. LEXIS 3929, 67 U.S.L.W. 3748 (1999), writ of certiorari denied by 528 U.S. 845, 120 S. Ct. 118, 145 L. Ed. 2d 100, 1999 U.S. LEXIS 5424, 68 U.S.L.W. 3225 (1999).

Evidence that national bank which was member of Federal Reserve System employed messenger to collect and receive money as property of bank, and that messenger was robbed of money in his possession as bank's agent, held to show that money stolen from messenger was property of bank, permitting conviction under statute for robbery of bank operating under Federal Reserve System. 12 U.S.C. § 588b. *White v. U.S.*, 85 F.2d 268, 1936 U.S. App. LEXIS 4087 (1936).

Money in care, custody, and control of messenger of national bank which was member of Federal Reserve System was, in contemplation of law, in care, custody, and control of bank, as respects whether money stolen from messenger was property of bank so as to permit conviction under statute for robbery of bank operating under Federal Reserve System (12 U.S.C. § 588b). *White v. U.S.*, 85 F.2d 268, 1936 U.S. App. LEXIS 4087 (1936).

Though evidence did not establish exactly where in victim's house stolen property was located, evidence did establish that property came from victim's home, and therefore was sufficient to support conviction of robbery. *Giles v. United States*, 472 A.2d 881, 1984 D.C. App. LEXIS 332 (1984).

— **Effect of possession of stolen property, weight and sufficiency of evidence.**

Evidence sustained robbery conviction of four defendants, who were discovered with stolen funds in automobile 40 minutes after the robbery which was actually perpetrated by three men. *Bailey v. United States*, 389 F.2d 305, 1967 U.S. App. LEXIS 4173 (C.A.D.C. 1967).

Particular defendant's presence in automobile in which stolen articles were found when arrests were made was insufficient to show he was in possession of stolen articles, and evidence of such presence and that he was present with properly convicted defendants, about an hour after robbery in another part of the city, in same automobile which had been seen speeding from point near scene of robbery was insufficient to connect particular defendant with the robbery. *Goodwin v. United States*, 347 F.2d 793, 1965 U.S. App. LEXIS 5521 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 920, 86 S. Ct. 298, 15 L. Ed. 2d 234, 1965 U.S. LEXIS 301 (1965).

Possession of property taken in a robbery, within a short time after the robbery, if unexplained to the satisfaction of the jury, may be sufficient to warrant a conclusion that possessor committed the robbery. *Laumer v. United States*, 409 A.2d 190, 1979 D.C. App. LEXIS 511 (1979).

Evidence, which indicated that property was taken and carried away and that defendant was seen driving car belonging to one victim while in possession of stolen calculator at time proximate to alleged offenses, was sufficient to allow reasonable jury to find beyond a reasonable doubt that defendant participated in armed robbery of victims. D.C. Code 1973, §§ 22-2901, 22-3202. *Head v. United States*, 451 A.2d 615, 1982 D.C. App. LEXIS 437 (1982).

— **Felony-murder, weight and sufficiency of evidence.**

Evidence that deceased's rings came into possession of one defendant immediately after deceased had been killed and evidence that defendant stated that she had gotten the rings from the victim and was going to keep them sustained conviction of both person who kept the ring and person who aided in the murder for felony-murder on the basis of robbery. D.C. Code §§ 22-2401, 22-2901. *United States v. Mackin*, 502 F.2d 429, 1974 U.S. App. LEXIS 7182 (C.A.D.C. 1974).

Evidence sustained conviction of first-degree felony-murder, first-degree premeditated murder and armed robbery. D.C. Code §§ 22-2401, 22-2901, 22-3202. *United States v. Mack*, 466 F.2d 333, 1972 U.S. App. LEXIS 8681 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223, 1972 U.S. LEXIS 986 (1972).

Evidence, including testimony as to statements of defendant and codefendant describing events and circumstances at time of shooting of cab driver, sustained convictions of robbery and felony murder. D.C. Code §§ 22-2401, 22-2901. *United States v. Carter*, 445 F.2d 669, 1971 U.S. App. LEXIS 10458 (C.A.D.C. 1971), writ of certiorari denied by 405 U.S. 932, 92 S. Ct. 988, 30 L. Ed. 2d 806, 1972 U.S. LEXIS 3775 (1972).

Evidence, including testimony of girl friend of one defendant as to incriminating statements which both defendants made to her, sustained convictions for felony murder and for attempted robbery. D.C. Code §§ 22-2401, 22-2902. *Calloway v. United States*, 399 F.2d 1006, 1968 U.S. App. LEXIS 6138 (C.A.D.C. 1968), writ of certiorari denied by 393 U.S. 987, 89 S. Ct. 464, 21 L. Ed. 2d 448, 1968 U.S. LEXIS 157 (1968).

The evidence, including evidence, that defendant was with his co-defendants immediately before and after the robbery-killing, that he fled to another city under an alias with articles stolen from the getaway automobile and that he admitted to an acquaintance that he was an active participant in the robbery, warranted conviction for robbery and second degree murder. *Dykes v. U.S.*, 313 F.2d 580, 1962 U.S. App. LEXIS 3291 (C.A.D.C. 1962).

Convictions on an aiding and abetting theory for first-degree premeditated murder and first-degree felony murder were supported by evidence that defendant arranged meeting for ostensible purpose of buying marijuana from victim, that he came to meeting with a gun, that he and co-defendants all drew their weapons as if on cue when defendant asked codefendant what he thought of the "weed," that defendant during armed robbery took marijuana from victim and pager from victim's associate, and that he shot at victim's associate as victim sustained fatal gunshot wound to head. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Defendant's corroborated admissions, coupled with Government's evidence of crime itself and circumstantial evidence of defendant's participation reasonably permitted finding of guilt beyond reasonable doubt, in prosecution for armed robbery and felony-murder. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Tribble v. United States*, 447 A.2d 766, 1982 D.C. App. LEXIS 380 (1982).

In prosecution, inter alia, for felony-murder and attempted robbery while armed, evidence

was sufficient to support the convictions. D.C. Code §§ 22-2401, 22-2902. *Dobson v. United States*, 426 A.2d 361, 1981 D.C. App. LEXIS 219 (1981).

Evidence was sufficient to support convictions for aiding and abetting robbery and for felony-murder. D.C. Code §§ 22-2401, 22-2901. *Shanahan v. United States*, 354 A.2d 524, 1976 D.C. App. LEXIS 501 (1976).

— Force and putting in fear, weight and sufficiency of evidence.

There was sufficient evidence of taking and asportation of victim's wallet and check to support armed robbery convictions, even though none of victim's property was taken from scene of incident or possessed by defendants for significant period of time; defendants acquired wallet and paycheck at gunpoint, both items were within their complete and exclusive control, they retained control over victim and any of his property by pistol-whipping him after finding nothing of value on him, and it was irrelevant that defendants might have held check and wallet for only brief moment of time before throwing both back at victim. D.C. Code 1981, § 22-2901. *Lattimore v. United States*, 684 A.2d 357, 1996 D.C. App. LEXIS 224 (1996).

— Identity of accused, weight and sufficiency of evidence.

Evidence, including identification by three of four counterwomen on duty at fast food restaurant on night of robbery and testimony of police officers suggesting that one robber was observed fleeing toward location in which defendant was stopped, which was near spot where bag with shotgun was discovered, sustained verdict convicting defendant of armed robbery. *U.S. v. Singleton*, 702 F.2d 1159, 1983 U.S. App. LEXIS 29661 (C.A.D.C. 1983).

Testimony by two victims of robbery that defendant was one of their two assailants was sufficient to sustain defendant's conviction for armed robbery. D.C. Code §§ 22-2901, 22-3202. *United States v. Alston*, 551 F.2d 315, 1976 U.S. App. LEXIS 7818 (C.A.D.C. 1976).

Evidence on issue of joint criminal venture and possession of purse and shotgun found in speeding automobile, occupied by defendants as driver and passenger, a short time after a purse had been forcibly taken from a pedestrian by two men, one of whom was armed with pistol, was sufficient to support conviction of armed robbery, assault with a dangerous weapon and possession of unregistered firearm, notwithstanding that at least one of four or five original occupants of vehicle had fled and that identification of defendants was "inconclusive" at best. D.C. Code §§ 22-502, 22-2901, 22-3202; 26 U.S.C. (I.R.C.1954) § 5861(d). *United States*

v. McCall, 460 F.2d 952, 1972 U.S. App. LEXIS 10560 (C.A.D.C. 1972).

In prosecution for robbery, there was ample identification by victim, including testimony of identification at lineup, supplemented by a photograph of lineup. *United States v. Hallman*, 439 F.2d 603, 1971 U.S. App. LEXIS 12451 (C.A.D.C. 1971).

Evidence, including evidence of defendant's in-trial identification and testimonial references to pretrial forerunners, sustained conviction for robbery and assault with dangerous weapon. D.C. Code §§ 22-501, 22-2901. *United States v. McNair*, 433 F.2d 1132, 1970 U.S. App. LEXIS 9919 (C.A.D.C. 1970).

Evidence, consisting of identification by single witness, as to identity of defendant as one of robbers was sufficient to support verdict of guilty to charge of armed robbery. *Jones v. United States*, 361 F.2d 537, 1966 U.S. App. LEXIS 6361 (C.A.D.C. 1966).

Evidence in prosecution for robbery and attempt to commit rape was sufficient to adequately identify defendant. *Whalem v. United States*, 346 F.2d 812, 1965 U.S. App. LEXIS 5807 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 862, 86 S. Ct. 124, 15 L. Ed. 2d 100, 1965 U.S. LEXIS 868 (1965).

In robbery prosecution, evidence of identification of defendant was sufficient to sustain conviction. *Green v. U.S.*, 289 F.2d 765, 1961 U.S. App. LEXIS 4758 (C.A.D.C. 1961).

Evidence was sufficient to support finding that juvenile was among the individuals who committed the charged armed robbery; positive identifications were made by two victims at a show-up held some twenty-five minutes after the robbery, victim testified that he recognized defendant by his facial features, dreadlock hair style and wristbands, victims professed to have no doubt about their identifications, and victim was robbed of three new and recently-obtained twenty-dollar bills, while defendant was found by police in possession of three new twenty-dollar bills. *In re T.C.*, 999 A.2d 72, 2010 D.C. App. LEXIS 398 (2010).

There was sufficient evidence of defendant's identity as the robber so as to support his conviction for armed robbery; victim was able to observe defendant and the other robbers at close range during the robbery and he saw the men pull out their guns, victim was able to describe defendant's build, complexion, and clothing when he gave an account of the robbery to police about thirty minutes after the robbery took place, and victim expressed no uncertainty when identifying defendant on the street later the same night of the robbery. *Lancaster v. United States*, 975 A.2d 168, 2009 D.C. App. LEXIS 251 (2009).

Defendants' convictions for second-degree burglary while armed, armed robbery, and possession of firearm during crime of violence were

supported by witnesses' identifications and other evidence including kind of clothing worn by defendants and car they were driving when they were apprehended. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3202, 22-3204(b). *Gregg v. United States*, 754 A.2d 265, 2000 D.C. App. LEXIS 108 (2000), writ of certiorari denied by 531 U.S. 980, 121 S. Ct. 430, 148 L. Ed. 2d 438, 2000 U.S. LEXIS 7361, 69 U.S.L.W. 3316 (2000).

Sufficient evidence identified defendant as one of two robbers, despite fact that victim was unable to identify defendant as assailant either at show-up identification held 20 minutes after assault or in court, where bank surveillance videotape, which captured assault committed near automatic teller machine showing actions of robbers, was played to jury, and shortly after assault, defendant was apprehended in company of codefendant whom victim positively identified. *Stevens v. United States*, 683 A.2d 452, 1996 D.C. App. LEXIS 193 (1996), writ of certiorari denied by 522 U.S. 883, 118 S. Ct. 211, 139 L. Ed. 2d 146, 1997 U.S. LEXIS 5655, 66 U.S.L.W. 3261 (1997).

Convictions of two counts of armed robbery and one count of possession of firearm during commission of crime of violence or dangerous crime were supported by sufficient evidence, including complaining witness' identification of defendant and identification of defendant's somewhat distinctive car by both witnesses at a second sighting. D.C. Code 1981, §§ 22-2901, 22-3202, 22-3204(b); U.S.C. Const.Amend. 6. *Goins v. United States*, 617 A.2d 956, 1992 D.C. App. LEXIS 307 (1992).

Evidence was insufficient to convict defendant of robbery of senior citizen; victim was pushed by two men, victim then discovered her wallet was gone, and defendant and another were arrested wearing clothes similar to those worn by perpetrators, but victim could not identify her assailants. D.C. Code 1981, §§ 22-2901, 22-3901. *Smith v. United States*, 561 A.2d 468, 1989 D.C. App. LEXIS 125 (1989), substituted opinion in part at 1989 D.C. App. LEXIS 218 (D.C. Oct. 11, 1989).

Eyewitness' identification of defendant, as corroborated by other evidence, sufficiently supported defendant's robbery conviction; although there were inconsistencies in eyewitness' identification, identification was corroborated by another witness, defendant's flight from scene, gun found along defendant's escape route, and defendant's admission that he was in area during commission of robbery. *Garris v. United States*, 559 A.2d 323, 1989 D.C. App. LEXIS 107 (1989).

Identification of defendant by victim, both in lineup and at trial, as person who displayed gun at time of her robbery was sufficient to support conviction for armed robbery, notwithstanding victim's failure to mention to police

that person with gun had scars on face and "large gap in the front of his mouth." *Singley v. United States*, 548 A.2d 780, 1988 D.C. App. LEXIS 183 (1988).

Pretrial identifications of defendant by eyewitness as bagman in robbery, standing alone as only probative evidence of guilt, was insufficient to support conviction, where identifications were meaningfully undercut by witness' testimony at trial that defendant did not look like bagman, none of other victims, all of whom had similar opportunity to observe perpetrator, was able to make any identification, and description of bagman given by one other victim was significantly at variance with defendant. *Beatty v. United States*, 544 A.2d 699, 1988 D.C. App. LEXIS 103 (1988).

Evidence was sufficient to sustain conviction of one codefendant of armed robbery where evidence indicated that he was identified on separate occasions by each of State's four main witnesses, his nickname appeared on witness' original list of alleged robbers and his attempt to harass State witness in connection with case was well documented at trial. *Payne v. United States*, 516 A.2d 484, 1986 D.C. App. LEXIS 455 (1986).

Evidence, including testimony of victim that he was robbed by a man with a gun as he was leaving restaurant, and that there was a streetlight nearby that shed enough light for him to see the robber's face, and his subsequent identification of defendant as person who robbed him at show-up, lineup, and in court, was sufficient to support armed robbery conviction. D.C. Code 1981, §§ 22-2901, 22-3202. *Fields v. United States*, 484 A.2d 570, 1984 D.C. App. LEXIS 543 (1984), writ of certiorari denied by 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501, 1985 U.S. LEXIS 1693, 53 U.S.L.W. 3777 (1985).

In prosecution for armed robbery, evidence in form of eyewitness identification of defendant by security guard and supervisor of security was sufficient to sustain conviction. *McClain v. United States*, 460 A.2d 562, 1983 D.C. App. LEXIS 351 (1983).

In view of fact that witness was present during entire robbery which lasted approximately 20 minutes, that store was well-lit, that her view was unobstructed and that neither man was wearing mask, her clear and unequivocal responses in making identification sustained conviction for robbery. D.C. Code §§ 22-2901, 22-3202. *Cunningham v. United States*, 408 A.2d 1240, 1979 D.C. App. LEXIS 508 (1979).

Evidence of identification of defendant was sufficient to permit finding that 15-year-old defendant was guilty of robbery beyond reasonable doubt. D.C. Code § 22-2901. *In re L.W.*, 390 A.2d 435, 1978 D.C. App. LEXIS 546 (1978).

Although one of witnesses to robbery was unable to identify defendant as perpetrator, where two other witnesses made positive identification, such constituted sufficient evidence to support finding of guilty beyond reasonable doubt. *Grier v. United States*, 381 A.2d 3, 1977 D.C. App. LEXIS 300 (1977).

Evidence in prosecution wherein defendant was convicted of armed robbery and of carrying pistol without license was sufficient to permit finding of identification beyond reasonable doubt, even considering 18 months time lapse between offense and positive identification of defendant at lineup. D.C. Code §§ 22-2901, 22-3202, 22-3204. *Tolliver v. United States*, 378 A.2d 679, 1977 D.C. App. LEXIS 248 (1977).

Discrepancy between victim's description of robber's height and defendant's actual height did not in itself indicate a substantial likelihood of misidentification in light of victim's excellent opportunity to observe robber during incident and fact that victim never wavered in his identification of defendant. *Williams v. United States*, 355 A.2d 784, 1976 D.C. App. LEXIS 525 (1976).

Testimony of robbery victim, who was confronted under streetlight, who was twice able to closely observe assailant as he leaned into her automobile, who described assailant and his attire in detail and who two days later identified defendant from third array of police photographs and also identified defendant at lineup and trial, was sufficient to support robbery conviction. D.C. Code § 22-2901. *Russell v. United States*, 348 A.2d 299, 1975 D.C. App. LEXIS 280 (1975).

Evidence sustained robbery conviction of defendant whose fingerprints were found by police on a dresser drawer in a generally locked woman's bedroom. D.C. Code § 22-2901. *Hawkins v. United States*, 329 A.2d 781, 1974 D.C. App. LEXIS 328 (1974).

— In general.

Evidence sustained finding that the defendant who asked filling station attendant to change \$5.00 bill and claimed that he left \$5.00 bill in exchange for \$5.00 he took was guilty of robbery. *Jackson v. United States*, 386 F.2d 641, 1967 U.S. App. LEXIS 4534 (C.A.D.C. 1967).

Unchallenged testimony by robbery victim that someone actually saw defendant take wallet out of her purse, together with evidence that defendant was at the bus stop where crime occurred and was found to have stolen money in his possession, was sufficient to sustain conviction for robbery. D.C. Code 1961, § 22-2901. *Jackson v. United States*, 359 F.2d 260, 1966 U.S. App. LEXIS 6620 (C.A.D.C. 1966), writ of certiorari denied by 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104, 1966 U.S. LEXIS 994 (1966).

In armed robbery prosecution, evidence that defendants ordered victims to throw their

money on the floor under clear threat of violence was sufficient to demonstrate both violent taking of property by depriving victims of its use and defendants' constructive control over the property to detriment of its owners. D.C. Code 1981, § 22-2901. *Newman v. United States*, 705 A.2d 246, 1997 D.C. App. LEXIS 189 (1997).

Government failed to prove beyond reasonable doubt that defendants took wallets from immediate actual possession of victims, and therefore evidence was insufficient to convict defendants of robbery or robbery of senior citizen, where there was no direct evidence that defendants took wallets, and no expert testimony as to methods used by pickpockets to remove wallets from clothing of individuals, or amount of force necessary to pickpocket. D.C. Code 1981, §§ 22-2901, 22-3901(a). *Zanders v. United States*, 678 A.2d 556, 1996 D.C. App. LEXIS 122 (1996).

Determination that defendant robbed victim in card shop was supported by sufficient evidence showing that defendant knocked over display while standing in front of victim, that defendant then looked past victim while victim felt series of nudges on her back and saw man behind her putting something into his pocket, that both men then left store and victim then noticed her money was gone from her wallet, and that victim had good opportunity to view defendant during incident and afterwards. D.C. Code 1981, § 22-2901. *Smith v. United States*, 561 A.2d 468, 1989 D.C. App. LEXIS 125 (1989), substituted opinion in part at 1989 D.C. App. LEXIS 218 (D.C. Oct. 11, 1989).

Conviction for robbery was supported by sufficient evidence, including testimony of victim that defendant took money from his wallet while codefendant held him at gunpoint. D.C. Code 1981, § 22-2901. *Streater v. United States*, 478 A.2d 1055, 1984 D.C. App. LEXIS 442 (1984).

Evidence tending to show that two robberies of cab drivers took place within seven hours, in same city block, by two women, one of whom was codefendant, that in each instance codefendant was in front seat while her accomplice, identified as defendant in second robbery, was in back seat, that codefendant used pistol in each robbery while her accomplice rifled victim's clothes and that in each case victim was deprived of use of cab as well as money and other personal items sustained conviction of defendant for first robbery as well as for second. D.C. Code §§ 22-2901, 22-3202. *Samuels v. United States*, 385 A.2d 16, 1978 D.C. App. LEXIS 445 (1978).

Evidence that money in cash register was taken from sales clerk as custodian for store was sufficient to establish possessory element of offense of armed robbery. D.C. Code §§ 22-

2901, 22-3202. *Jones v. United States*, 362 A.2d 718, 1976 D.C. App. LEXIS 349 (1976).

— **Insanity or other incapacity, weight and sufficiency of evidence.**

Record, including testimony of a private psychiatrist who examined defendant at government expense, was sufficient to support finding that criminal acts committed by defendant (armed robbery, assault with a dangerous weapon, and carrying a dangerous weapon) were not so proximately tied to defendant's mental impairment as to require his exculpation. D.C. Code §§ 22-502, 22-2901, 22-3202, 22-3204; 18 U.S.C. *United States v. Wilson*, 471 F.2d 1072, 1972 U.S. App. LEXIS 7095 (C.A.D.C. 1972), writ of certiorari denied by 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691, 1973 U.S. LEXIS 3264 (1973).

Finding that commission of robbery and assault with dangerous weapon was not causally connected with defendant's alleged mental illness and narcotic addiction was supported by substantial testimony. D.C. Code §§ 22-502, 22-2901. *United States v. Carter*, 436 F.2d 200, 1970 U.S. App. LEXIS 8882 (C.A.D.C. 1970).

In light of evidence on issue whether offense was a product of mental illness, conviction for robbery of property belonging to United States, assault with dangerous weapon and carrying dangerous weapon would be affirmed. 18 U.S.C. § 2112; D.C. Code §§ 22-502, 22-2901, 24-301(a). *Adams v. United States*, 413 F.2d 411, 1969 U.S. App. LEXIS 12488 (C.A.D.C. 1969).

Jury was justified in finding that assault with intent to commit robbery and robbery were not product of alleged mental disease of defendant, where psychiatrist testified that defendant was suffering from low grade mental illness predisposing to psychosis particularly when defendant was under influence of large amounts of alcohol, and evidence indicated that defendant was completely sober at time of alleged offenses. D.C. Code 1961, §§ 22-501, 22-2901. *Hawkins v. U.S.*, 310 F.2d 849, 1962 U.S. App. LEXIS 3772 (C.A.D.C. 1962).

Where defendant, accused of murder and robbery, introduced evidence that on date thereof he was suffering from mental disease or defect, it became duty of government to prove him sane beyond reasonable doubt at time of commission of crimes charged. D.C. Code 1951, §§ 22-2401, 22-2901. *Carey v. U.S.*, 296 F.2d 422, 1961 U.S. App. LEXIS 3480 (C.A.D.C. 1961).

Where there is evidence that accused was of unsound mind when offenses occurred, prosecution is under necessity of establishing to satisfaction of jury beyond reasonable doubt that offenses were not result of accused's insanity. D.C. Code 1951, §§ 22-2901, 24-301. *Douglas v. U.S.*, 239 F.2d 52, 1956 U.S. App. LEXIS 4124 (C.A.D.C. 1956).

In order to justify conviction, where there is evidence that accused was of unsound mind when offenses occurred, proof, considered with presumption of sanity, must exclude beyond reasonable doubt the hypothesis that conduct indicted was product of a diseased mind or mental defect. D.C. Code 1951, §§ 22-2901, 24-301. *Douglas v. U.S.*, 239 F.2d 52, 1956 U.S. App. LEXIS 4124 (C.A.D.C. 1956).

— Intent, weight and sufficiency of evidence.

Evidence was sufficient to show that defendant had intended to rob victim, as required to support conviction for attempted robbery while armed; intended victim had been invited to tattoo party where he gave tattoos to partygoers for discounted price, he earned approximately \$1000 that night, he was paid in cash by each person at party, defendant had complained that he thought victim's prices were too high, and witness testified that, when defendant heard that victim, who had assisted intended victim that night, had been shot killed, defendant stated that "he didn't know they were going to kill him, the plan was for them to rob the guy." *Matthews v. United States*, 13 A.3d 1181, 2011 D.C. App. LEXIS 105 (2011).

A jury may infer the intent to rob from the totality of the evidence; this inference may be drawn not only from the words uttered by the suspect but also from his conduct. *Abdus-Price v. United States*, 873 A.2d 326, 2005 D.C. App. LEXIS 204 (2005).

Evidence indicating that defendant twice returned to closet where he had placed complainant and inquired as to whereabouts of her money and that defendant, on returning to closet a third time, told complainant that he was going to get some writing paper and a drink was sufficient to raise inference that defendant was looking for complainant's money and that, on finding it, was going to purchase some goods with money and, as such, was sufficient to raise inference in prosecution for armed robbery that defendant took complainant's property with specific intent to steal it. D.C. Code §§ 22-2901, 22-3202. *Beck v. U.S.*, 402 A.2d 418, 1979 D.C. App. LEXIS 372 (1979).

— Juvenile proceedings, weight and sufficiency of evidence.

In delinquency proceeding, evidence that victim was shot during juvenile's robbery of another victim in same car, together with juvenile's confession, was sufficient to support finding of juvenile's involvement in offense and adjudication as delinquent. D.C. Code 1981, §§ 16-2317, 16-2319, 22-501, 22-2401, 22-2901, 22-3202. In re C.L.W., 467 A.2d 706, 1983 D.C. App. LEXIS 460 (1983).

In proceeding in which juvenile was adjudicated delinquent on basis of determination that he had committed a robbery, properly admitted evidence was insufficient to sustain the adjudication of delinquency. D.C. Code § 22-2901. In re O., 400 A.2d 1055, 1979 D.C. App. LEXIS 346 (1979).

Evidence that a spree of cab driver robberies took place from 4:30 a. m. to 6:30 a. m., that, in the first two robberies, juvenile sat behind the driver while his companion sat on the right of the rear seat, that in both instances the companion pulled a gun and cab driver was robbed of his money, jewelry, and pocket chattels, that third victim was shot, that items taken during the two earlier robberies were found at the murder scene, and that the two persons seen fleeing from the murder scene were wearing clothing consistent with that described by occupant of apartment at the time that juvenile and his accomplice arrived with other loot and a bloody appearance was sufficient to sustain juvenile's convictions for felony-murder and attempted robbery. D.C. Code §§ 22-2401, 22-2901, 22-3202. In re A.L.S., 377 A.2d 1149, 1977 D.C. App. LEXIS 393 (1977).

It was within province of court, as trier of fact, to disbelieve testimony of waitress who had chosen juvenile's photograph from display on day after robbery of restaurant but who testified at trial that defendant was not the boy who had pointed gun at her. D.C. Code §§ 22-502, 22-2901. In re W.K., 323 A.2d 442, 1974 D.C. App. LEXIS 251 (1974).

Positive identification by one eyewitness and somewhat tentative identifications by two other eyewitnesses were sufficient basis for finding juvenile guilty of robbery and assault with dangerous weapon. D.C. Code §§ 22-502, 22-2901. In re W.K., 323 A.2d 442, 1974 D.C. App. LEXIS 251 (1974).

Under record, trial court's finding that juvenile was an aider and abettor in assault and robbery, and hence a delinquent, was not plainly wrong. D.C. Code §§ 22-105, 22-502, 22-2901. In re W., 294 A.2d 174, 1972 D.C. App. LEXIS 237 (1972).

— Kidnapping, weight and sufficiency of evidence.

Evidence was not insufficient to support defendant's kidnapping conviction on ground victim was not transported subsequent to robbery. D.C. Code 1981, §§ 22-2101, 22-2901. *Catlett v. United States*, 545 A.2d 1202, 1988 D.C. App. LEXIS 109 (1988), writ of certiorari denied by 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803, 1989 U.S. LEXIS 251, 57 U.S.L.W. 3453 (1989).

Circumstantial evidence, including complainant's testimony that her abductor held gun to her head, that he had taken one of her husband's black leather gloves from car, and

that he had emptied her pants pockets of money and watch, and other evidence that handgun was found close to spot where defendant was apprehended after he had run from car which held complainant, that defendant had covered gun with black leather glove, and that defendant had watch and money on person, was sufficient to support defendant's convictions for armed robbery, rape and kidnapping. *White v. United States*, 484 A.2d 553, 1984 D.C. App. LEXIS 546 (1984).

— **Multiple offenses, weight and sufficiency of evidence.**

Testimony by prison guards that they were locked in a cell and held as hostages, that defendant frequently checked the cell where the guards were confined, that he told the guards that he "had nothing to lose by going out looking," that defendant separated himself from a group of inmates who did not want to escape immediately before rebellious inmates clustered for breakout attempt, and that defendant thereafter came by the cell many times armed with a short piece of steel with a sharp end and threatened the hostages was sufficient to sustain defendant's convictions for attempted escape, armed kidnapping, robbery, and riot. 18 U.S.C. § 751; D.C. Code §§ 22-502, 22-1122, 22-2901, 22-3202. *United States v. Bridgeman*, 523 F.2d 1099, 1975 U.S. App. LEXIS 11742 (C.A.D.C. 1975), writ of certiorari denied by 425 U.S. 961, 96 S. Ct. 1743, 96 S. Ct. 1744, 48 L. Ed. 2d 206, 1976 U.S. LEXIS 1553 (1976).

Evidence sustained conviction on three-count indictment charging housebreaking, robbery and assault with intent to commit robbery. D.C. Code 1961, §§ 22-501, 22-1801, 22-2901. *Martin v. United States*, 314 F.2d 266, 1963 U.S. App. LEXIS 6332 (C.A.D.C. 1963).

Evidence established defendant's guilt of unauthorized use of vehicle and robbery. *United States v. Allen*, 278 F. Supp. 544, 1968 U.S. Dist. LEXIS 7886 (D.D.C.1968).

Sufficient evidence supported convictions for armed carjacking, armed robbery, aggravated assault while armed (AAWA), assault with a dangerous weapon (ADW), possession of a firearm while committing a crime of violence, and carrying a pistol without a license; victim was able to determine defendants' relative heights and complexions, although they masked their faces, officer apprehended defendant after he fled from car bearing license number of car reported stolen only a few minutes earlier, and wearing very shoes identified as those stolen from victim's feet, and defendant's girlfriend testified that defendants brought into her apartment several person items belonging to victim. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Evidence was sufficient to support defendant's convictions for first-degree murder while armed, assault with intent to kill while armed, armed robbery, conspiracy to commit armed robbery, and first-degree burglary while armed; according to driver of get-away vehicle, defendant struggled to open stolen safe in vehicle following murders and made statement about apparent contents of safe, and other witnesses testified that defendant ran to vehicle from victims' house with codefendant, that defendant helped count out money, drugs, and other items found in safe, and that defendant ultimately took his own share, including a diamond ring which he was seen wearing shortly after the murders. D.C. Code 1981, §§ 22-105(a), 22-501, 22-1801(a), 22-2401, 22-2901, 22-3202. *Dancy v. United States*, 745 A.2d 259, 2000 D.C. App. LEXIS 12 (2000).

Evidence sustained defendant's convictions for felony-murder, robbery, and first-degree burglary. D.C. Code §§ 22-1801(a), 22-2401, 22-2901. *Brown v. United States*, 464 A.2d 120, 1983 D.C. App. LEXIS 437 (1983).

Evidence sustained convictions for assault with intent to kill while armed and assault with intent to rob while armed. D.C. Code §§ 22-106, 22-501, 22-3202, 22-3214(b). *McBride v. United States*, 393 A.2d 123, 1978 D.C. App. LEXIS 341 (1978), writ of certiorari denied by 440 U.S. 927, 99 S. Ct. 1260, 59 L. Ed. 2d 482, 1979 U.S. LEXIS 938 (1979).

Evidence sustained convictions for first-degree burglary while armed and armed robbery. D.C. Code §§ 22-1801(a), 22-2901. *Franey v. United States*, 382 A.2d 1019, 1978 D.C. App. LEXIS 419 (1978).

Government's evidence, although partly circumstantial, reasonably permitted finding that juvenile was guilty of mayhem and malicious disfigurement and robbery by force and violence. D.C. Code §§ 22-506, 22-2901. In re E.G.C., 373 A.2d 903, 1977 D.C. App. LEXIS 321 (1977).

— **Persons liable, weight and sufficiency of evidence.**

Evidence in robbery prosecution was sufficient to support finding that defendant participated, with companion, in robbery of liquor store during which companion produced pistol and demanded money while defendant watched customers, and that second robbery of hostage outside store was not companion's independent frolic or unrelated to general criminal scheme. D.C. Code § 22-2901. *United States v. Belt*, 514 F.2d 837, 1975 U.S. App. LEXIS 14203 (C.A.D.C. 1975).

Evidence including testimony showing that defendant walked behind victims and tried to remove wallet from victim's pocket was sufficient to support the implicit finding of verdict that defendant aided and abetted the offense of

assault with intent to commit robbery while armed with a dangerous weapon and the offense of assault with a dangerous weapon. D.C. Code §§ 22-105, 22-501 et seq., 22-502. *United States v. Prater*, 462 F.2d 292, 1972 U.S. App. LEXIS 10401 (C.A.D.C. 1972).

To uphold conviction for aiding and abetting robbers, there must be evidence to support finding that defendant knowingly aided and abetted holdup. *United States v. Harris*, 435 F.2d 74, 1970 U.S. App. LEXIS 7752 (C.A.D.C. 1970), writ of certiorari denied by 402 U.S. 986, 91 S. Ct. 1675, 29 L. Ed. 2d 152, 1971 U.S. LEXIS 2081 (1971).

Evidence, in prosecution for armed robbery and assault with dangerous weapon, warranted finding that defendant knowingly aided and abetted holdup. *United States v. Harris*, 435 F.2d 74, 1970 U.S. App. LEXIS 7752 (C.A.D.C. 1970), writ of certiorari denied by 402 U.S. 986, 91 S. Ct. 1675, 29 L. Ed. 2d 152, 1971 U.S. LEXIS 2081 (1971).

In robbery prosecution of pickpocket who allegedly took wallet from purse of lady in line of people outside White House grounds waiting to gain entrance to observe children's annual Easter egg roll, evidence was sufficient to permit jury to conclude beyond reasonable doubt that defendant gained possession of the purse from the immediate actual possession of the lady. D.C. Code § 22-2901. *Davis v. United States*, 433 F.2d 1222, 1970 U.S. App. LEXIS 8424 (C.A.D.C. 1970).

Evidence of defendant's presence at scene of crime, slight association with actual perpetrator, and subsequent flight, did not sustain conviction for robbery. Fed.Rules Crim.Proc. rule 29(a); D.C. Code §§ 22-105, 22-2901. *Bailey v. United States*, 416 F.2d 1110, 1969 U.S. App. LEXIS 13359 (C.A.D.C. 1969).

Evidence was sufficient to sustain conviction of defendants for robbery as aiders and abettors. *Williams v. U.S.*, 255 F.2d 896, 1958 U.S. App. LEXIS 4271 (C.A.D.C. 1958).

Evidence was insufficient to sustain robbery conviction of alleged lookout. *Scott v. U.S.*, 232 F.2d 362, 1956 U.S. App. LEXIS 3034 (C.A.D.C. 1956).

In robbery prosecution, where defendant claimed that he acted under compulsion by another after having intended only an extortion, evidence justified conviction. *Vinci v. U.S.*, 159 F.2d 777, 1947 U.S. App. LEXIS 2525 (1947).

Evidence sustained conviction for robbery. D.C. Code 1951, § 22-2901. *U.S. v. Mann*, 119 F.Supp. 406, 1954 U.S. Dist. LEXIS 4397 (D.D.C.1954).

Evidence was sufficient to establish a felonious taking, in support of conviction for robbery, even though defendant was initially driving the victim's vehicle with the victim's permission; the victim conditionally transferred possession

of his vehicle to defendant while defendant and the victim were driving around, as the victim did not have a valid driver's license, and while the parties were driving around co-defendant shot and killed victim. *Pleasant-Bey v. United States*, 988 A.2d 496, 2010 D.C. App. LEXIS 34 (2010), writ of certiorari denied by 132 S. Ct. 532, 181 L. Ed. 2d 373, 2011 U.S. LEXIS 7636, 80 U.S.L.W. 3261 (U.S. 2011).

Sufficient evidence supported conviction for robbery under theory of aiding and abetting; defendant helped accomplice escape, as he was driver of getaway vehicle, defendant engaged police in high speed chase and, once vehicle was forcibly stopped, police found money and guns in vehicle. *Lyons v. U.S.*, 833 A.2d 481, 2003 D.C. App. LEXIS 618 (2003).

Accomplice's unsworn statement, that he committed armed robbery with someone other than defendant, was insufficient to show defendant's actual innocence, so as to survive summary denial of motion for postconviction relief as successive motion for similar relief as first motion that also raised ineffective assistance claim. *Dobson v. United States*, 815 A.2d 748, 2003 D.C. App. LEXIS 16 (2003).

Evidence was insufficient to support finding that defendant knowingly and intentionally aided and abetted codefendant's armed robbery of victim, who was attempting to purchase handgun, so as to support defendant's armed robbery conviction, despite fact that codefendant robbed victim after defendant told victim to see codefendant respecting handgun purchase; there was no direct evidence that defendant planned robbery or had any advance knowledge that robbery would occur, and codefendant's decision to rob victim appeared to have been improvised at last moment, rather than planned in advance. D.C. Code 1981, §§ 22-2901, 22-3202. *Roy v. United States*, 652 A.2d 1098, 1995 D.C. App. LEXIS 6 (1995).

Evidence at first trial that defendant acted with "guilty knowledge" that principal was committing robbery when defendant picked principal and companion up in car and drove away, and that defendant knew or should have foreseen that gun would be required to commit the robbery, was sufficient to sustain conviction for aiding and abetting armed robbery, so that retrial was not barred on double jeopardy grounds following remand based on reversible instructional errors, in view of evidence that defendant had inside information and arranged to drive robbers to particular grocery store on heavy check-cashing day at exact time when person would arrive with large amounts of cash, that reasonable precautions against theft might have been expected, and that principal entered defendant's car with two guns. *U.S. Const.Amend. 5*; D.C. Code 1981, § 22-105. *Kelly v. United States*, 639 A.2d 86, 1994 D.C. App. LEXIS 35 (1994).

Evidence supported convictions for unauthorized use of murder victim's car, robbery of items from murder victim and burglary and theft of items from victim's apartment; defendant joined two others in victim's car, helped murder victim and took property from him and went to victim's home and removed two plastic bags of personal property belonging to victim. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b). *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

Conviction of defendant of armed robbery as aider and abettor was supported by sufficient evidence, including defendant's fingerprints on top and bottom of stolen pizza boxes and principal's statements and defendant's adoption of them. D.C. Code 1981, §§ 22-2901, 22-3202. *Robinson v. United States*, 606 A.2d 1368, 1992 D.C. App. LEXIS 101 (1992).

Conviction for aiding and abetting codefendant in armed robbery was supported by evidence that defendant knew that codefendant was armed and that his affirmative response to codefendant's query as to whether he wanted victim's radio helped to set in motion events which culminated in robbery, that defendant acted as lookout, and that he immediately met up with codefendant after robbery. *Prophet v. United States*, 602 A.2d 1087, 1992 D.C. App. LEXIS 26 (1992).

Evidence that defendant set up drug transaction with undercover police officer, that officer was subsequently robbed by codefendant, and that defendant acted as lookout during robbery was sufficient to support defendant's robbery conviction on aiding and abetting theory. *Taylor v. United States*, 601 A.2d 1060, 1991 D.C. App. LEXIS 347 (1991), remanded by 661 A.2d 636, 1995 D.C. App. LEXIS 123 (D.C. 1995).

Evidence was sufficient to sustain defendant's conviction for armed robbery under an aider and abettor theory despite testimony suggesting presence of other individuals, based on defendant's proximity to scene of crime, his role as lookout, and his continued association after incident with codefendant who had stood over victim with a shotgun while victim complied with command to empty his pockets. *Dew v. United States*, 558 A.2d 1112, 1989 D.C. App. LEXIS 76 (1989).

Evidence was sufficient to establish that defendant aided and abetted codefendant in armed robbery, as defendant and codefendant were together not only during robbery, but at different locations throughout day, arrived at robbery scene together, defendant's presence was substantial aid to codefendant in that defendant distracted lookout for robbery victims, who desired to buy drugs from codefendant, and there was sufficient circumstantial evidence to conclude that defendant had guilty

knowledge of crime. *Wesley v. United States*, 547 A.2d 1022, 1988 D.C. App. LEXIS 168 (1988).

Evidence supported conviction of defendant as aider and abettor of codefendant's armed robbery of parking lot attendant; two men were observed circling hospital parking lot two hours before robbery; during robbery defendant was seated in driver's seat of codefendant's car with motor running, had unobstructed view of robbery, and lied by telling police sergeant that he was not waiting for anyone; and jury could reasonably find that codefendant was unlikely to have kept gun in waistband for entire two-hour period and that use of some type of weapon was reasonably foreseeable. D.C. Code 1981, §§ 22-105, 22-2901, 22-3202. *Hordge v. United States*, 545 A.2d 1249, 1988 D.C. App. LEXIS 125 (1988).

Evidence of sequence of events surrounding robbery permitted finding defendant guilty of armed robbery based on his having aided and abetted actual gunman who stole victim's money orders and cash. *Driver v. United States*, 521 A.2d 254, 1987 D.C. App. LEXIS 287 (1987).

Complainant's testimony that defendant, charged with aiding and abetting armed robbery, was standing on scene looking left and right and at complainant could support inference that defendant was participating in crime as lookout, particularly in view of additional testimony that defendant did not attempt to offer assistance or stop crime. *Tillman v. United States*, 519 A.2d 166, 1986 D.C. App. LEXIS 516 (1986).

Evidence that defendant was a passenger in automobile driven by codefendant after codefendant had committed a robbery, that defendant knew that codefendant had committed a robbery, and that defendant reached underneath backseat while being chased by victim was insufficient to support finding that defendant assisted codefendant in order to hinder codefendant's apprehension and thus was insufficient to support his conviction as an accessory after the fact. *Fields v. United States*, 484 A.2d 570, 1984 D.C. App. LEXIS 543 (1984), writ of certiorari denied by 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501, 1985 U.S. LEXIS 1693, 53 U.S.L.W. 3777 (1985).

Evidence that defendant was present when murder occurred, that he moved from back seat of car to driver's seat during altercation and drove off when his associates got back in the car, and warned unwitting passenger not to tell anyone what he had witnessed was sufficient to support defendant's conviction for being accessory after the fact to felony-murder and armed robbery. D.C. Code 1981, § 22-105. *Jefferson v. United States*, 463 A.2d 681, 1983 D.C. App. LEXIS 420 (1983).

Evidence in prosecution for aiding and abetting a robbery was sufficient to allow trier of fact to infer juvenile's criminal complicity. In re Q.L.J., 458 A.2d 30, 1982 D.C. App. LEXIS 523 (1982).

Evidence that defendant told his brother that the victim had \$60, that the defendant stayed with the victim while his brother went to get a pipe which was used to fatally beat the victim, that defendant stayed in the room during the assault, that defendant assisted his brother in rolling the victim off the couch and searching his pockets for money, that defendant took one third of the proceeds, that defendant directed a third party to dispose of defendant's bloody pants, and that defendant fled the scene after changing his clothes was sufficient to establish his guilt of robbery on an aiding and abetting theory. *Johnson v. United States*, 434 A.2d 415, 1981 D.C. App. LEXIS 343 (1981).

In prosecution for assault with intent to commit robbery while armed, evidence that assailants got out of car defendant was driving and almost immediately thereafter assaulted victim, that victim ran after one assailant as he returned to car after committing assault and that defendant had opportunity to see victim and her continued pursuit of that assailant, and that assailants were in car defendant was driving when it was stopped by police short time later was sufficient to support conviction of defendant for aiding and abetting assailants. D.C. Code 1973, §§ 22-2902, 22-3202. *Johnson v. United States*, 434 A.2d 415, 1981 D.C. App. LEXIS 343 (1981).

In prosecution for being an accessory after the fact of an armed robbery, evidence was insufficient to sustain an inference that when defendant drove passenger one block or less defendant knew that passenger had committed the armed robbery, and thus evidence was insufficient to sustain the conviction. D.C. Code § 22-106. *Clark v. United States*, 418 A.2d 1059, 1980 D.C. App. LEXIS 348 (1980).

Evidence in prosecution brought against four defendants accused of robbing five victims in hallway of apartment building was sufficient to establish that one defendant, who asserted that he did not appear in hallway of building until victims' property had been taken and did not actually search any of victims, was aider and abettor of crimes charged, and thus was sufficient to support that defendant's conviction for assault with intent to commit robbery while armed. D.C. Code §§ 22-501, 22-3202. *Heiligh v. United States*, 379 A.2d 689, 1977 D.C. App. LEXIS 252 (1977).

Evidence that defendant was driver of car in which purse snatcher fled from scene of purse snatching supported conviction for robbery. *McMillan v. United States*, 373 A.2d 912, 1977 D.C. App. LEXIS 327 (1977).

Evidence, including evidence of juvenile's close association with correspondent prior to and after purse snatching, juvenile's presence near scene of crime and his flight from scene with correspondent, was sufficient to support juvenile's conviction of robbery. D.C. Code § 22-2901. In re A.B.H., 343 A.2d 573, 1975 D.C. App. LEXIS 233 (1975).

Evidence sustained robbery conviction of defendant who was one of robber's companions, watched commission of robbery, and ran from scene of crime with robber and other companion. D.C. Code § 22-2901. *Creek v. United States*, 324 A.2d 688, 1974 D.C. App. LEXIS 268 (1974).

Witnesses and examination of witnesses.

— Competency; capacity and qualifications, witnesses and examination of witnesses.

Trial court properly rejected attempt by two witnesses who were unfamiliar with defendant's reputation as to character traits in issue in robbery and assault case to testify as to his character. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Hinkle*, 448 F.2d 1157, 1971 U.S. App. LEXIS 8860 (C.A.D.C. 1971).

Prosecutor who called robbery victims to testify despite victims' expressed inability to recall events was entitled to continue questioning victims in order to probe memory and test recollection in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

— Confrontation of witnesses, witnesses and examination of witnesses.

Allowing defendant to cross-examine prosecution's key witness, regarding witness' possible bias from being involved in the robbery and fearing prosecution in District of Columbia, did not satisfy defendant's right under Confrontation Clause to cross-examine witness regarding possible bias resulting from unrelated criminal charge against witness which had been placed on "stet" docket in Maryland, which meant Maryland prosecutor had not elected to proceed on indictment but could later decide to proceed on it. *Blunt v. United States*, 863 A.2d 828, 2004 D.C. App. LEXIS 683 (2004).

Failing to allow defendant to conduct any cross-examination of prosecution's key witness, regarding criminal charge against witness which had been placed on "stet" docket in Maryland, which meant Maryland prosecutor had not elected to proceed on indictment but could later decide to proceed on it, violated defendant's Sixth Amendment right to confront witnesses to expose bias, in prosecution for

robbery; witness may have subjectively believed that United States Attorney's Office for District of Columbia could influence Maryland prosecutor if witness did not testify favorably for the prosecution in District of Columbia. *Blunt v. United States*, 863 A.2d 828, 2004 D.C. App. LEXIS 683 (2004).

Prosecutor's leading questions which were asked despite victims' inability to recall events, but which did not constitute only direct evidence against defendant, did not violate defendant's Sixth Amendment right to confront witnesses in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204; U.S. Const. Amends. 5, 6. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Admitting evidence of complainant's statement to investigating officers that he had lost a brown manila envelope containing \$6,000 in cash was violative of robbery defendant's Sixth Amendment right of confrontation where nontestifying complainant was alive at time of trial and his statement was crucial to the Government's case, in that indictment charged defendant with taking a "brown envelope containing money" and although there was eyewitness testimony that defendant took such envelope it was only through the out-of-court statement that its monetary content was established. D.C. Code § 22-2901; U.S. Const. Amend. 6. *Harrison v. United States*, 407 A.2d 683, 1979 D.C. App. LEXIS 465 (1979).

In prosecution for armed burglary, armed robbery, and assault, trial court's ruling curtailing in limine defense counsel's inquiry of complainant concerning her possible status as a police informant in other cases, which allegedly would have caused jury to view her testimony with skepticism, was not an abridgement of defendant's Sixth Amendment right to confrontation, in that such evidence was not relevant given fact that complainant's status was that of a crime victim rather than that of a provider of information regarding criminal activities of others and fact that jury had before it complainant's admission that she engaged in after-hours sale of cigarettes and liquor contrary to law. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 25-102 et seq.; U.S. Const. Amend. 6. *Smith v. United States*, 389 A.2d 1364, 1978 D.C. App. LEXIS 543 (1978).

Trial court, in prosecution for armed robbery, kidnapping, and sexual abuse, did not violate defendant's and codefendant's Sixth Amendment right of confrontation by limiting defendant's and codefendant's cross-examination of witness concerning witness's mental state to date charged offenses occurred and during any other time about witness might have testified;

evidence of witness's mental condition at another time in his life was not relevant to witness's perception of events on the night offenses occurred. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

— Credibility and impeachment generally, witnesses and examination of witnesses.

Refusal, in criminal prosecution, to admit testimony regarding effect of drug use on perception for purposes of impeaching testimony of accomplice, who testified for government and who was a heroin user, unless it was established that accomplice had used narcotics on day of offenses was not error. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

Had defendant taken stand in prosecution for armed robbery, assault with dangerous weapon, and carrying dangerous weapon without license, evidence of prior conviction for impersonating owner of federal check would have been admissible for impeachment purposes. D.C. Code §§ 22-502, 22-2901, 22-3204. *United States v. Moore*, 459 F.2d 1360, 1972 U.S. App. LEXIS 11942 (C.A.D.C. 1972).

Defense witness' robbery conviction was admissible in robbery prosecution for impeachment purposes, notwithstanding contention that robbery was not crime involving dishonest conduct. D.C. Code §§ 14-305(b)(1), 22-2901. *United States v. Baber*, 447 F.2d 1267, 1971 U.S. App. LEXIS 8861 (C.A.D.C. 1971), writ of certiorari denied by 404 U.S. 957, 92 S. Ct. 324, 30 L. Ed. 2d 274, 1971 U.S. LEXIS 452 (1971).

In robbery prosecution of pickpocket who allegedly took wallet from purse of lady in line of people outside White House grounds waiting to gain entrance to observe children's annual Easter egg roll, trial judge did not exceed his discretion when he ruled that prosecutor would be allowed to impeach defendant, if he testified, with two earlier convictions for petty larceny. D.C. Code § 22-2901. *Davis v. United States*, 433 F.2d 1222, 1970 U.S. App. LEXIS 8424 (C.A.D.C. 1970).

Cross-examination of defendant during which prosecution was permitted to develop that for some time prior to date of offense defendant had been absent from his military post without leave was improper, and prejudice was magnified by erroneous admission of government's rebuttal evidence as to defendant's absence from military post. D.C. Code §§ 22-502, 22-1801(a), 22-2901. *United States v. Shumate*, 429 F.2d 777, 1970 U.S. App. LEXIS 8423 (C.A.D.C. 1970).

Decision, rendered after hearing on admissibility that 1959 conviction of one defendant for housebreaking and larceny and 1962 conviction of another defendant for attempted house-

breaking could be brought out on cross-examination in robbery prosecution unless either defendant could satisfy court that since conviction he had led legally blameless life was not abuse of discretion. D.C. Code §§ 14-305, 22-502, 22-2901, 22-3214(a); U.S. Const. Amends. 5, 6, 14. *United States v. Bailey*, 426 F.2d 1236, 1970 U.S. App. LEXIS 10227 (C.A.D.C. 1970).

In prosecution for, *inter alia*, robbery, wherein defendant testified after being denied bifurcated trial, it was not error to permit impeachment by showing prior offense of housebreaking, though it had occurred six years earlier and defendant had pleaded guilty to the housebreaking offense. D.C. Code § 22-2901. *United States v. Grimes*, 421 F.2d 1119, 1969 U.S. App. LEXIS 10770 (C.A.D.C. 1969), writ of certiorari denied by 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98, 1970 U.S. LEXIS 1795 (1970).

Where defendant's testimony at his trial for robbery was essential because prosecution based whole case on delayed identification by complaining witness and therefore decision depended on credibility, trial judge's permitting evidence of defendant's prior conviction of assault to be introduced to impeach defendant's credibility was an abuse of discretion. D.C. Code § 14-305; D.C. Code 1967, § 22-2901. *Jones v. United States*, 402 F.2d 639, 1968 U.S. App. LEXIS 6161 (C.A.D.C. 1968).

Once defense raises issue of whether evidence of defendant's prior convictions should be excluded from trial for purposes of impeaching defendant's credibility when he testifies, even though burden of persuasion remains on defendant, there is a duty on judge to make sufficient inquiry to inform himself on relevant considerations. D.C. Code § 14-305; D.C. Code 1967, § 22-2901. *Jones v. United States*, 402 F.2d 639, 1968 U.S. App. LEXIS 6161 (C.A.D.C. 1968).

In prosecution for robbery, defendant could be impeached with his prior conviction of unlawful entry; unlawful entry involved "dishonesty" akin to housebreaking. D.C. Code §§ 14-305(b)(1)(B), 22-2901, 22-3102. *Bates v. United States*, 403 A.2d 1159, 1979 D.C. App. LEXIS 419 (1979).

— Cross-examination, witnesses and examination of witnesses.

Police officer's report and broadcast transcript could properly be used to cross-examine taxi driver, in prosecution for robbery of the taxi driver, so as to lay foundation for his anticipated subsequent impeachment by the officer who made the records. D.C. Code §§ 22-2901, 22-3202. *United States v. Smith*, 521 F.2d 957, 1975 U.S. App. LEXIS 12262 (C.A.D.C. 1975).

Record of prosecution for robbery and other offenses wherein defendant, who was denied

bifurcated trial, claimed want of criminal responsibility and testified as to his state of mind did not show that court, in its rulings on particular questions asked on cross-examination of defendant, substantially departed from court's ruling that it would allow cross-examination as to defendant's state of mind but not as to possible participation in offense. D.C. Code § 22-2901. *United States v. Grimes*, 421 F.2d 1119, 1969 U.S. App. LEXIS 10770 (C.A.D.C. 1969), writ of certiorari denied by 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98, 1970 U.S. LEXIS 1795 (1970).

A defendant's right to pursue a particular line of cross-examination is circumscribed by general principles of relevance. *Bruce v. United States*, 820 A.2d 540, 2003 D.C. App. LEXIS 151 (2003).

Trial judge's limitation of cross-examination of witness for prosecution, who identified gun at trial as weapon he had sold to defendant, regarding witness' purported bias, which was alleged to have stemmed from defendant's employment discrimination complaint against witness' superior, was not error in robbery prosecution; proffer of bias was marginal, and thus, inadequate to require judge to permit proposed line of inquiry, and situation before trial judge was rife with potential for confusion of issue and for distraction of jury from question of whether defendant was innocent or guilty. *Coles v. United States*, 808 A.2d 485, 2002 D.C. App. LEXIS 556 (2002), writ of certiorari denied by 540 U.S. 931, 124 S. Ct. 346, 157 L. Ed. 2d 237, 2003 U.S. LEXIS 7207, 72 U.S.L.W. 3245 (2003).

Testimony about assault in which defendant pointed gun at Government witness and pulled trigger was admissible on redirect examination of witness, despite the risk of prejudice, where defendant attempted, on cross-examination of witness, to discredit witness's more limited testimony about having merely seen defendant with a gun prior to robbery and murder of victim. D.C. Code 1981, §§ 22-2401, 22-2901, 22-3202. *Busey v. United States*, 747 A.2d 1153, 2000 D.C. App. LEXIS 63 (2000).

— Harmless or reversible error, witnesses and examination of witnesses.

In view of overwhelming case made out by prosecution against defendants in robbery prosecution, trial court's error in allowing impeachment of one defendant by evidence of prior conviction for simple assault, such crime not being a felony and not involving dishonesty or false statement, was harmless. D.C. Code §§ 14-305, 22-2901. *United States v. Belt*, 514 F.2d 837, 1975 U.S. App. LEXIS 14203 (C.A.D.C. 1975).

Refusal, in prosecution for felony-murder, first-degree murder, armed robbery, robbery and second-degree burglary, to permit cross-

examination of accomplice, who testified for government and whose counsel had been informed that government would be willing, with regard to unrelated narcotics and robbery charges against accomplice, to accept plea of guilty to one misdemeanor, as to whether government had made any disposition of such unrelated charges was reversible error when considered in conjunction with other errors. D.C. Code §§ 22-1801(b), 22-2401, 22-2901, 22-3202. *United States v. Leonard*, 494 F.2d 955, 1974 U.S. App. LEXIS 10300 (C.A.D.C. 1974).

In prosecution for armed robbery and assault with a dangerous weapon, trial court committed prejudicial error in ruling that a prospective defense character witness whose testimony was to be limited to defendant's reputation for truth and veracity could be cross-examined about an alleged arrest of defendant for rape; in addition to introducing the reprobated "bad man—good man" dichotomy into the trial, the relationship between rape and veracity is tenuous at best, and any possible probative value of the evidence would have been far outweighed by its prejudicial effect. D.C. Code §§ 22-502, 22-2901, 22-3202. *United States v. Fox*, 473 F.2d 131, 1972 U.S. App. LEXIS 6730 (C.A.D.C. 1972).

Error, if any, in refusing to bar use of defendant's prior conviction for impeachment purposes in prosecution for robbery was harmless, given evidence against defendant. D.C. Code § 22-2901. *United States v. Horton*, 440 F.2d 253, 1971 U.S. App. LEXIS 11392 (C.A.D.C. 1971).

Denying impeachment of complaining witness in prosecution for robbery by reference to complaining witness' prior convictions for assault and rape was not abuse of discretion affecting substantial rights of defendants where impeachment of the witness with three convictions for crimes of auto theft, robbery, and burglary, each crime having element of dishonesty, was permitted. D.C. Code §§ 14-305, 22-2901. *Davis v. United States*, 409 F.2d 453, 1969 U.S. App. LEXIS 8887 (C.A.D.C. 1969).

In robbery prosecution, wherein after direct examination of witness called by the United States was concluded, defendant moved for production of witness' statement made to police, error in instructing counsel to ask policeman for statement when he "takes the stand" was harmless where when policeman took the stand entire police file was produced and made available to defense counsel, and after counsel read the file, the matter of the statement was not pursued. D.C. Code 1961, § 22-2901; 18 U.S.C. § 3500(b). *Leach v. United States*, 320 F.2d 670, 1963 U.S. App. LEXIS 5479 (C.A.D.C. 1963), affirmed by 353 F.2d 451, 122 U.S. App. D.C. 280, 1965 U.S. App. LEXIS 4082 (1965).

Cross-examination of defendant's wife, concerning her alleged statements to officers, although she had said nothing of these matters on direct examination and they did not directly challenge her direct testimony, was not proper on any ground and required reversal, despite sufficiency of other evidence and lack of objection, and was not cured by instruction that testimony could be considered only on question of wife's credibility. D.C. Code 1961, § 22-2901. *Dixon v. U.S.*, 303 F.2d 226, 1962 U.S. App. LEXIS 5015 (C.A.D.C. 1962).

Error was not harmless beyond a reasonable doubt, in prosecution for robbery, as to violation of defendant's right under Confrontation Clause to cross-examine witnesses regarding bias by failing to allow him to conduct any cross-examination of prosecution's key witness regarding criminal charge against witness which had been placed on "stet" docket in Maryland, which meant Maryland prosecutor had not elected to proceed on indictment but could later decide to proceed on it; jury's question to court during deliberations, regarding whether witness could be prosecuted in District of Columbia for participating in the robbery, illustrated jury's concern with witness' veracity and bias, jury acquitted defendant of greater offense of armed robbery, and witness was the only eyewitness to affirmatively identify defendant as the perpetrator. *Blunt v. United States*, 863 A.2d 828, 2004 D.C. App. LEXIS 683 (2004).

Prosecutor's question to detective as to date of photograph of defendant that detective had volunteered was a police identification photograph, to which detective responded that photograph was from a date prior to charged offenses, was not prosecutive error in murder and armed robbery prosecution; it was not apparent that prosecutor acted with intent to prejudice defendant by showing that police secured photograph before his arrest in present case, and question helped show that defendant's hairstyle near time of offenses matched witnesses' descriptions of one assailant. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Prosecutor's repeated use of leading questions did not require reversal of murder and armed robbery convictions, where almost all of defendant's objections to the leading nature of the questions were sustained. *Porter v. United States*, 826 A.2d 398, 2003 D.C. App. LEXIS 421 (2003).

Error, as result of prosecutor's open-ended question leading detective to violate court order not to mention photographic identification made by witnesses who had not given identification testimony, did not prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and

carrying pistol without license, where detective did not testify that witness had made identification, and defense did not rest on claim of misidentification. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's improper use of eight leading questions which were put to robbery victims who could not recall events, which asked whether property was taken from victims and whether victims remembered identifying defendant to police, which put before jury a fact not otherwise known, which was directly relevant to main issue in case, but which asked for cumulative evidence and were not answered, did not substantially prejudice defendant in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

In prosecution wherein defendants were convicted of armed kidnapping and armed robbery, where defense counsel was denied any opportunity to cross-examine as to possible liberty interest bias after making adequate proffer and where witness involved was key government witness and where chance of testimonial motivation of witness was not otherwise made known to jury, so that jury had no opportunity to assess potential bias of witness, error in refusing to allow cross-examination of prosecuting witness against whom an unrelated drug charge was pending could not be said to be harmless. D.C. Code 1973, §§ 22-2101, 22-2901, 22-3202; U.S. Const. Amend. 6. *Coligan v. United States*, 434 A.2d 483, 1981 D.C. App. LEXIS 351 (1981).

In prosecution for armed burglary, armed robbery and assault, error of a constitutional dimension occurred in restricting scope of defense cross-examination of detective and complainant concerning her possible role as an informant in other cases, which might have demonstrated her need to curry favor with authorities, presumably in exchange for their overlooking her own illegal conduct of bootlegging liquor and cigarettes, but such error was harmless, where complainant testified that she believed that police were aware of her illegal activities, complainant admitted status as lawbreaker, evidence showed that complainant was victim of violent assault and record reflected that restricted cross-examination was of relatively little importance in trial below. D.C. Code §§ 22-502, 22-1801, 22-2901, 22-3202, 25-102 et seq.; U.S. Const. Amend. 6. *Smith v. United States*, 389 A.2d 1364, 1978 D.C. App. LEXIS 543 (1978).

Improper prohibition on defendant from inquiring on cross-examination into federal narcotics charge pending against prosecution witness was harmless error where defendant was permitted to cross-examine witness extensively regarding his possession of narcotics paraphernalia and his possession and use of marijuana and cocaine on date of robbery, and where other evidence indicated defendant's guilt. D.C. Code §§ 22-1801(a), 22-2901. *Rhodes v. United States*, 354 A.2d 863, 1976 D.C. App. LEXIS 511 (1976).

— In general.

In prosecution for robbery, conspiracy to commit robbery, and for carrying a deadly weapon without a license, requiring counsel for one defendant to ask a more precise question than question counsel asked a witness for prosecution as to whether such witness was convicted several times of prostitution during specified years was within discretion of trial court. D.C. Code 1940, §§ 22-2901, 22-3204; 18 U.S.C. § 371. *Bundy v. U.S.*, 193 F.2d 694, 1951 U.S. App. LEXIS 2938 (C.A.D.C. 1951).

Prosecutor who asked detective open-ended question leading to testimony as to identification made by witness that had not testified about identification and whose open-ended question led to detective's testimony in violation of court order was not sufficiently cautious and injected error into trial for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

Prosecutor's eight leading questions which were put to victims despite victims' inability to recall events of robbery were improper in prosecution for armed robbery, assault with intent to commit robbery and to kill while armed, assault with dangerous weapon, and carrying pistol without license. D.C. Code 1981, §§ 22-501, 22-502, 22-2901, 22-3202, 22-3204. *Arnold v. United States*, 511 A.2d 399, 1986 D.C. App. LEXIS 357 (1986).

— Re-examination and rebuttal, witnesses and examination of witnesses.

In proceeding in which defendant was convicted of armed robbery and in which he testified that he did not frequent the area in question and could not possibly be the perpetrator of the offense, allowing three officers, who were assigned to prostitution enforcement branch, to testify, in rebuttal, that they had seen defendant in such area on at least 13 occasions was not abuse of discretion, particularly in light of strength of Government's case and the fact that testimony concerning prostitution had already been admitted at trial. D.C. Code §§ 22-2901,

22-3202. *Fitzhugh v. United States*, 415 A.2d 548, 1980 D.C. App. LEXIS 304 (1980).

— **Self-incrimination, witnesses and examination of witnesses.**

If testimony is incriminatory, tending to show that the witness has engaged in criminal activities, then the propriety of invoking the privilege against self-incrimination depends on whether the risk of prosecution is substantial and real and not merely fanciful. U.S.C. Const. Amends. 5, 6. *Jaggers v. United States*, 482 A.2d 786, 1984 D.C. App. LEXIS 499 (1984).

Witness has Fifth Amendment privilege to decline to answer incriminating questions, but witness does not have the broader Fifth Amendment right that an accused has to decline even to take the stand. U.S. Const. Amend. 5. *Vaughn v. United States*, 364 A.2d 1187, 1976 D.C. App. LEXIS 387 (1976).

— **Subpoena duces tecum, witnesses and examination of witnesses.**

In robbery prosecution wherein after direct

examination of witness called by the United States was concluded, defendant moved for production of witness' statement made to the police, and when prosecutor indicated he did not have the statement court told counsel to ask policeman for the statement when he "takes the stand," such action was error since the statute requires production of witness' statement for use in his cross-examination, and court by its action required defendant's counsel to proceed with cross-examination of witness without it. D.C. Code 1961, § 22-2901; 18 U.S.C. § 3500(b). *Leach v. United States*, 320 F.2d 670, 1963 U.S. App. LEXIS 5479 (C.A.D.C. 1963), affirmed by 353 F.2d 451, 122 U.S. App. D.C. 280, 1965 U.S. App. LEXIS 4082 (1965).

§ 22-2802. **Attempt to commit robbery.**

Whoever attempts to commit robbery, as defined in § 22-2801, by an overt act, shall be imprisoned for not more than 3 years or be fined not more than \$500, or both.

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 811.)

Cross references. — Armed offenses, additional penalty for committing crime when armed, see §§ 22-4501 and 22-4502.

Prior Codifications. — 1981 Ed., § 22-2902.

1973 Ed., § 22-2902.

CASE NOTES

ANALYSIS

Adequacy of representation.

Admissibility of evidence.

Arrest.

Defenses.

Indictment and information.

Instructions.

Joint or separate trial of charges.

Juvenile offenders.

Lesser included offenses.

Nature and elements of offense.

Sentence and punishment.

Verdict.

Weight and sufficiency of evidence.

Adequacy of representation.

Assistance of defense counsel was not inadequate because of refusal, on tactical and other grounds, to cross-examine the Government's principal witness who was 15 years old at time of offense and 16 at time of trial, where it was apparent that had such witness testified fur-

ther, there was a strong likelihood she would have testified to additional facts that would have supplied factual elements from which jury might have found both defendants guilty of first-degree felony murder or premeditated murder as well as armed robbery and robbery instead of only second-degree murder. D.C. Code §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Assistance of defense counsel in prosecution for first-degree murder and robbery was not inadequate for failure to cross-examine the Government's principal witness who was 15 years old at time of offense and 16 at time of trial which failure was attributable to a failure to interview the witness or do adequate research, where record disclosed that counsel had adequate knowledge of the facts, counsel were skilled and experienced, and their tactics were highly successful in that they secured acquit-

tals on two first-degree murder charges for each defendant and also acquittals on both robbery charges. D.C. Code §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *United States v. Clayborne*, 509 F.2d 473, 1974 U.S. App. LEXIS 5639 (C.A.D.C. 1974).

Admissibility of evidence.

In prosecution for second degree murder, attempted robbery, assault with intent to kill while armed, carrying of pistol without a license, assault with intent to kill while armed, and obstruction of justice, defendant was not denied a fair trial when court admitted evidence concerning threats he had uttered to witnesses but failed to instruct jurors that their consideration of such threats was to be limited only to its showing of defendant's consciousness of guilt. D.C. Code 1981, §§ 22-501, 22-703, 22-2902, 22-3202, 22-3204. *Smith v. United States*, 470 A.2d 315, 1983 D.C. App. LEXIS 550 (1983), writ of certiorari denied by 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344, 1985 U.S. LEXIS 988, 53 U.S.L.W. 3598 (1985).

Where complainant, at front door of his apartment building, was accosted by three men who demanded his money and wallet, where he ran across street to seek help, where the three men walked away down the street, where at that moment a police cruiser happened by and complainant reported the incident, where the officers took complainant in the cruiser and made a search of the area, where they decided to search a nearby apartment building but told complainant to remain in the cruiser, where the officers apprehended two men in the building, and where the complainant, because he was afraid to stay in the cruiser alone, came into the building and immediately identified the two men, the on-the-scene confrontation was not so unduly suggestive as to create a substantial likelihood of misidentification. D.C. Code §§ 22-2902, 22-3202. *Bowler v. United States*, 322 A.2d 281, 1974 D.C. App. LEXIS 241 (1974).

Arrest.

Police officer, who received report from man that defendant appeared to have robbed girl, who started to walk toward defendant, and who called scout car for assistance when defendant began running from officer, had probable cause for warrantless arrest of defendant. D.C. Code § 22-2902. *Clarke v. United States*, 256 A.2d 782, 1969 D.C. App. LEXIS 310 (App. 1969).

Defenses.

Defendant's testimony, in robbery prosecution, that he and codefendant never intended to rob victim, but that he assaulted victim and picked up his wallet only after it had fallen to the ground during their struggle, did not preclude defendant or codefendant from presenting a contradictory defense that they had in-

tended to rob victim, but their robbery attempt had been thwarted by victim and his neighbors before they were able to complete the robbery, as would support an instruction on lesser included offense of attempted robbery. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

Evidence that coperpetrator asked victim where coperpetrators' drugs were did not support claim of right defense to attempted robbery while armed; forcible self-help could not be used to retake illegal drugs. D.C. Code 1981, § 22-2902. *Townsend v. United States*, 549 A.2d 724, 1988 D.C. App. LEXIS 196 (1988), writ of certiorari denied by 490 U.S. 1102, 109 S. Ct. 2457, 104 L. Ed. 2d 1011, 1989 U.S. LEXIS 2732, 57 U.S.L.W. 3792 (1989).

Indictment and information.

Crimes of robbery and of attempted robbery are similar in nature and joinder in indictment is permissible. D.C. Code 1961, §§ 22-2901, 22-2902; Fed.Rules Crim.Proc. rule 8(a), 18 U.S.C. *Drew v. United States*, 331 F.2d 85, 1964 U.S. App. LEXIS 6404 (C.A.D.C. 1964).

Instructions.

Codefendants were not entitled to jury instruction on attempted robbery, as lesser-included offense of robbery, even if jury credited one codefendant's testimony that he merely picked up victim's wallet from the ground, where it was undisputed that codefendant took possession of victim's wallet, and jury would have to convict on the greater charge of robbery if it found the requisite intent to rob, otherwise it would have to acquit on either the greater or the lesser-included charge. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

In prosecution for second-degree murder, attempted robbery, assault with intent to kill while armed, carrying a pistol without a license, assault with intent to kill while armed, and obstruction of justice, court's refusal to give limiting instruction as to use jury might make of evidence of one crime in determination of the other crimes was not error given the fact that jury was instructed on need to keep overlapping evidence of each crime charged separate in its deliberations. D.C. Code 1981, §§ 22-501, 22-703, 22-2902, 22-3202, 22-3204. *Smith v. United States*, 470 A.2d 315, 1983 D.C. App. LEXIS 550 (1983), writ of certiorari denied by 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344, 1985 U.S. LEXIS 988, 53 U.S.L.W. 3598 (1985).

Trial court did not err when, in prosecution for attempted robbery, it refused to instruct jury that disorderly conduct was lesser included offense of crime charged. D.C. Code §§ 22-1121(4), 22-2901, 22-2902. *Hawkins v.*

United States, 399 A.2d 1306, 1979 D.C. App. LEXIS 326 (1979).

Joint or separate trial of charges.

There was prejudice in joinder of crimes of robbery and attempted robbery and separate trials should have been granted, where the similarities were not so close that proof of one crime would establish proof of the other if there were separate trials, and the jury was confused and was unable to treat the evidence relevant to each charge separately and distinctly. D.C. Code 1961, §§ 22-2901, 22-2902; Fed.Rules Crim.Proc. rules 8(a), 14, 18 U.S.C. *Drew v. United States*, 331 F.2d 85, 1964 U.S. App. LEXIS 6404 (C.A.D.C. 1964).

In prosecution for second-degree murder, attempted robbery, assault with intent to kill while armed, carrying a pistol without a license, assault with intent to kill while armed, and obstruction of justice, court's refusal to sever charges relating to death by strangling from shooting charges was not abuse of discretion since grant of severance during trial is left to court's discretion and under particular circumstances evidence of each crime was admissible in proof of others. D.C. Code 1981, §§ 22-501, 22-703, 22-2902, 22-3202, 22-3204. *Smith v. United States*, 470 A.2d 315, 1983 D.C. App. LEXIS 550 (1983), writ of certiorari denied by 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344, 1985 U.S. LEXIS 988, 53 U.S.L.W. 3598 (1985).

Juvenile offenders.

Since appellant, who had been found guilty of attempted robbery while armed after a delinquency petition was filed against him, had become 18 years of age, so that he was no longer subject to jurisdiction of family division, and more than four years had passed since holding of suppression hearing, case would be remanded to trial court for additional findings, without prejudice to dismissal of original delinquency petition. D.C. Code 1973, §§ 16-2301(3), 17-306, 22-2902 to 22-3202. *In re P*, 439 A.2d 460, 1981 D.C. App. LEXIS 404 (1981).

Lesser included offenses.

Second-degree murder while armed and attempted robbery while armed were lesser included offenses of felony-murder, requiring vacation of either the felony-murder conviction or the convictions for the lesser offenses. U.S. Const.Amend. 5; D.C. Code 1981, §§ 22-2401, 22-2403, 22-2902, 22-3202, 22-3204. *Price v. United States*, 531 A.2d 984, 1987 D.C. App. LEXIS 448 (1987).

Nature and elements of offense.

The elements of attempted robbery require that: (1) the defendant committed an act which was reasonably designed to commit the crime of

robbery; (2) at the time the act was committed, the defendant acted with the specific intent to commit the offense of robbery; and (3) the act went beyond mere preparation as the defendant came dangerously close to completing the crime of robbery. *Johnson v. United States*, 756 A.2d 458, 2000 D.C. App. LEXIS 177 (2000).

Sentence and punishment.

Remand was required for reconsideration of whether prior conviction for attempted robbery under District of Columbia law was properly classified as "crime of violence" for purposes of Sentencing Guidelines provision governing base offense levels for firearm offenses, given that defendant had pleaded guilty to attempted robbery as lesser included offense and statutory definition of attempted robbery included nonviolent conduct; district court erred in relying solely on indictment to determine conviction's classification. U.S.S.G. §§ 2K2.1, 4B1.2(1), 18 U.S.C.; D.C. Code 1981, §§ 22-2901, 22-2902. *United States v. Hill*, 131 F.3d 1056, 1997 U.S. App. LEXIS 35965 (C.A.D.C. 1997).

Where defendant, who had been sentenced on first indictment from two to six years, on each of four counts in second indictment from one to three years, with such sentences to take effect consecutively with one another and with sentence on first indictment, and on third indictment from one to three years concurrently with the other sentences, had actually pleaded guilty only to one count in each of the three indictments, Court of Appeals would set aside sentence on second indictment except as to one sentence from one to three years, and, as to first indictment, district court could resentence defendant in view of fact that existing sentence was a general one covering two counts. 18 U.S.C. § 2255; D.C. Code 1951, §§ 22-2901, 22-2902. *Campbell v. U.S.*, 258 F.2d 160, 1958 U.S. App. LEXIS 4604 (C.A.D.C. 1958).

Imposing consecutive sentences on defendant convicted of conspiracy to commit robbery and attempted robbery did not violate double jeopardy; each offense required proof of fact that the other did not. D.C. Code 1981, §§ 22-105a, 22-2901, 22-2902, 23-112; U.S.C. Const.Amend. 5. *Robinson v. United States*, 608 A.2d 115, 1992 D.C. App. LEXIS 122 (1992).

Verdict.

Under statute, attempted robbery or actual robbery is possible without assault, and acquittal of assault with intent to rob does not require acquittal of attempted robbery. D.C. Code 1940, §§ 22-2901, 22-2902. *Pope v. Huff*, 141 F.2d 727, 1944 U.S. App. LEXIS 3782 (1944).

Weight and sufficiency of evidence.

Evidence, including testimony of girl friend of one defendant as to incriminating statements which both defendants made to her, sustained convictions for felony murder and for

attempted robbery. D.C. Code §§ 22-2401, 22-2902. *Hawkins v. United States*, 399 A.2d 1306, 1979 D.C. App. LEXIS 326 (1979).

Evidence sustained conviction of attempt to commit robbery in violation of District of Columbia Code, notwithstanding fact that testimony of principal prosecution witness was uncorroborated and that intent to rob could only be inferred. D.C. Code 1951, § 22-2902. *Accardo v. U.S.*, 249 F.2d 519, 1957 U.S. App. LEXIS 4031 (C.A.D.C. 1957).

Evidence of defendant's intent to rob one victim provided sufficient evidence of his intent to rob second victim at another location moments later to support finding of attempted robbery as predicate for felony murder conviction, where incidents were close to each other in time and place, there was somewhat distinctive manner of carrying out robbery, clothing seen on assailant attempting to rob was similar to clothing seen on assailant at murder scene, and there was no other discernable reason for defendant to approach other victim. D.C. Code 1981, §§ 22-2401, 22-2902, 22-3202. *Long v. United States*, 687 A.2d 1331, 1996 D.C. App. LEXIS 234 (1996).

Although facts strongly suggested desire to complete illegal sale of drugs, there was insufficient evidence for jury to find specific intent to

rob, as required for convictions of felony-murder while armed, assault with intent to commit robbery while armed, and attempted robbery while armed. D.C. Code 1981, §§ 22-501, 22-2401, 22-2902, 22-3202. *Jones v. United States*, 516 A.2d 929, 1986 D.C. App. LEXIS 519 (1987), writ of certiorari denied by 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848, 1987 U.S. LEXIS 2179, 55 U.S.L.W. 3776 (1987).

In prosecution for assault with intent to commit robbery while armed, evidence that assailants got out of car defendant was driving and almost immediately thereafter assaulted victim, that victim ran after one assailant as he returned to car after committing assault and that defendant had opportunity to see victim and her continued pursuit of that assailant, and that assailants were in car defendant was driving when it was stopped by police short time later was sufficient to support conviction of defendant for aiding and abetting assailants. D.C. Code 1973, §§ 22-2902, 22-3202. *Downing v. United States*, 434 A.2d 409, 1981 D.C. App. LEXIS 350 (1981).

In prosecution, inter alia, for felony-murder and attempted robbery while armed, evidence was sufficient to support the convictions. D.C. Code §§ 22-2401, 22-2902. *Dobson v. United States*, 426 A.2d 361, 1981 D.C. App. LEXIS 219 (1981).

§ 22-2803. Carjacking.

(a)(1) A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle.

(2) A person convicted of carjacking shall be fined not more than \$5,000 and be imprisoned for a mandatory-minimum term of not less than 7 years and a maximum term of not more than 21 years, or both.

(b)(1) A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking.

(2) A person convicted of armed carjacking shall be fined not more than \$10,000 and be imprisoned for a mandatory-minimum term of not less than 15 years and a maximum term of not more than 40 years, or both. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), armed carjacking is a Class A felony.

(c) Notwithstanding any other provision of law, a person convicted of carjacking shall not be released from prison prior to the expiration of 7 years

from the date of the commencement of the sentence, and a person convicted of armed carjacking shall not be released from prison prior to the expiration of 15 years from the date of the commencement of the sentence.

(Mar. 3, 1901, ch. 854, § 811a, as added May 8, 1993, D.C. Law 9-270, § 2, 39 DCR 9223; Oct. 2, 1993, D.C. Law 10-26, § 2, 40 DCR 3416; June 8, 2001, D.C. Law 13-302, § 4(f), 47 DCR 7249; June 19, 2001, D.C. Law 13-313, § 21(a), 48 DCR 1873.)

Cross references. — Eligibility for geriatric or medical parole, persons convicted under this section, see § 24-467.

Good time credits, exceptions pertaining to persons convicted under this section, see § 24-221.06.

Prior Codifications. — 1981 Ed., § 22-2903.

Effect of amendments. — D.C. Law 13-302, in subsec. (b)(2), inserted the last two sentences.

D.C. Law 13-313, in subsec. (b)(2), substituted “40 years” for “45 years”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 4(f) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 4(f) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

For temporary (90-day) amendment of section, see § 4(f) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of section, see § 4(f) of the Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

Legislative history of Law 13-313. — Law 13-313, the “Technical Amendment Act of 2000”, was introduced in Council and assigned Bill No. 13-879, which was referred to the Committee on the Whole. The Bill was adopted on first and second readings on December 5, 2000, and December 19, 2000, respectively. Signed by the Mayor on January 19, 2001, it was assigned Act No. 13-574 and transmitted to both Houses of Congress for its review. D.C. Law 13-313 became effective on June 19, 2001.

Legislative history of Law 9-270. — Law 9-270, the “Carjacking Prevention Temporary Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-629. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-328 and transmitted to both Houses of Congress for its review. D.C. Law 9-270 became effective on May 8, 1993.

Legislative history of Law 10-26. — Law 10-26, the “Carjacking Prevention Amendment Act of 1993,” was introduced in Council and assigned Bill No. 10-16, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 7, 1993, and May 4, 1993, respectively. Signed by the Mayor on May 19, 1993, it was assigned Act No. 10-28 and transmitted to both Houses of Congress for its review. D.C. Law 10-26 became effective on October 2, 1993.

CASE NOTES

ANALYSIS

Evidence.

Instructions.

Merger of offenses.

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Robbery k 9.

Sentence and punishment.

Witnesses.

Evidence.

Evidence was sufficient to support finding on armed carjacking charge that victim was in immediate actual possession of his car at time of armed robbery during which defendant and

his cohorts obtained keys to car; although victim had left his parked car for an evening with friends and was roughly 45 to 50 feet away from it and intending to walk further when he was accosted, he remained close enough to the car to have prevented its taking but for the violence against him, which included a threat of death that remained pending until defendant’s cohort drove car away. *Sutton v. United States*, 988 A.2d 478, 2010 D.C. App. LEXIS 28 (2010).

Formulation by federal appellate courts in *United States v. Lake* and *United States v. Kimble* of the “taken from the presence of another” element under federal carjacking statute enhances the understanding of what “close

enough” should mean as used in local jury instruction on a District of Columbia carjacking charge, and of what distance of victim from vehicle is within the range to satisfy the “immediate actual possession” element of the District of Columbia statute. *Sutton v. United States*, 988 A.2d 478, 2010 D.C. App. LEXIS 28 (2010).

Defendant was not materially prejudiced in armed carjacking prosecution by difference between test for evidentiary sufficiency on “immediate actual possession” element, which required that car be in such range that victim could retain actual control over it if not deterred by violence or fear, and standard jury instruction given at trial, which left out the “violence or fear” language; under both the sufficiency test and the standard instruction, scope or range of property within one’s immediate actual possession was effectively the same, namely, an area delimited by how far away one can be from the property and yet reasonably be expected to exercise physical control over it. *Sutton v. United States*, 988 A.2d 478, 2010 D.C. App. LEXIS 28 (2010).

Even if showup identification procedure was unnecessarily suggestive, victim’s identifications of defendant and codefendant were sufficiently reliable to be admissible in joint trial for car jacking and related offenses; victim’s truck had been stopped soon after the car jacking and defendant and codefendant were apprehended, victim had a good opportunity, in a well-lit area to view defendant and codefendant at time of crimes and he provided a rather detailed physical description of them, and victim’s identification of defendant and codefendant was within one hour of the crimes. *Diggs v. United States*, 906 A.2d 290, 2006 D.C. App. LEXIS 500 (2006).

Evidence was sufficient to support jury’s finding that defendant aided and abetted the codefendant in committing murder, kidnapping, and carjacking, where defendant had the opportunity to disassociate himself from the codefendant at several points, but chose to stay when victim was kidnapped, stabbed, and shot, and defendant displayed his consciousness of guilt by fleeing from the police and attempting to conceal himself in some bushes. *Johnson v. United States*, 883 A.2d 135, 2005 D.C. App. LEXIS 488 (2005).

Evidence supported conclusion that victim of carjacking was in “immediate actual possession” of car, as required for convictions under statute criminalizing carjacking; victim left his car running only a few feet away when he stopped to make urgent telephone call, keeping an eye on car as he placed call, and thus it was reasonable to conclude that he intended to get back into car when he completed call, and would have done so had he not been assaulted

by defendants. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Sufficient evidence supported convictions for armed carjacking, armed robbery, aggravated assault while armed (AAWA), assault with a dangerous weapon (ADW), possession of a firearm while committing a crime of violence, and carrying a pistol without a license; victim was able to determine defendants’ relative heights and complexions, although they masked their faces, officer apprehended defendant after he fled from car bearing license number of car reported stolen only a few minutes earlier, and wearing very shoes identified as those stolen from victim’s feet, and defendant’s girlfriend testified that defendants brought into her apartment several person items belonging to victim. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Evidence supported conviction for carjacking; evidence showed that car was parked near apartment building in which defendant was staying, the car was found missing the following afternoon, and was then located on another street, with broken steering column and a screwdriver that could have been used to start the car. *Winstead v. United States*, 809 A.2d 607, 2002 D.C. App. LEXIS 601 (2002).

Instructions.

Requirement under jury instruction on “immediate actual possession” element of carjacking, that motor vehicle be close enough to victim that one could reasonably expect the victim to exercise physical control over it, means close enough to exercise control at the time of the alleged taking of the car, and therefore a victim’s physical control over the key does not in itself suggest that the victim was close enough to the car, wherever located, to trigger the carjacking statute. *Sutton v. United States*, 988 A.2d 478, 2010 D.C. App. LEXIS 28 (2010).

No plain error arose from omission from “immediate actual possession” instruction on District of Columbia carjacking charge of formulation by federal appellate courts in *United States v. Lake* and *United States v. Kimble* of the “presence” element under federal carjacking statute; a juror instructed in District of Columbia case that car must be located close enough that one could reasonably expect victim to exercise control over it was more likely than not to intuitively and logically conclude, as provided in the federal formulation, that victim must be close enough to stop the thief if not overcome by violence or prevented by fear. *Sutton v. United States*, 988 A.2d 478, 2010 D.C. App. LEXIS 28 (2010).

Merger of offenses.

Armed carjacking and armed robbery began at same time and were committed together by

means of same act of violence involving same weapon, and thus, separate convictions for possession of firearm during crime of violence for which carjacking and robbery served as predicates merged, even if asportation of victim's purse may not have been satisfied after carjacking was completed. *Matthews v. United States*, 892 A.2d 1100, 2006 D.C. App. LEXIS 10 (2006).

Multiple convictions for possession of firearm during crime of violence will merge, even if the predicate felony offenses do not merge, if they arise out of a defendant's uninterrupted possession of a single weapon during a single act of violence. *Matthews v. United States*, 892 A.2d 1100, 2006 D.C. App. LEXIS 10 (2006).

Under the fresh impulse or fork-in-the-road test for determining whether separate offenses merge, if at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment. *Matthews v. United States*, 892 A.2d 1100, 2006 D.C. App. LEXIS 10 (2006).

Each time the defendant commits an independent violent crime, a separate decision is made whether or not to possess the firearm during that crime, thereby exposing the defendant to a separate, additional conviction of possession of firearm during crime of violence. *Matthews v. United States*, 892 A.2d 1100, 2006 D.C. App. LEXIS 10 (2006).

Taking property without right (TPWR) was not lesser included offense of carjacking, where TPWR required proof of asportation while carjacking required only possession or control of vehicle. *Moorer v. United States*, 868 A.2d 137, 2005 D.C. App. LEXIS 31 (2005).

Each of defendant's and codefendant's convictions for destroying property, armed carjacking, and unauthorized use of a vehicle did not merge into one crime for double jeopardy purposes; despite fact that crime spree engaged in by defendant and codefendant extended over several hours, many of their crimes occurred after significant breaks in time, changes of location, and opportunities to reformulate criminal intent. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Carjacking and kidnapping are distinct offenses that do not merge; each includes an element that the other does not, and there is no clear indication of contrary legislative intent. *Malloy v. United States*, 797 A.2d 687, 2002 D.C. App. LEXIS 91 (2002).

Defendant's conviction for unauthorized use of motor vehicle (UUV) did not merge with his conviction for carjacking for sentencing purposes; carjacking could have been accomplished without implicating three of five statutory elements of UUV. D.C. Code 1981, §§ 22-2903,

22-3815. *Allen v. United States*, 697 A.2d 1, 1997 D.C. App. LEXIS 124 (1997).

Defendant's conviction for armed robbery did not merge with his conviction for armed carjacking; each of the two crimes required proof of factual element which the other did not. D.C. Code 1981, §§ 22-2901, 22-2903(a)(1). *Pixley v. United States*, 692 A.2d 438, 1997 D.C. App. LEXIS 71 (1997).

Presumptions and burden of proof.

To establish a violation of the carjacking statute, the prosecution must prove beyond a reasonable doubt that the defendant (1) knowingly or recklessly; (2) by force or violence; (3) took from another person; (4) immediate actual possession; (5) of a person's vehicle; or (6) attempted to do so. *Moorer v. United States*, 868 A.2d 137, 2005 D.C. App. LEXIS 31 (2005).

To establish violation of carjacking statute, prosecution must prove beyond reasonable doubt that defendant: knowingly or recklessly; by force or violence; took from another person; immediate actual possession; of person's vehicle; or attempted to do so. D.C. Code 1981, § 22-2903. *Allen v. United States*, 697 A.2d 1, 1997 D.C. App. LEXIS 124 (1997).

Robbery k 9.

Something within "immediate actual possession," as used in the carjacking statute, is within such range that one could, if not deterred by violence or fear, retain actual physical control. *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari denied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

"Immediate actual possession," as used in the carjacking statute, refers to the area within which the victim can reasonably be expected to exercise some physical control over the property. *Downing v. United States*, 929 A.2d 848, 2007 D.C. App. LEXIS 461 (2007), writ of certiorari denied by 555 U.S. 877, 129 S. Ct. 187, 172 L. Ed. 2d 133, 2008 U.S. LEXIS 6816, 77 U.S.L.W. 3202 (2008).

"Immediate actual possession," for purposes of determining whether defendant has committed carjacking by denying victim "immediate actual possession" of car, refers to the area within which the victim can reasonably be expected to exercise some physical control over the property; a thing is within one's "immediate actual possession" so long as it is within such range that he could, if not deterred by violence or fear, retain actual physical control over it. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

"Immediate actual possession," for purposes of determining whether defendant has committed carjacking by denying victim "immediate actual possession" of car is determined by

whether the victim remained in the vicinity of the car and evinced an intention to return to the car. *Beaver v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Defendant took car from victim's "immediate actual possession," as element of carjacking, although victim was in guard booth, not car, at the time defendant began assault; car was parked nearby, within a range in which victim could retain actual physical control over it, and defendant forced victim into car. *Winstead v. United States*, 809 A.2d 607, 2002 D.C. App. LEXIS 601 (2002).

Under the carjacking statute, "immediate actual possession" over a vehicle is retained if the car is within such range that the victim, if not deterred by violence or fear, could retain actual physical control over it. *Winstead v. United States*, 809 A.2d 607, 2002 D.C. App. LEXIS 601 (2002).

A carjacker may take immediate actual possession of a motor vehicle from another by force or violence at any point during a continuous course of assaultive conduct, not just at the starting point. *Winstead v. United States*, 809 A.2d 607, 2002 D.C. App. LEXIS 601 (2002).

Sentence and punishment.

Trial court was not authorized to downwardly depart from mandatory minimum seven-year sentence, as provided under carjacking statute, nor sentence defendant to lesser term under Youth Rehabilitation Act as alternative sentencing option; carjacking statute required mandatory minimum seven-year sentence notwithstanding existence of sentencing alternatives. *Peterson v. United States*, 997 A.2d 682, 2010 D.C. App. LEXIS 288 (2010).

Trial court lacked statutory discretion to grant probation for carjacking, under carjacking statute that defendant not be released from prison prior to expiration of mandatory minimum seven-year sentence. *Moorer v. United States*, 868 A.2d 137, 2005 D.C. App. LEXIS 31 (2005).

Witnesses.

Any error in trial court's restriction on defendants' questioning of complaining witness about witness' alleged prior conduct in loaning out his car and then falsely reporting it stolen was harmless, in prosecution for armed carjacking and weapons offenses, where complain-

ant's version of crime, his reputation for truthfulness, his past behavior with friends, and his history of criminal convictions were all ventilated for jury's consideration. D.C. Code 1981, §§ 6-2311(a), 6-2361(3), 22-2903(b), 22-3204(a, b). *Brown v. United States*, 726 A.2d 149, 1999 D.C. App. LEXIS 31 (1999), writ of certiorari denied by 528 U.S. 1130, 120 S. Ct. 967, 145 L. Ed. 2d 838, 2000 U.S. LEXIS 792, 68 U.S.L.W. 3460 (2000), writ of certiorari denied by 528 U.S. 1130, 120 S. Ct. 967, 145 L. Ed. 2d 838, 2000 U.S. LEXIS 793, 68 U.S.L.W. 3460 (2000).

Affidavit of complaining witness' girlfriend provided sufficient factual predicate for defendants to ask witness impeaching questions, in prosecution for armed carjacking and weapons offenses, about witness' alleged prior conduct in loaning out his car and then falsely reporting it stolen. D.C. Code 1981, §§ 6-2311(a), 6-2361(3), 22-2903(b), 22-3204(a, b). *Brown v. United States*, 726 A.2d 149, 1999 D.C. App. LEXIS 31 (1999), writ of certiorari denied by 528 U.S. 1130, 120 S. Ct. 967, 145 L. Ed. 2d 838, 2000 U.S. LEXIS 792, 68 U.S.L.W. 3460 (2000), writ of certiorari denied by 528 U.S. 1130, 120 S. Ct. 967, 145 L. Ed. 2d 838, 2000 U.S. LEXIS 793, 68 U.S.L.W. 3460 (2000).

Counsel rendered effective assistance of counsel with respect defendant's decision not to testify on his own behalf, in armed carjacking prosecution in which defendant would have testified that complainant loaned car to defendant in exchange for cocaine, where counsel advised defendant that defendant could be impeached with prior misdemeanor conviction, that defendant could also be impeached with pre-arrest statement given to police which failed to mention exchange of cocaine, and that defendant could risk exposure to prosecution for distributing drugs, and counsel succeeded in admitting other evidence that corroborated defendant's theory that incident was not a forcible carjacking. U.S. Const. Amend. 6; D.C. Code 1981, §§ 6-2311(a), 6-2361(3), 22-2903(b), 22-3204(a, b). *Brown v. United States*, 726 A.2d 149, 1999 D.C. App. LEXIS 31 (1999), writ of certiorari denied by 528 U.S. 1130, 120 S. Ct. 967, 145 L. Ed. 2d 838, 2000 U.S. LEXIS 792, 68 U.S.L.W. 3460 (2000), writ of certiorari denied by 528 U.S. 1130, 120 S. Ct. 967, 145 L. Ed. 2d 838, 2000 U.S. LEXIS 793, 68 U.S.L.W. 3460 (2000).

CHAPTER 29. SALE OF UNWHOLESOME FOOD.

Sec.

22-2901 to 22-2907. [Repealed].

§ 22-2901. Sale of unwholesome food — prohibited. [Repealed].

Repealed.

(Dec. 16, 1941, 55 Stat. 807, ch. 587, § 1; May 2, 2002, D.C. Law 14-116, § 8(f), 49 DCR 1945.)

Prior Codifications. — 1981 Ed., § 22-3416.

1973 Ed., § 22-3416.

Temporary Amendment of Section. — Section 8(f) of D.C. Law 14-55 repealed §§ 22-2901 to 22-2907.

Section 10(b) of D.C. Law 14-55 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Emergency Amendment Act of 2001 (D.C. Act 14-128, August 3, 2001, 48 DCR 7939).

For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Legislative Review Emergency Amendment Act of 2001 (D.C. Act 14-147, October 23, 2001, 48 DCR 10183).

Legislative history of Law 14-55. — Law 14-55, the “Food Regulation Temporary Amendment Act of 2001”, was introduced in Council

and assigned Bill No. 14-300, which was retained by Council. The Bill was adopted on first and second readings on July 10, 2001, and September 19, 2001, respectively. Signed by the Mayor on October 2, 2001, it was assigned Act No. 14-135 and transmitted to both Houses of Congress for its review. D.C. Law 14-55 became effective on December 6, 2001.

Legislative history of Law 14-116. — Law 14-116, the “Food Regulation Amendment Act of 2002”, was introduced in Council and assigned Bill No. 14-154, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on December 4, 2001, and February 5, 2002, respectively. Signed by the Mayor on February 25, 2002, it was assigned Act No. 14-268 and transmitted to both Houses of Congress for its review. D.C. Law 14-116 became effective on May 2, 2002.

§ 22-2902. Same — “Food” defined [Repealed].

Repealed.

(Dec. 16, 1941, 55 Stat. 807, ch. 587, § 2; May 2, 2002, D.C. Law 14-116, § 8(f), 49 DCR 1945.)

Prior Codifications. — 1981 Ed., § 22-3417.

1973 Ed., § 22-3417.

Temporary Amendment of Section. — Section 8(f) of D.C. Law 14-55 repealed §§ 22-2901 to 22-2907.

Section 10(b) of D.C. Law 14-55 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) repeal of section, see § 8(f) of Food

Regulation Emergency Amendment Act of 2001 (D.C. Act 14-128, August 3, 2001, 48 DCR 7939).

For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Legislative Review Emergency Amendment Act of 2001 (D.C. Act 14-147, October 23, 2001, 48 DCR 10183).

Legislative history of Law 14-55. — For Law 14-55, see note following § 22-2901.

Legislative history of Law 14-116. — For Law 14-116, see notes following § 22-2901.

§ 22-2903. Same — Inspection authorized. [Repealed].

Repealed.

(Dec. 16, 1941, 55 Stat. 807, ch. 587, § 3; Aug. 1, 1950, 64 Stat. 393, ch. 513,

§ 1; Oct. 18, 1981, D.C. Law 4-39, § 4, 28 DCR 3391; May 21, 1994, D.C. Law 10-119, § 17(a), 41 DCR 1639; May 2, 2002, D.C. Law 14-116, § 8(f), 49 DCR 1945.)

Prior Codifications. — 1981 Ed., § 22-3418.

1973 Ed., § 22-3418.

Temporary Amendment of Section. — Section 8(f) of D.C. Law 14-55 repealed §§ 22-2901 to 22-2907.

Section 10(b) of D.C. Law 14-55 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Emergency Amendment Act of 2001 (D.C. Act 14-128, August 3, 2001, 48 DCR 7939).

For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Legislative Review Emergency Amendment Act of 2001 (D.C. Act 14-147, October 23, 2001, 48 DCR 10183).

Legislative history of Law 4-39. — Law 4-39, the “Good Faith Donor and Donee Act of 1981,” was introduced in Council and assigned Bill No. 4-4, which was referred to the Commit-

tee on Human Services. The Bill was adopted on first and second readings on June 16, 1981, and June 30, 1981, respectively. Signed by the Mayor on July 20, 1981, it was assigned Act No. 4-66 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 14-55. — For Law 14-55, see notes following § 22-2901.

Legislative history of Law 14-116. — For Law 14-116, see notes following § 22-2901.

§ 22-2904. Same — Council to make rules and regulations [Repealed].

Repealed.

(Dec. 16, 1941, 55 Stat. 808, ch. 587, § 4; May 2, 2002, D.C. Law 14-116, § 8(f), 49 DCR 1945.)

Prior Codifications. — 1981 Ed., § 22-3419.

1973 Ed., § 22-3419.

Temporary Amendment of Section. — Section 8(f) of D.C. Law 14-55 repealed §§ 22-2901 to 22-2907.

Section 10(b) of D.C. Law 14-55 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Emergency Amendment Act of 2001 (D.C. Act 14-128, August 3, 2001, 48 DCR 7939).

For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Legislative Review Emergency Amendment Act of 2001 (D.C. Act 14-147, October 23, 2001, 48 DCR 10183).

Legislative history of Law 14-55. — For Law 14-55, see notes following § 22-2901.

Legislative history of Law 14-116. — For Law 14-116, see notes following § 22-2901.

Change in Government. — This section originated at a time when local government

powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(208) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 22-2905. Same — Prosecutions for violations. [Repealed].

Repealed.

(Dec. 16, 1941, 55 Stat. 808, ch. 587, § 5; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); May 21, 1994, D.C. Law 10-119, § 17(b), 41 DCR 1639; May 2, 2002, D.C. Law 14-116, § 8(f), 49 DCR 1945.)

Prior Codifications. — 1981 Ed., § 22-3420.

1973 Ed., § 22-3420.

Temporary Amendment of Section. — Section 8(f) of D.C. Law 14-55 repealed §§ 22-2901 to 22-2907.

Section 10(b) of D.C. Law 14-55 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Emergency Amendment Act of 2001 (D.C. Act 14-128, August 3, 2001, 48 DCR 7939).

For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Legislative Review Emergency Amendment Act of 2001 (D.C. Act 14-147, October 23, 2001, 48 DCR 10183).

Legislative history of Law 10-119. — For legislative history of D.C. Law 10-119, see Historical and Statutory Notes following § 22-2903.

Legislative history of Law 14-55. — For Law 14-55, see notes following § 22-2901.

Legislative history of Law 14-116. — For Law 14-116, see notes following § 22-2901.

§ 22-2906. Same — Penalty. [Repealed].

Repealed.

(Dec. 16, 1941, 55 Stat. 808, ch. 587, § 6; May 2, 2002, D.C. Law 14-116, § 8(f), 49 DCR 1945.)

Prior Codifications. — 1981 Ed., § 22-3421.

1973 Ed., § 22-3421.

Temporary Amendment of Section. — Section 8(f) of D.C. Law 14-55 repealed §§ 22-2901 to 22-2907.

Section 10(b) of D.C. Law 14-55 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) repeal of section, see § 8(f) of Food

Regulation Emergency Amendment Act of 2001 (D.C. Act 14-128, August 3, 2001, 48 DCR 7939).

For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Legislative Review Emergency Amendment Act of 2001 (D.C. Act 14-147, October 23, 2001, 48 DCR 10183).

Legislative history of Law 14-55. — For Law 14-55, see notes following § 22-2901.

Legislative history of Law 14-116. — For Law 14-116, see notes following § 22-2901.

§ 22-2907. Chapter supplemental to Federal Food, Drug, and Cosmetic Act. [Repealed].

Repealed.

(Dec. 16, 1941, 55 Stat. 808, ch. 587, § 7; May 2, 2002, D.C. Law 14-116, § 8(f), 49 DCR 1945.)

Cross references. — Sex offender registration, “Anti-Sexual Abuse Act” defined, see § 22-4101.

Prior Codifications. — 1981 Ed., § 22-3422.

1973 Ed., § 22-3422.

Temporary Amendment of Section. — Section 8(f) of D.C. Law 14-55 repealed §§ 22-2901 to 22-2907.

Section 10(b) of D.C. Law 14-55 provided that

the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) repeal of section, see § 8(f) of Food Regulation Emergency Amendment Act of 2001 (D.C. Act 14-128, August 3, 2001, 48 DCR 7939).

For temporary (90 day) repeal of section, see

§ 8(f) of Food Regulation Legislative Review Emergency Amendment Act of 2001 (D.C. Act 14-147, October 23, 2001, 48 DCR 10183).

Legislative history of Law 14-55. — For Law 14-55, see notes following § 22-2901.

Legislative history of Law 14-116. — For Law 14-116, see notes following § 22-2901.

CASE NOTES

In general.

The District of Columbia statute prohibiting the sale of unwholesome food in the District of Columbia does not, as does the Federal Food, Drug, and Cosmetic Act, cover manufacture as well as sale, and it does not, as does the federal act, cover food which is adulterated without

being unwholesome or unfit for use. D.C. Code 1940, §§ 22-3416 to 22-3422, 33-101, 33-103(b)(9); Federal Food, Drug, and Cosmetic Act §§ 201, 301(a, g), 302, 402(a)(3, 4), 21 U.S.C. §§ 321, 331(a, g), 332, 342(a)(3, 4). *Rubenstein v. U.S.*, 153 F.2d 127, 1946 U.S. App. LEXIS 1889 (1946).

CHAPTER 30. SEXUAL ABUSE.

Subchapter I. General Provisions

Sec.

22-3001. Definitions.

Subchapter II. Sex Offenses

- 22-3002. First degree sexual abuse.
- 22-3003. Second degree sexual abuse.
- 22-3004. Third degree sexual abuse.
- 22-3005. Fourth degree sexual abuse.
- 22-3006. Misdemeanor sexual abuse.
- 22-3007. Defense to sexual abuse.
- 22-3008. First degree child sexual abuse.
- 22-3009. Second degree child sexual abuse.
- 22-3009.01. First degree sexual abuse of a minor.
- 22-3009.02. Second degree sexual abuse of a minor.
- 22-3009.03. First degree sexual abuse of a secondary education student.
- 22-3009.04. Second degree sexual abuse of a secondary education student.
- 22-3010. Enticing a child or minor.
- 22-3010.01. Misdemeanor sexual abuse of a child or minor.
- 22-3010.02. Arranging for a sexual contact with a real or fictitious child.
- 22-3011. Defenses to child sexual abuse and sexual abuse of a minor.

Sec.

- 22-3012. State of mind proof requirement.
- 22-3013. First degree sexual abuse of a ward, patient, client, or prisoner.
- 22-3014. Second degree sexual abuse of a ward, patient, client, or prisoner.
- 22-3015. First degree sexual abuse of a patient or client.
- 22-3016. Second degree sexual abuse of a patient or client.
- 22-3017. Defenses to sexual abuse of a ward, patient, or client.
- 22-3018. Attempts to commit sexual offenses.
- 22-3019. No immunity from prosecution for spouses or domestic partners.
- 22-3020. Aggravating circumstances.

Subchapter III. Admission of Evidence in Sexual Abuse Offense Cases

- 22-3021. Reputation or opinion evidence of victim's past sexual behavior inadmissible.
- 22-3022. Admissibility of other evidence of victim's past sexual behavior.
- 22-3023. Prompt reporting.
- 22-3024. Privilege inapplicable for spouses or domestic partners.

Subchapter I. General Provisions.

§ 22-3001. Definitions.

For the purposes of this chapter:

(1) "Actor" means a person accused of any offense proscribed under this chapter.

(2) "Bodily injury" means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.

(3) "Child" means a person who has not yet attained the age of 16 years.

(4) "Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.

(4A) "Domestic partner" shall have the same meaning as provided in § 32-701(3).

(4B) "Domestic partnership" shall have the same meaning as provided in § 32-701(4).

(5) "Force" means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.

(5A) “Minor” means a person who has not yet attained the age of 18 years.

(6) “Official custody” means:

(A) Detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion;

(B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; or

(C) Probation or parole.

(7) “Serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(8) “Sexual act” means:

(A) The penetration, however slight, of the anus or vulva of another by a penis;

(B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.

(9) “Sexual contact” means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(10) “Significant relationship” includes:

(A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;

(B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim;

(C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and

(D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.

(11) “Victim” means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.

(May 23, 1995, D.C. Law 10-257, § 101, 42 DCR 53; Apr. 24, 2007, D.C. Law 16-306, § 216(a), 53 DCR 8610; Dec. 10, 2009, D.C. Law 18-88, § 404(a), 56 DCR 7413.)

Prior Codifications. — 1981 Ed., § 22-4101.

Effect of amendments. — D.C. Law 16-306 added par. (5A); in par. (10)(A), substituted “marriage, domestic partnership, or adoption” for “marriage, or adoption”; in par. (10)(C), substituted “spouse, domestic partner, or paramour” for “spouse or paramour”; and rewrote par. (10)(D), which had read as follows: “(D) A teacher, scout master, coach, recreation center leader, or others in similar positions.”

D.C. Law 18-88 added pars. (4A) and (4B).

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(a) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(a) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(a) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 216(a) of Omnibus Public Safety

Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 404(a) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 404(a) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 10-257. — Law 10-257, the “Anti-Sexual Abuse Act of 1994,” was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CASE NOTES

ANALYSIS

Child.
Common law.
Consent.
Construction and application.
Construction with other laws.
Different offenses in same transaction.
Elements.
Force.
Harmless error.
Instructions.
Lesser included offenses.
Merger of offenses.
Persons liable.
Separate acts.
Serious bodily injury.
Sexual act.
—In general.
—Penetration, sexual act.
—Touching, sexual act.
Weight and sufficiency of evidence.

Child.

Statute prohibiting sexual contact with child by person who is at least four years older than

child does not require proof of scienter to convict. D.C. Code 1981, §§ 22-4101(3, 9), 22-4109. In re E.F., 740 A.2d 547, 1999 D.C. App. LEXIS 256 (1999).

Statute prohibiting sexual contact with child by person who is at least four years older than child imposed a duty on juvenile, under pain of strict liability, to determine age of child before having sexual contact with her, and that being so, common sense dictated that by engaging in forbidden sexual contact with child, juvenile was presumptively in need of rehabilitation. D.C. Code 1981, §§ 16-2301(6), 16-2317(c)(2), 22-4101(3, 9), 22-4109. In re E.F., 740 A.2d 547, 1999 D.C. App. LEXIS 256 (1999).

Common law.

Prohibition against common-law rape is intended to protect females capable of giving consent from forcible sexual intercourse. D.C. Code § 22-2801. Ballard v. United States, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Consent.

Where offense involves a female child under 16 years of age, only remaining element of

corpus delicti is penetration, for when a child under the age of consent is involved the law conclusively presumes force and the question of consent is immaterial. D.C. Code § 22-2801. *United States v. Jones*, 477 F.2d 1213, 1973 U.S. App. LEXIS 11120 (C.A.D.C. 1973).

In rape prosecution, "consent" is not shown when the evidence discloses resistance is overcome by threats which put the woman in fear of death or grave bodily harm or by those combined with some degree of physical force. *Ewing v. U.S.*, 135 F.2d 633, 1942 U.S. App. LEXIS 2445 (1942).

In prosecution for murder and rape, evidence regarding whether defendant's oral admissions against interest and his written confession were voluntary was sufficient to justify the submission of the issue of voluntariness to the jury. D.C. Code 1940, § 22-2801. *Catoe v. U.S.*, 131 F.2d 16, 1942 U.S. App. LEXIS 2695 (1942).

In determining whether defendant has proved consent as affirmative defense to rape charge, voluntariness is not the standard; correct standard is whether reasonable person would think that complainant's "words or overt actions indicate[d] a freely given agreement to the sexual act or contact in question." D.C. Code 1981, § 22-4101(4). *Russell v. United States*, 698 A.2d 1007, 1997 D.C. App. LEXIS 178 (1997).

Jury could have found defendant not guilty of rape if it determined either that government did not prove that act was accomplished by force or that defendant proved, by preponderance of the evidence, that complainant consented to sexual act. D.C. Code 1981, § 22-4101(4). *Russell v. United States*, 698 A.2d 1007, 1997 D.C. App. LEXIS 178 (1997).

Construction and application.

Under the "report-of-rape rule," a witness may testify that the complainant stated that a sexual crime occurred and may relate the detail necessary to identify the crime. *Mattete v. United States*, 902 A.2d 113, 2006 D.C. App. LEXIS 359 (2006).

Construction with other laws.

Societal interests which Congress sought to protect by enactment of provisions penalizing felony-murder and rape are separate and distinct; rape statute is to protect women from sexual assault while felony-murder statute purports to protect human life by permitting jury to infer requisite intent from fact that felony was committed. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Sexual-abuse statute's definition of "bodily injury," which is an "injury involving loss or impairment of the function of a bodily member,

organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain," may be used to determine the evidence necessary to prove "injury" under the felony-assault statute's definition of "significant bodily injury," which is an "injury that requires hospitalization or immediate medical attention." In *Matter of R.P.*, 136 WLR 549 (Super. Ct. 2008).

Different offenses in same transaction.

Conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape so that consecutive punishments for killing in the course of rape and rape are not authorized under District of Columbia law. D.C. Code §§ 22-2401, 22-2404, 22-2801, 23-112. *Whalen v. U.S.*, 100 S.Ct. 1432, 1980 U.S. LEXIS 15 (U.S. Dist. Col. 1980).

Where complainant was initially accosted and robbed on well-lighted street in front of her home and she was taken over 200 yards to darkened secluded spot and spent approximately one hour with defendant, asportation was not integral part of rape, and defendant could be convicted both for kidnapping and for rape, as well as robbery. D.C. Code 1981, §§ 22-2101, 22-2801, 22-2901, 22-3202. *Boyd v. United States*, 473 A.2d 828, 1984 D.C. App. LEXIS 328 (1984).

In prosecution for first-degree murder, felony-murder and rape, separate convictions and sentences for first-degree premeditated murder and felony-murder were proper; however, remand for resentencing was necessary where concurrent prison term was imposed for rape conviction. D.C. Code 1973, §§ 22-2401, 22-2801. *Doepel v. United States*, 434 A.2d 449, 1981 D.C. App. LEXIS 345 (1981), writ of certiorari denied by 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483, 1981 U.S. LEXIS 4463, 50 U.S.L.W. 3376 (1981).

Elements.

For purposes of sexual-act element of offense of first-degree sexual abuse of a ward, an object comes into contact with the mouth if it enters cavity bounded externally by the lips or jaws and internally by the pharynx or gullet that encloses in the typical vertebrate the tongue, gums, and teeth, regardless of whether the object also touches the tongue or lips as it would during the act of "sucking." *R.W. v. United States*, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by 558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

Force.

In order to convict for rape, jury has to find that defendant had sexual intercourse with complaining witness, and act was committed forcibly and against her will. D.C. Code 1981,

§ 22-2801. *Greene v. United States*, 571 A.2d 218, 1990 D.C. App. LEXIS 52 (1990).

Elements necessary to establish offense of common-law rape are sexual intercourse with a female, committed forcibly and against her will. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Detention, coercion or confinement, which is an integral part of every rape, cannot support a separate conviction for kidnapping. D.C.C.E §§ 22-2101, 22-2801. *Smothers v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

Evidence in rape prosecution was sufficient to show that rape victims submitted only after they were threatened with death or serious bodily harm. D.C. Code § 22-2801. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

Harmless error.

Defendant was not prejudiced by trial court's erroneous attribution of testimony to him regarding why he invited victim to his house, during bench trial in prosecution for misdemeanor sexual abuse, as this finding was not the key factor in trial court's decision, but was one of numerous findings upon which trial court relied in making its final judgment, and trial court relied on demeanor and believability of victim, the unbelievability of defendant's testimony, and past encounters between defendant and victim. *Mattete v. United States*, 902 A.2d 113, 2006 D.C. App. LEXIS 359 (2006).

Even if trial court erred in allowing police detective to testify beyond scope of report-of-rape rule with respect to what happened before and after alleged incident, such error was harmless, in prosecution for misdemeanor sexual abuse, as victim's testimony was sufficient to convict defendant, and trial court credited and properly relied on victim's testimony. *Mattete v. United States*, 902 A.2d 113, 2006 D.C. App. LEXIS 359 (2006).

Instructions.

Error in trial court's omission of intent element when instructing jury on second-degree child sexual abuse did not affect defendant's substantial rights and, thus, was not plain error; overwhelming evidence supported a conclusion that defendant's actions with minor victims, who were his two daughters, were taken with intent to gratify himself sexually, in that each victim testified that defendant touched her thighs, buttocks, breasts, and vagina, that such touching made her feel uncomfortable, and that defendant disregarded her requests to stop, and one victim also testified that defendant directed her to pose for nude photographs "like the girls in porno maga-

zines." *Green v. United States*, 948 A.2d 554, 2008 D.C. App. LEXIS 244 (2008).

Lesser included offenses.

For purposes of imposing cumulative sentences under District of Columbia law, Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of a rape. D.C. Code §§ 22-2401, 22-2404, 22-2801, 23-112. *Whalen v. U.S.*, 100 S.Ct. 1432, 1980 U.S. LEXIS 15 (U.S. Dist. Col. 1980).

Non-violent sexual touching simple assault is lesser-included offense of misdemeanor sexual abuse (MSA); MSA includes all elements of non-violent sexual touching assault, plus at least one additional element of intent not found in latter, i.e., intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Rape is not a lesser included offense of felony-murder. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Merger of offenses.

Conviction for carnal knowledge of a minor merged into conviction for rape where the offenses arose from single sexual assault on a single minor victim. D.C. Code 1981, §§ 22-2801, 22-3202. *Davis v. United States*, 641 A.2d 484, 1994 D.C. App. LEXIS 67 (1994), writ of certiorari denied by 514 U.S. 1028, 115 S. Ct. 1384, 131 L. Ed. 2d 237, 1995 U.S. LEXIS 2189, 63 U.S.L.W. 3690 (1995).

Defendant's convictions for rape, carnal knowledge, and incest for same incidents did not merge. D.C. Code 1981, §§ 22-1901, 22-2801. *Pounds v. United States*, 529 A.2d 791, 1987 D.C. App. LEXIS 415 (1987).

Convictions of rape, robbery, and burglary, which underlay felony-murder convictions, merged into those felony-murder convictions and, accordingly, convictions of rape, robbery, and burglary would be vacated. D.C. Code 1981, §§ 22-1801, 22-2401, 22-2801, 22-2901, 22-3502. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

In view of different societal interests protected by the rape and felony-murder statutes and in absence of any indication that Congress intended rape to be nonprosecutable under the merger rule when a defendant is charged with felony-murder based on a rape, offense of rape did not merge into felony-murder based on the rape. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Persons liable.

Whether evidence of joint participation in

rape was sufficient and whether instruction on subject was deficient did not have to be determined where evidence indicated that certain defendants did commit rape and that the other defendant aided and abetted. D.C. Code 1961, § 22-2801; 18 U.S.C. § 2. *Franklin v. United States*, 330 F.2d 205, 1963 U.S. App. LEXIS 3460 (C.A.D.C. 1963).

Criminal liability for aiding and abetting carnal knowledge may not attach merely for accused's presence during commission of unlawful coitus. D.C. Code §§ 22-105, 22-2801. In *re J.W.Y.*, 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Separate acts.

Defendant's insertion of his finger into victim's vagina was a new criminal act, the product of a new impulse, punishable separately from earlier act of penetrating victim's vagina with his penis, such that two convictions for misdemeanor sexual abuse did not violate Double Jeopardy Clause. *Jenkins v. United States*, 980 A.2d 421, 2009 D.C. App. LEXIS 365 (2009).

Serious bodily injury.

In the offense of aggravated assault, the jury may infer from a description of the nature and extent of injuries that an individual has suffered serious bodily injury as defined by statute. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

Evidence was insufficient to show that complainant suffered "serious bodily injury," as required to support conviction for aggravated assault; although complainant suffered sprained wrist and bruises to body and to kidney, injuries were not life threatening or disabling. *Earl v. United States*, 932 A.2d 1122, 2007 D.C. App. LEXIS 844 (2007).

Evidence was sufficient to establish that the nature of victim's three gunshot wounds, one of which broke a vertebra and lodged inside his body, constituted serious bodily injury, as required to sustain conviction for aggravated assault while armed, even though victim was not in critical condition, was not paralyzed, and did not receive emergency surgery; victim nearly lost consciousness, indicated that he was in pain, and suffered from an impairment of the function of his right leg, victim was at risk of paralysis if his spine started to swell in the area where the bullet had lodged, and bullet was only an inch from victim's aorta. *Freeman v. United States*, 912 A.2d 1213, 2006 D.C. App. LEXIS 654 (2006).

Error in failing to instruct on definition of "serious bodily injury" element of aggravated assault while armed (AAWA) was not plain error requiring reversal of conviction; jury was instructed on each element of AAWA, there was

no reason to believe jury would have voted to acquit, given victim's testimony that he lost consciousness, and thus substantial rights were not affected. *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Sufficient evidence supported conclusion that victim suffered "serious bodily injury," as necessary to sustain conviction for aggravated assault while armed (AAWA); victim testified that he lost consciousness from multiple blows to his head, from which could be concluded that there was not merely substantial risk of unconsciousness, but actual loss of consciousness, thus placing his injuries squarely within statutory definition of "serious bodily injury." *Beaner v. United States*, 845 A.2d 525, 2004 D.C. App. LEXIS 75 (2004).

Sentence of life without parole for first-degree sexual abuse, imposed under statute allowing court to increase life sentence to life without parole for certain sex crimes if victim sustained serious bodily injury as result of offense, did not violate Apprendi, where jury also returned conviction for second-degree murder, finding as an essential element that victim suffered injuries from which she died, and thus necessarily made corollary finding that victim's injuries involved a substantial risk of death so as to satisfy definition of "serious injury." *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434 (2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Court of Appeals would consider defendant's argument that evidence was insufficient to sustain conviction for aggravated assault while armed, though issue was raised for the first time in an appellate reply brief; in case decided after the parties filed their briefs, Court adopted definition of "serious bodily injury," as set forth in the sexual abuse statute, for the purposes of the aggravated assault statute, and the government was not substantially prejudiced, in that it had the opportunity to argue the sufficiency of the evidence and to file a supplemental brief on the subject. D.C. Code 1981, §§ 22-504.1, 22-3202, 22-4101(7). *Gathy v. United States*, 754 A.2d 912, 2000 D.C. App. LEXIS 128 (2000).

Definition of "serious bodily injury" appearing in sexual abuse statute was consistent with that followed in majority of jurisdictions, and thus, Court of Appeals would adopt it for purpose of determining whether Government met its burden to prove "serious bodily injury" under aggravated assault statute, which did not define "serious bodily injury." D.C. Code 1981, §§ 22-504.1, 22-3202, 22-4101(7). *Nixon v. United States*, 730 A.2d 145, 1999 D.C. App. LEXIS 88 (1999), writ of certiorari denied by

528 U.S. 899, 120 S. Ct. 233, 145 L. Ed. 2d 196, 1999 U.S. LEXIS 6211, 68 U.S.L.W. 3230 (1999).

Sexual act.

— In general.

Evidence was sufficient to support second-degree child sexual abuse conviction; eleven-year-old victim testified that thirty-three-year-old defendant pushed “his private part” against her “bottom” and that he moved himself “from side to side, well, forward and backward” against her, and when asked repeatedly by the government what she felt rubbing against her buttocks, victim testified that it was defendant’s genitals and not the zipper on his pants. *Ortiz v. United States*, 942 A.2d 1127, 2008 D.C. App. LEXIS 83 (2008).

Sufficient evidence supported conviction for misdemeanor sexual abuse; victim testified that defendant touched her breasts with his hand and her genitalia with a vacuum cleaner hose, and defendant’s intent to derive gratification from his actions was inferable from his testimony, during which he characterized incidents as “good times.” *Olafisoye v. United States*, 857 A.2d 1078, 2004 D.C. App. LEXIS 446 (2004).

When prosecuting misdemeanor sexual abuse (MSA) based on alleged sexual contact or penetration of the anus or vulva, the government must prove an element of intent, i.e., the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Conviction for rape was amply supported by evidence that sperm was found in victim’s vagina and other circumstances showing that defendant was responsible. D.C. Code § 22-2801. *Smothers v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

— Penetration, sexual act.

Penetration is essential element of crime of carnal knowledge. D.C. Code 1981, § 22-2801 (repealed). *Graham v. United States*, 746 A.2d 289, 2000 D.C. App. LEXIS 30 (2000).

The slightest penetration is sufficient to sustain a conviction for carnal knowledge. D.C. Code 1981, § 22-2801 (repealed). *Graham v. United States*, 746 A.2d 289, 2000 D.C. App. LEXIS 30 (2000).

Two elements of offense of rape are sexual penetration of victim and that that penetration was against her will. D.C. Code § 22-2801. *Smothers v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

Absence of unequivocal medical corroboration of penetration does not preclude conviction of carnal knowledge. D.C. Code § 22-2801. In re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Slightest penetration is sufficient to sustain conviction of carnal knowledge and there is no requirement of penetration through vaginal canal beyond hymen. D.C. Code § 22-2801. In re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Direct medical evidence of penetration is not required for conviction of carnal knowledge; penetration of the female organs may be proved by circumstantial evidence. D.C. Code § 22-2801. *Williams v. United States*, 357 A.2d 865, 1976 D.C. App. LEXIS 287 (1976).

Although penetration of victim’s sexual organs is an essential element of the crime of carnal knowledge, Government need not prove full penetration since the offense is committed if the male organ enters only the labia of the female organs. D.C. Code § 22-2801. *Williams v. United States*, 357 A.2d 865, 1976 D.C. App. LEXIS 287 (1976).

— Touching, sexual act.

Victim’s testimony that defendant touched her thigh, continuously rubbed her legs, and attempted to undress her by grasping at clasp on side of her skirt, along with her demonstration as to how defendant touched her on the thigh, was sufficient to support conviction for misdemeanor sexual abuse for the touching of victim’s inner thigh. *Mattete v. United States*, 902 A.2d 113, 2006 D.C. App. LEXIS 359 (2006).

Weight and sufficiency of evidence.

Evidence was sufficient to support conviction for first-degree child sexual abuse; child victim stated that defendant called her into his bedroom, and she “[t]urned on the TV and turned on the—the cartoons. And then he come out of the closet [wearing a] white T-shirt and boxers and he put his private in [her] bottom again.” *Koonce v. United States*, 993 A.2d 544, 2010 D.C. App. LEXIS 200 (2010).

Evidence was sufficient in delinquency proceeding to support finding that juvenile committed attempted first-degree child sexual abuse; victim testified that juvenile forced her onto her back on the floor, “got on top of [her],” pulled off his shirt and shoes, and then “tried to unbutton [her] pants” and refused to stop when she said “no.” In re D.W., 989 A.2d 196, 2010 D.C. App. LEXIS 78 (2010).

Evidence was insufficient to support juvenile adjudication based on first-degree child sexual abuse; evidence established that juvenile was lying on his back naked, five-year-old victim was naked and was sitting on his groin area, that their groin areas were touching, and that juvenile held victim by her hips and was moving her up and down, child victim did not testify about what happened to her, witness who observed the events did not testify that he saw juvenile penetrate victim, and no forensic evi-

dence suggested penetration. In re L.L., 974 A.2d 859, 2009 D.C. App. LEXIS 243 (2009).

Evidence was insufficient to show that defendant penetrated victim's anus with defendant's penis on or about the date alleged, so as to preclude a finding that defendant committed first-degree child sexual abuse as charged, even though evidence presented at trial supported a finding that some type of sexual abuse occurred at some unspecified time; victim's mother testified that "nothing really happened" on the date alleged, and victim corroborated mother's testimony that there was no sexual act on that date. In re E.H., 967 A.2d 1270, 2009 D.C. App. LEXIS 54 (2009).

Sufficient evidence existed that sexual act occurred to support conviction for first-degree sexual abuse of a ward, although sperm fraction taken from victim's mouth matched victim's DNA and defendant was excluded as source of either sperm fraction or non-sperm fraction; evidence indicated that defendant, a corrections officer, stuck his penis in mouth of victim, who was an inmate, and ejaculated in victim's mouth. R.W. v. United States, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by 558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

Subchapter II. Sex Offenses.

§ 22-3002. First degree sexual abuse.

(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined in an amount not to exceed \$250,000, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

- (1) By using force against that other person;
- (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;
- (3) After rendering that other person unconscious; or
- (4) After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

(b) The court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.

(May 23, 1995, D.C. Law 10-257, § 201, 42 DCR 53; June 3, 1997, D.C. Law 11-275, § 13(a), 44 DCR 1408; June 8, 2001, D.C. Law 13-302, § 7(a), 47 DCR 7249.)

Cross references. — Sentencing, supervised release, and good time credit for felonies under this section committed on or after August 5, 2000, see § 24-403.01.

Sexually violent offense defined for purposes of sex offender registration, see § 22-4101.

Section references. — This section is referred to in §§ 22-3007 and 22-

Prior Codifications. — 1981 Ed., § 22-4102.

Effect of amendments. — D.C. Law 13-302 designated subsec. (a); and added subsec. (b).

Emergency legislation. — For temporary (90-day) amendment of section, see § 7(a) of the Sentencing Reform Emergency Amendment

Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of section, see § 7(a) of the Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 7(a) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 7(a) of Sentencing Reform Second Congressional Review Emergency Amendment

Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 11-275. — Law 11-275, the “Second Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-909, which

was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-520 and transmitted to both Houses of Congress for its review. D.C. Law 11-275 became effective on June 3, 1997.

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

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— Character and habits of victim, admissibility of evidence.

Proffered evidence of alleged rape victim's prior sexual behavior with defendant's acquaintance was not governed by rule relating to admissibility of evidence of victim's past sexual behavior where it was offered solely to show the defendant's state of mind. Fed.Rules Evid.Rule 412, 18 U.S.C. United States v. Saunders, 736 F. Supp. 698, 1990 U.S. Dist. LEXIS 5594 (1990).

Evidence that defendant knew of a friend's alleged recent consensual sex with alleged rape victim was not relevant to defendant's state of mind on the night of the alleged rape and thus was not admissible, especially in view of the danger of unfair prejudice. Fed.Rules Evid.Rule 412, 18 U.S.C. United States v. Saunders, 736 F. Supp. 698, 1990 U.S. Dist. LEXIS 5594 (1990).

Testimony from sexual assault victim's mother regarding the victim's reputation for untruthfulness was both speculative and cumulative, and thus, the testimony was not admissible, where defense counsel had not been able to speak with mother to ascertain any information she had that might have been relevant and

favorable to the defense, and the victim admitted during her testimony that she had been arrested several times and used various aliases. *Castellon v. United States*, 864 A.2d 141, 2004 D.C. App. LEXIS 681 (2004).

Evidence of prior sexual activity by the victim should not be admitted in prosecution of a sexual offense except in the most unusual cases where the probative value of the evidence is precisely demonstrated. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

With rare exceptions, evidence of prior sexual activity by the victim with persons other than the defendant is not admissible in a rape case, because it has no probative value on the issue of consent and no relevance to the victim's credibility. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

Offer of proof, through defendant's testimony or otherwise, that victim performed services as prostitute on charged occasion does not, without more, make evidence of victim's alleged prior sexual acts admissible in rape prosecution. *Hagins v. United States*, 639 A.2d 612, 1994 D.C. App. LEXIS 44 (1994).

Evidence of rape victim's alleged prior acts of prostitution with persons other than defendant and evidence of her alleged reputation in the community as a prostitute was inadmissible in rape prosecution to show that victim consented to have intercourse with defendant. D.C. Code 1981, § 22-2801. *Brewer v. United States*, 559 A.2d 317, 1989 D.C. App. LEXIS 106 (1989), writ of certiorari denied by 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066, 1990 U.S. LEXIS 764, 58 U.S.L.W. 3528 (1990).

In rape prosecution, testimony as to reputation of prosecutrix for unchastity should not be admitted except in most unusual cases where probative value is precisely demonstrated and outweighs the prejudicial effect of the testimony. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, prejudicial effect of proffered testimony of two defense witnesses pertaining to prosecutrix' reputation for unchastity clearly outweighed its probative value and was properly excluded. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, testimony that complaining witness had engaged in sexual relations with others on prior occasions was not admissible under any exceptions to general rule prohibiting admission of character evidence based upon proof of past acts. Federal Rules of Evidence, rule 404(a, b), 18 U.S.C.; D.C. Code §§ 14-305, 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, there can be unusual circumstances where defense may inquire into specific sexual acts by prosecutrix with others when probative value of evidence is clearly demonstrated and is shown to outweigh prejudicial effect. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, a woman's reputation for unchastity is of very slight probative value since it is neither relevant to her credibility as a witness nor material on the issue whether on occasion of alleged crime she consented or was forced to submit to an act of sexual intercourse. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

— Complaints and declarations of victim, admissibility of evidence.

In prosecution for rape and housebreaking, testimony of complainant's mother relating to telephone call made by complainant immediately after alleged attack was properly received in evidence. D.C. Code 1961, §§ 22-1801, 22-2801. *Smith v. U.S.*, 312 F.2d 867, 1962 U.S. App. LEXIS 3335 (C.A.D.C. 1962).

During trial, rape victim did not repudiate or disavow her earlier identification of defendant at "show-up" identification with police, where victim, in response to prosecutor's questions, merely stated that she did not point out defendant to the police when first identifying defendant as her assailant. *Redmond v. United States*, 829 A.2d 229, 2003 D.C. App. LEXIS 474 (2003), writ of certiorari denied by 543 U.S. 914, 125 S. Ct. 119, 160 L. Ed. 2d 196, 2004 U.S. LEXIS 6192, 73 U.S.L.W. 3214 (2004).

Testimony of sexual assault nurse examiner (SANE) as to what victim told her at hospital during her examination was admissible in trial for first degree sexual abuse under report-of-rape exception to hearsay rule, where defense emphasized that victim did not mention sexual assaults in her 911 call after she was forced out of van where sexual assaults allegedly occurred, victim recounted sexual assaults to first health professional that she encountered as soon as she completed her interview with police, and nurse related minimal facts about participants in sexual assaults and about force used and sexual abuse that occurred in van and earlier in apartment. *Dyson v. United States*, 848 A.2d 603, 2004 D.C. App. LEXIS 202 (2004), writ of certiorari denied by 545 U.S. 1141, 125 S. Ct. 2962, 162 L. Ed. 2d 892, 2005 U.S. LEXIS 5075 (2005).

The report-of-rape hearsay exception allows a witness to testify that the complainant stated that a sexual crime occurred and to relate the detail necessary to identify the crime. *Dyson v. United States*, 848 A.2d 603, 2004 D.C. App. LEXIS 202 (2004), writ of certiorari denied by

545 U.S. 1141, 125 S. Ct. 2962, 162 L. Ed. 2d 892, 2005 U.S. LEXIS 5075 (2005).

Under "report of rape" exception to hearsay rule, a witness may testify that the complainant stated that a sexual crime occurred and may relate the detail necessary to identify the crime. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Rationale for admitting evidence under "report of rape" exception to hearsay rule is: (1) to negate the assumption that if there is no such evidence, no complaint was made; (2) to show that the victim behaved as is expected traditionally, i.e., by making a prompt report; and (3) to rebut the claim of recent fabrication. *Velasquez v. United States*, 801 A.2d 72, 2002 D.C. App. LEXIS 314 (2002), US Supreme Court certiorari denied by 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319, 2002 U.S. LEXIS 7514, 71 U.S.L.W. 3265 (2002).

Under the report of rape rule, a witness may testify that the complainant stated that a sexual crime occurred and may relate the detail necessary to identify the crime. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

Report of rape rule under which hearsay testimony concerning sexual assault complaint by victim is admissible survives abolition of corroboration requirement in sex crime prosecutions, as other rationales for rule survive; evidence of complaint negates jurors' assumptions that if there is no evidence of complaint, no complaint was made; such evidence negates prejudices by showing that victim behaved as society traditionally has expected such victims to act, and it rebuts implied charge of recent fabrication. *Battle v. United States*, 630 A.2d 211, 1993 D.C. App. LEXIS 216 (1993).

In absence of actual impeachment of victim through testimony or documentary evidence, testimony about sexual assault victim's prior statements sought to be admitted under report of rape rule can properly include only enough details to show that victim reported sexual assault charge. *Battle v. United States*, 630 A.2d 211, 1993 D.C. App. LEXIS 216 (1993).

While hearsay testimony concerning victim's report of sexual assault can properly, under report of rape rule, provide information about victim's report sufficient to identify nature of offense, its time and place, and perpetrator of alleged assault, such testimony cannot go further in describing details of assault. *Battle v. United States*, 630 A.2d 211, 1993 D.C. App. LEXIS 216 (1993).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, in view of threat made against child so that she feared

reprisal, there was explanation for delay in her report of occurrence, and thus fact of complaint was admissible, but not details of occurrence, testimony being offered only to bolster credibility of complainant, and thus testimony should be limited to fact that complaint was made, without details, and jury was to be instructed that such evidence was to be considered solely for purpose of corroboration of testimony of complainant. D.C. Code 1973, §§ 22-501, 22-3501(a, b). *Fitzgerald v. United States*, 443 A.2d 1295, 1982 D.C. App. LEXIS 313 (1982).

In rape prosecution, fact of accusation by prosecutrix tends to corroborate truth of charge, and failure to make prompt complaint casts doubt upon truth of charge. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, in view of threat made against child so that she feared reprisal, there was explanation for delay in her report of occurrence, and thus fact of complaint was admissible, but not details of occurrence, testimony being offered only to bolster credibility of complainant, and thus testimony should be limited to fact that complaint was made, without details, and jury was to be instructed that such evidence was to be considered solely for purpose of corroboration of testimony of complainant. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

— Condition of female subsequent to offense, admissibility of evidence.

In rape prosecution, testimony of victim's relatives that victim's behavior changed in a number of ways following rape was relevant; evidence that victim was afraid to walk alone and afraid to wait at bus stop alone, that she was jumpy and fearful of men, and that she had not had boyfriend since incident reasonably supported conclusion that victim had not consented to intercourse with defendant. D.C. Code 1981, §§ 22-2801, 22-3202; Fed. Rules Evid. Rule 401, 18 U.S.C. *Street v. United States*, 602 A.2d 141, 1992 D.C. App. LEXIS 5 (1992).

Lay testimony of rape victim's relatives as to observable changes in victim's behavior was admissible; expert testimony concerning observable behavior was not required, since changes described by relatives would be readily comprehensible to jury. *Street v. United States*, 602 A.2d 141, 1992 D.C. App. LEXIS 5 (1992).

In rape prosecution, testimony of victim's relatives as to changes in victim's behavior which occurred after rape did not deprive defendant of his opportunity to cross-examine

victim concerning other possible causes of her behavior; defendant could have cross-examined relatives regarding alternative explanations for victim's conduct, defendant could have asked for permission to have victim recalled for further cross-examination, had he been able to develop new evidence on cross-examination of victim's relatives, or defendant could have called victim as witness. *Street v. United States*, 602 A.2d 141, 1992 D.C. App. LEXIS 5 (1992).

— **Confessions and admissions, admissibility of evidence.**

Where immediately after police entered defendant's apartment and informed him that female neighbor had charged him with rape, defendant volunteered that he had not been in victim's apartment but that he had been in tavern and no claim was made that defendant was subjected to any custodial interrogation, statement was admissible, notwithstanding that defendant had not been previously warned of right to counsel and right to remain silent. *Bosley v. United States*, 426 F.2d 1257, 1970 U.S. App. LEXIS 9888 (C.A.D.C. 1970).

In prosecution for rape, evidence was sufficient to support trial court's conclusion that defendant's confession related to charged offense, and confession was therefore admissible, despite defendant's contention that, because of discrepancies between circumstances of rape to which he confessed and known facts of instant rape, his confession had to be regarded as relating to a different or fictional rape, and was inadmissible as other crimes evidence. D.C. Code 1981, §§ 22-2801, 22-3202. *Staton v. United States*, 466 A.2d 1245, 1983 D.C. App. LEXIS 497 (1983).

— **Demonstrative evidence, admissibility of evidence.**

Any error in trial court's refusal to allow defendant, after the government played a portion of a recording of a telephone call made by defendant from jail, to play the entire recording or specific additional portions of it, which defendant argued violated the rule of completeness, was not plain error at a trial for kidnapping and sexual abuse; trial court instructed the jury that the recording was being admitted for the limited purpose of showing consciousness of guilt, the recording played for the jury was duplicative of unimpeached testimony of a government witness that defendant admitted his guilt, and the entire recording painted a picture of defendant as a violent individual. *Watts v. United States*, 971 A.2d 921, 2009 D.C. App. LEXIS 169 (2009).

Absence of testimony by alleged rape victim that knife admitted into evidence at trial was the knife used in rape went to the weight of the evidence rather than its admissibility. *Lee v.*

United States, 471 A.2d 683, 1984 D.C. App. LEXIS 301 (1984).

— **Documentary evidence, admissibility of evidence.**

Color photographs of rape victim's body were relevant and necessary to meet Government's burden of proving that defendant had forcibly raped victim. D.C. Code § 22-2801. *Wilkerson v. U.S.*, 427 A.2d 923, 1981 D.C. App. LEXIS 229 (1981).

Tests performed on victim of sexual assault and records of the results of those tests were not diagnostic opinions but rather were observations of factual data upon which competent physicians would not likely disagree so that the records, which showed presence of sperm in victim's vagina, were admissible in defendant's trial for carnal knowledge. D.C. Code § 22-2801; 18 U.S.C. § 1732. *Smith v. United States*, 337 A.2d 219, 1975 D.C. App. LEXIS 366 (1975).

— **Expert testimony, admissibility of evidence.**

Testimony of DNA expert in rape prosecution, to effect that standard methodologies used to test crime scene samples and blood samples had particular probabilities of coincidental match, but that in defendant's particular case he believed those numbers to be overly conservative due to defendant's unusual genetic profile, did not exceed scope of pre-trial order with respect to DNA evidence, which order had included specific figures cited by expert; order did not limit expert's testimony to fixed numbers, but rather required his testimony to be based on accepted methodologies, and expert offered no specific figures other than those included in pre-trial order. *Porter v. United States*, 769 A.2d 143, 2001 D.C. App. LEXIS 65 (2001).

Physician who examined victim properly was allowed to testify as expert medical witness in prosecution for burglary and rape, although he was not specialist in gynecology. *Grady v. United States*, 376 A.2d 437, 1977 D.C. App. LEXIS 356 (1977).

Testimony by hospital physician that tests performed on victim of sexual assault were part of the standard protocol at the hospital established that they were routinely used by the hospital so that records which demonstrated results of those tests were admissible in defendant's trial for carnal knowledge. 18 U.S.C. § 1732; D.C. Code § 22-2801. *Smith v. United States*, 337 A.2d 219, 1975 D.C. App. LEXIS 366 (1975).

— **In general.**

Statements from rape victim's granddaughter and from police officer regarding victim's out of court identification of defendant at "show-up" identification were not hearsay, where granddaughter and officer testified at

trial, they were subject to cross-examination concerning the statements, and the statements were in regards to an identification of a person made after perceiving the person. *Redmond v. United States*, 829 A.2d 229, 2003 D.C. App. LEXIS 474 (2003), writ of certiorari denied by 543 U.S. 914, 125 S. Ct. 119, 160 L. Ed. 2d 196, 2004 U.S. LEXIS 6192, 73 U.S.L.W. 3214 (2004).

In rape cases and other cases of the nature of a sexual assault, delay in making complaint is a subject for consideration of jury and may seriously affect credibility of complaining witness. *Stitely v. U.S.*, 61 A.2d 491, 1948 D.C. App. LEXIS 189 (Cr.App. 1948).

— In-court identification, admissibility of evidence.

Government established, in prosecution for rape while armed and armed robbery, by clear and convincing evidence that the in-court identifications of defendant by the victims were based on observation of suspect rather than on drawing of man submitted to victims for identification, and identification procedure was not improper. *United States v. Adams*, 481 F.2d 1099, 1973 U.S. App. LEXIS 9189 (C.A.D.C. 1973).

Rape victim's in-court identification of defendant was admissible, even though it took several attempts before victim identified defendant as her assailant, where victim had previously identified defendant to her granddaughter, victim identified defendant to the police at a "show-up" identification, victim identified defendant to doctor who examined her at hospital, victim had known defendant for almost 30 years, and defendant's appearance at trial was different in that he was wearing a suit and had shaved his facial hair. *Redmond v. United States*, 829 A.2d 229, 2003 D.C. App. LEXIS 474 (2003), writ of certiorari denied by 543 U.S. 914, 125 S. Ct. 119, 160 L. Ed. 2d 196, 2004 U.S. LEXIS 6192, 73 U.S.L.W. 3214 (2004).

Rape victim's in-court identification of defendant was not conducive to irreparable misidentification, even if it was allegedly accompanied by suggestivity, where victim had previously unequivocally identified defendant outside of court at "show-up" identification, and victim's in-court identification contained strong elements of reliability, involving a long-time acquaintance. *Redmond v. United States*, 829 A.2d 229, 2003 D.C. App. LEXIS 474 (2003), writ of certiorari denied by 543 U.S. 914, 125 S. Ct. 119, 160 L. Ed. 2d 196, 2004 U.S. LEXIS 6192, 73 U.S.L.W. 3214 (2004).

— Other offenses, admissibility of evidence.

Evidence of uncharged acts of sexual abuse and vaginal intercourse against child complain-

ant were admissible on theory of predisposition to gratify special desires with that particular victim, in prosecution for various sex offenses, including rape and sexual abuse. D.C. Code 1981, §§ 22-4102, 22-4108; §§ 22-2801, 22-3501 (repealed). *Graham v. United States*, 746 A.2d 289, 2000 D.C. App. LEXIS 30 (2000).

In prosecutions for sexual offenses, evidence of history of sexual abuse of complainant by defendant may be admissible on theory of predisposition to gratify special desires with particular victim. *Pounds v. United States*, 529 A.2d 791, 1987 D.C. App. LEXIS 415 (1987).

In prosecution on multiple counts involving sexual assault, evidence that, over three-month period in victimized neighborhood, defendant rang doorbells, peered into windows, wandered between houses and bushes, posed as salesman and workman, followed one woman, and gave alias to inquisitive police officer, was admissible as circumstantially relevant to show defendant's identity, as its probative value on that issue outweighed any prejudice to defendant, in light of substantial and probative direct evidence linking defendant with charged offenses. *Wheeler v. United States*, 470 A.2d 761, 1983 D.C. App. LEXIS 547 (1983).

— Relevancy, admissibility of evidence.

That there may be evidence contradicting prosecutrix' story is relevant to issue of credibility but not to matter of corroboration of her accusations of sexual misconduct. *United States v. Green*, 429 F.2d 754, 1970 U.S. App. LEXIS 8665 (C.A.D.C. 1970).

In rape prosecution, evidence that victim's behavior had changed in a number of ways following rape was not more prejudicial than probative; testimony of victim's relatives that victim was afraid to walk on street or wait for bus alone, that she was jumpy and fearful of men, that she had not had boyfriend since incident, and that she appeared solemn when topic of sexual assault was discussed was not inflammatory and not likely to sway jury's deliberations improperly. D.C. Code 1981, §§ 22-2801, 22-3202. *Street v. United States*, 602 A.2d 141, 1992 D.C. App. LEXIS 5 (1992).

— Res gestae, admissibility of evidence.

Declaration of complaint by sex crime victim, made shortly after commission of crime, is generally admissible either as spontaneous utterance or as complaint of rape, but declaration even if admitted remains hearsay, and if it does not meet requirements of the spontaneous utterance only bare facts of complaint can be introduced, and only for purposes of corroboration, i.e., that report was made, and not for truth of the matter asserted therein. *Fitzgerald v. United States*, 443 A.2d 1295, 1982 D.C. App. LEXIS 313 (1982).

Declaration of complaint by sex crime victim, made shortly after commission of crime, is generally admissible either as spontaneous utterance or as complaint of rape, but declaration even if admitted remains hearsay and thus only bare fact of complaint can be introduced, and only for purposes of corroboration, i.e., after report was made, and not for truth of matter asserted therein. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Alleged victim's statements to detective that she had been kidnapped and raped by defendant and codefendant was admissible under the excited utterance exception to hearsay rule prosecution for first-degree sexual abuse and kidnapping; alleged victim made statements after she was placed in an ambulance following six hour kidnapping that involved repeated rapes that ended in police shootout, alleged victim's statements were corroborated by other evidence admitted at trial, and alleged victim was available for cross-examination of her statement. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Alleged victim's statement to police officer and detective that she had been kidnapped and raped by defendant and codefendant was admissible under excited utterance exception to hearsay rule in prosecution for first-degree sexual abuse and kidnapping; alleged victim made the statements in the moments immediately following a six-hour kidnapping that involved repeated rapes and ended in a dramatic police shootout, alleged victim made her comments as soon as she saw officer, and when officer saw alleged victim in the back of the van, she was crying, shaking, and very distraught. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

— Warrantless seizure, admissibility of evidence.

Exigent circumstances justified seizing penile swab samples from defendants in first-degree sexual abuse prosecution without a warrant or court order; because of its delicate nature and the area in which it was located, the DNA evidence contained on swabs could easily have disappeared if police officer who collected samples had first sought a court order or had transported defendants to a hospital where samples could have been taken. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Arrest.

Where after arresting officers knocked on partially opened door to defendant's apartment and received no response they knocked again and on noting defendant asleep on couch officers entered apartment and awakened defen-

dant and announced their purpose, by informing him that female neighbor had accused him of rape, statute providing for forcible entry to effectuate arrest on notice of officer's authority and purpose was complied with and evidence taken from defendant at police station was properly admitted, since to have informed defendant of authority and purpose prior to entry would have been useless gesture. 18 U.S.C. § 3109. *Bosley v. United States*, 426 F.2d 1257, 1970 U.S. App. LEXIS 9888 (C.A.D.C. 1970).

Defenses.

Trial court had territorial jurisdiction in first-degree sexual abuse case, even though defendant argued that sexual activity did not occur until he and victim were outside District of Columbia; use-of-force element of offense occurred in District when victim was ordered to get into prone position in van upon exiting apartment where other sexual activity had taken place and where she learned that defendant's companion in crime had gun. *Dyson v. United States*, 848 A.2d 603, 2004 D.C. App. LEXIS 202 (2004), writ of certiorari denied by 545 U.S. 1141, 125 S. Ct. 2962, 162 L. Ed. 2d 892, 2005 U.S. LEXIS 5075 (2005).

Voluntary intoxication is not a defense to a general intent crime such as first-degree sexual abuse. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Discovery.

No foundation was laid for a Jencks Act hearing in rape prosecution where officer on cross-examination stated that, after being informed of rape, he took complainant's name and date of birth and then transported her to office of the sex squad, and where it did not appear from the record that defense counsel ever established that officer recorded a statement. D.C. Code § 22-2801; 18 U.S.C. § 3500. *Wilburn v. United States*, 340 A.2d 810, 1975 D.C. App. LEXIS 415 (1975).

Expert fees.

Any error in trial court's denial of rape defendant's request for funds to consult with expert witness was harmless, where court's concern that particular expert with whom defendant sought to consult was not qualified to testify would have led it to reserve right to disallow expert's testimony at trial, and where other evidence against defendant was overwhelming. *Porter v. United States*, 769 A.2d 143, 2001 D.C. App. LEXIS 65 (2001).

Harmless and prejudicial error.

Instruction in prosecution for rape and assault with intent to commit rape that evidence, which was introduced by defendant, as to prior

rape of complainant by defendant was to be used, if it at all "solely for your consideration whether it tends to show a predisposition on the part of the defendant to gratify his sexual desires with the complainant," was not plain error, notwithstanding contention that such evidence, which was introduced solely to impeach complainant for hostility to defendant, was not admissible because of its tendency to show criminal propensity. D.C. Code § 22-2801. *United States v. Huff*, 442 F.2d 885, 1971 U.S. App. LEXIS 11498 (C.A.D.C. 1971).

Where concurrent sentences were imposed on defendant for crimes of carnal knowledge and housebreaking, error, if any, in failure to make out prima facie case of housebreaking did not result in prejudice to defendant. D.C. Code §§ 22-1801, 22-2801. *Duckett v. United States*, 410 F.2d 1004, 1969 U.S. App. LEXIS 13297 (C.A.D.C. 1969).

Where counsel for defendant in prosecution for rape of nine year old girl stated in closing argument to jury that a verdict of guilty was proper, reference by trial court in charge to the concession of guilt, and failure to caution jury that notwithstanding such concession, defendant was entitled to have the jury alone determine his guilt or innocence, constituted a defect affecting "substantial rights" within meaning of rule that plain errors or defects affecting "substantial rights" may be noticed on appeal though they were not brought to attention of the trial court. D.C. Code 1940, § 22-2801; Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C. *Tatum v. U.S.*, 190 F.2d 612, 1951 U.S. App. LEXIS 2469 (C.A.D.C. 1951).

Any error in the trial court's refusal to admit testimony from sexual assault victim's mother regarding victim's reputation for untruthfulness was harmless, where such testimony was not only cumulative, but less damaging than victim's actual testimony concerning her arrests and aliases. *Castellon v. United States*, 864 A.2d 141, 2004 D.C. App. LEXIS 681 (2004).

Any error in trial court's denial of rape defendant's request for funds to consult with expert witness was harmless, where court's concern that particular expert with whom defendant sought to consult was not qualified to testify would have led it to reserve right to disallow expert's testimony at trial, and where other evidence against defendant was overwhelming. *Porter v. United States*, 769 A.2d 143, 2001 D.C. App. LEXIS 65 (2001).

Any error in admission, in rape prosecution, of testimony of DNA expert to effect that standard methodologies used to test crime scene samples and blood samples had particular probabilities of coincidental match, but that in defendant's particular case he believed those numbers to be overly conservative due to defendant's unusual genetic profile, did not amount

to miscarriage of justice and did not warrant mistrial, where state's other evidence was overwhelming. *Porter v. United States*, 769 A.2d 143, 2001 D.C. App. LEXIS 65 (2001).

Defendant was not prejudiced by the denial of a continuance of prosecution for first-degree sexual abuse and kidnapping, allegedly required to permit defense counsel to prepare adequately for trial and to allow defendant to consider a "combination" plea offer made by the government, where defendant obtained a de facto continuance of three months. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Error, if any, was harmless in prosecutor's reference, during closing argument in rape case, to another highly publicized rape case. *Cain v. United States*, 532 A.2d 1001, 1987 D.C. App. LEXIS 471 (1987).

Prosecutor's argument that focused on credibility of rape victim and referred to her demeanor on witness stand and possible motivations for her testimony was not such an improper appeal to jury's sympathy and did not refer so extensively to matters outside the record as to constitute plain error, in light of fact that trial court carefully instructed jury that counsel's remarks were not arguments and that jurors' determination of facts must govern verdict. *Lee v. United States*, 471 A.2d 683, 1984 D.C. App. LEXIS 301 (1984).

Even assuming arguendo that timing of defense discovery of FBI report indicating that none of defendant's pubic hair was found after combing had been taken from alleged rape victim and after examination of her bedding for hair had been made, which report was withheld until pretrial motion hearing held on first day of trial, was within scope of Brady rule and that disclosure delay amounted to exclusion of report from trial, defendant was not denied fair trial in said prosecution wherein it was clear from entire record, including report, that guilt beyond reasonable doubt was reasonable conclusion. D.C. Code § 22-2801. *Smith v. United States*, 363 A.2d 667, 1976 D.C. App. LEXIS 378 (1976).

Action of trial court in rape prosecution in refusing to give instruction on corroboration mandated by applicable case law in jurisdiction, although error, was not error of constitutional proportions in view of facts that defendant had fair and impartial trial during which corroborating evidence actually was introduced (Per Pair, Associate J., with three Judges concurring, one Judge concurring in result and one Judge concurring in part and dissenting in part.) D.C. Code §§ 11-721(e), 22-2801. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

Indictment or information.

Counts of indictment charging defendant

with assaulting female persons with intent to carnally know and abuse such persons did not charge offenses under District of Columbia law where victims were females over 16 years of age. D.C. Code §§ 22-501, 22-2801. *United States v. Hutchinson*, 478 F.2d 997, 1973 U.S. App. LEXIS 9991 (C.A.D.C. 1973).

That indictment charging rape contained four counts relating to two acts of intercourse did not prejudice defendant, where defendant made no election, stated that he was ready to go to jury on all four counts, and in no way questioned charge allowing case to go to jury only on two counts charging carnal knowledge of a girl under age of consent because testimony was that complaining witness was under 16. D.C. Code 1940, § 22-2801. *Robinson v. U.S.*, 128 F.2d 322, 1942 U.S. App. LEXIS 3571 (1942).

Defendant was not prejudiced by variance in proof and bill of particulars, as was required to obtain reversal of rape conviction; indictment and trial transcript would adequately protect defendant against subsequent jeopardy for any act of sodomy, carnal knowledge or rape against complainant during the entire period alleged in indictment, and defendant made no claim of surprise. D.C. Code 1981, § 22-2801 (repealed). *Roberts v. United States*, 743 A.2d 212, 1999 D.C. App. LEXIS 301 (1999).

Allegation contained in sodomy count of indictment, that defendant committed "a certain and unnatural and perverted sexual practice," articulated central elements of sodomy, and thus defendant was not deprived of his Fifth Amendment right to be tried only on offense for which grand jury returned indictment when prosecutor was allowed to explicate text of indictment by indicating that count was distinguishable from a facially identical count in that it referred to aiding and abetting oral and anal sodomy by another, notwithstanding defendant's claim that language used did not capture essential element of crime of sodomy because it did not specify whether charge was oral or anal sodomy. D.C. Code 1981, § 22-3502; U.S. Const. Amend. 5. *Cain v. United States*, 532 A.2d 1001, 1987 D.C. App. LEXIS 471 (1987).

Indictment charging that sexual offenses occurred between October 1 and October 31, 1983, was sufficiently precise to give defendant notice of charges against him. *Pounds v. United States*, 529 A.2d 791, 1987 D.C. App. LEXIS 415 (1987).

Although trial court erred in allowing government to go forward on both rape and carnal knowledge charges without formally amending its petition, trial court cured whatever ambiguity existed in petition when defendant was put on notice of charges against him and it was made clear to defendant that he could be convicted either of rape or of carnal knowledge, rendering error harmless, and, therefore, de-

fendant could be convicted of taking indecent liberties with a child as lesser included offense of carnal knowledge. D.C. Code 1973, §§ 22-2801, 22-3501(a). In re C.D., 437 A.2d 171, 1981 D.C. App. LEXIS 382 (1981).

Where rape and robbery victims were prostitutes who were abducted or induced into getting into defendant's car in very early hours of morning, and each victim described the car, in varying degrees of particularity consistent with defendant's as a dark blue 1970 Thunderbird, and where circumstances of crime were similar but each crime was separate and distinct, joinder of counts against defendant did not work any prejudice. D.C. Code §§ 22-501, 22-2401, 22-2801, 22-2901, 22-3202, 22-3502. *Bowyer v. United States*, 422 A.2d 973, 1980 D.C. App. LEXIS 385 (1980).

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Ineffective assistance of counsel.

Defense counsel's failure to present medical expert to serve as rebuttal evidence against government's witnesses, and their ability to recall due to their state of mind as alleged crack cocaine users, did not prejudice defendant, and thus could not amount to ineffective assistance in prosecution for sexual abuse; defendant admitted to having sexual encounters with both women and his DNA was matched to semen found on each one, evidence presented at trial included testimony and medical reports that both victim had fresh injuries after their sexual encounters with defendant, and jury was aware of victims' long history of drug use. *Thomas v. U.S.*, 2012 WL 1207422 (2012).

Instructions.

— In general.

Evidence in prosecution for rape and assault with intent to commit rape required instruction, which was requested but not given, on lesser offense of simple assault. D.C. Code § 22-2801. *United States v. Huff*, 442 F.2d 885, 1971 U.S. App. LEXIS 11498 (C.A.D.C. 1971).

Instruction, in rape prosecution, that identification of assailant by complaining witness may be sufficient if circumstances would convince of its accuracy beyond reasonable doubt and that, in considering accuracy of such identification, jury could consider opportunity

which complaining witness had to observe, or other factors and other evidence which may tend to corroborate identification was adequate when considered in context of general instruction that there must be corroboration of testimony of complaining witness. D.C. Code § 22-2801. *Carter v. United States*, 427 F.2d 619, 1970 U.S. App. LEXIS 9497 (C.A.D.C. 1970).

Erroneous affirmative defense consent instruction in prosecution for first-degree sexual assault, which placed the burden of persuasion on defendant to prove consent by a preponderance of the evidence created a reasonable likelihood that the jury applied the instruction so as to impermissibly shift the burden of persuasion to the defense on the critical element of force, in violation of due process; instruction was confusing, trial court never explained how jury could reconcile the affirmative defense of consent with the government's burden of proving the use of force, but instead, perplexingly told the jury it had to consider whether victim consented even if it initially found the government had established the element of force., and while trial court properly told jury it could consider evidence of consent in deciding whether the government had met its burden of proving force, it never explicitly warned the jury that defendant's burden to prove consent by a preponderance of the evidence was irrelevant to that determination. *Hatch v. United States*, 35 A.3d 1115, 2011 D.C. App. LEXIS 682 (2011).

Defendant, in prosecution for kidnapping and first-degree sexual abuse, was not entitled to instruction on consent as a defense to such charges; while alleged victim acknowledged being a prostitute, no evidence existed that alleged victim consented to being kidnapped and raped, as evidence indicated that alleged victim was taken from the street at gunpoint, forced into a van, and held for over six hours, during which she was ordered to perform sexual acts with several men or else she would be shot. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Trial court erred when it instructed jury on carnal knowledge after initially informing counsel prior to closing argument that it would not do so, but error did not prejudice defendant where jury verdict of guilty of carnal knowledge was rational under facts of case and no other defense could be raised at a new trial. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

— Necessity and sufficiency, instructions.

Incidents underlying rape charge against defendant were neither factually nor legally separable so as to require court to sua sponte give special unanimity instruction where the rape was committed in a continuous course of conduct and there was no significant break be-

tween the events; although defendant and complainant moved a short distance between the first two acts of sexual intercourse and all three acts necessarily were separated by a few minutes, the short spatial and temporal separations were not enough to transform a single course of action into several separate rapes, nor did interruptions between second and third acts of intercourse terminate defendant's original intent to have and complete sexual intercourse against the will of complainant. *Gray v. United States*, 544 A.2d 1255, 1988 D.C. App. LEXIS 99 (1988).

No limiting instruction to jury in connection with admission of knife into evidence against defendant charged with armed rape was required, even though knife tended also to show other crimes such as possession of prohibited weapon or carrying dangerous weapon, since evidence of those other crimes was inextricably entwined with evidence necessary to prove armed rape. D.C. Code 1981, §§ 22-2801, 22-3202. *Lee v. United States*, 471 A.2d 683, 1984 D.C. App. LEXIS 301 (1984).

In prosecution for an assault committed upon a woman in a street car, where woman involved explained her delay in complaining to police by stating that she had not intended to complain until she saw defendant commit the same act upon another woman two weeks later, defendant was entitled, upon a timely request, to have jury instructed that testimony in explanation of delay was to be considered only in respect to delay in making complaint and not as evidence that offense charged was committed but where he failed to do so, no complaint could be made. *Stitely v. U.S.*, 61 A.2d 491, 1948 D.C. App. LEXIS 189 (Cr.App. 1948).

— Resistance of victim, instructions.

In prosecution for rape and sodomy, defendant's prayer for instruction requiring utmost resistance by complaining witness incorrect. D.C. Code 1940, §§ 22-2801, 22-3502. *McGuinn v. U.S.*, 191 F.2d 477, 1951 U.S. App. LEXIS 2575 (C.A.D.C. 1951).

— Weight and sufficiency of evidence, instructions.

Although there was expert testimony that spermatozoa could have been deposited 72 hours before being found in complainant's vagina and complainant was married and living with her husband, where spermatozoa were also found on her underclothing, laundryman who had been tied up by intruder heard complainant's entry and brief conversation with intruder, and complainant reported that she had been raped by laundryman, who observed her nude after intruder departed, charge that, in considering whether there was corroboration of complainant's testimony, jury might consider medical testimony as to presence of spermato-

zoa in complainant's vagina was not improper. *Borum v. United States*, 409 F.2d 433, 1967 U.S. App. LEXIS 4076 (C.A.D.C. 1967), writ of certiorari denied by 395 U.S. 916, 89 S. Ct. 1765, 23 L. Ed. 2d 230, 1969 U.S. LEXIS 1689 (1969).

In future, no instruction directed specifically to credibility of any mature female victim of rape or its lesser included offenses and necessity for corroboration of her testimony shall be required or given in trial of any such case in District of Columbia court system. D.C. Code §§ 11-721(e), 22-2801, 49-301; U.S. Const. art. 3, § 3. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

Joint or separate trial of charges.

Denial of motion to sever counts of indictment in proceeding in which accused was convicted of four rape offenses and other offenses was not abuse of discretion, in view of similar characteristics of such offenses, in which assailant entered through rear of apartments, awoke victims, threatened them with weapon, demanded silence and submission and committed no act of violence if there was compliance with his orders, in which, in three of the cases, he sought to prevent victims from getting good look at him and cut or threatened to cut phone lines and in which he cut off any pants worn by victims. D.C. Code §§ 22-502, 22-1801(a), 22-2801, 22-3202, 23-311(a), 23-313; D.C. Code SCR, Criminal Rules 8(a), 14. *Bridges v. United States*, 381 A.2d 1073, 1977 D.C. App. LEXIS 304 (1977), writ of certiorari denied by 439 U.S. 842, 99 S. Ct. 135, 58 L. Ed. 2d 141, 1978 U.S. LEXIS 2828 (1978).

Lesser included offenses.

Neither rape nor carnal knowledge is lesser included offense of incest. D.C. Code 1981, §§ 22-1901, 22-2801. *Pounds v. United States*, 529 A.2d 791, 1987 D.C. App. LEXIS 415 (1987).

Nature and elements of offenses.

— Armed offenses, nature and elements of offenses.

Hot clothes iron was "dangerous weapon" needed to support conviction for armed rape where victim testified that defendant's use of hot iron resulted in serious burns to victim's chest and abdomen. D.C. Code 1981, § 22-3202(a). *Johnson v. United States*, 613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

In order to obtain conviction for armed rape, government must prove beyond reasonable doubt that defendant committed rape while armed with or when having readily available any dangerous or deadly weapon. D.C. Code 1981, § 22-3202(a). *Johnson v. United States*,

613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

— Carnal knowledge, nature and elements of offenses.

Penetration by the male organ is necessary to constitute the crime of rape or carnal knowledge, but full penetration is not necessary; penetration only of the labia of the female organ being sufficient. *Holmes v. U.S.*, 171 F.2d 1022, 1948 U.S. App. LEXIS 2938 (C.A.D.C. 1948).

Penetration is essential element of crime of carnal knowledge. D.C. Code 1981, § 22-2801 (repealed). *Graham v. United States*, 746 A.2d 289, 2000 D.C. App. LEXIS 30 (2000).

The slightest penetration is sufficient to sustain a conviction for carnal knowledge. D.C. Code 1981, § 22-2801 (repealed). *Graham v. United States*, 746 A.2d 289, 2000 D.C. App. LEXIS 30 (2000).

Any labial penetration, however slight, constitutes sexual intercourse. *Greene v. United States*, 571 A.2d 218, 1990 D.C. App. LEXIS 52 (1990).

Slightest penetration is sufficient to sustain conviction of carnal knowledge and there is no requirement of penetration through vaginal canal beyond hymen. D.C. Code § 22-2801. In re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Although penetration of victim's sexual organs is an essential element of the crime of carnal knowledge, Government need not prove full penetration since the offense is committed if the male organ enters only the labia of the female organs. D.C. Code § 22-2801. *Williams v. United States*, 357 A.2d 865, 1976 D.C. App. LEXIS 287 (1976).

— Force, nature and elements of offenses.

In rape prosecution, Government was not required to establish that acts of sexual intercourse were forcibly consummated; it was enough that victims were shown to have had at that time reasonable belief induced by threats that they faced death or serious bodily harm. D.C. Code § 22-2801. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

— In general.

The legal term "rape" refers to the unlawful carnal knowledge of a woman by a man forcibly and against her will. *United States v. Bailey*, 585 F.2d 1087, 1978 U.S. App. LEXIS 10218 (C.A.D.C. 1978), reversed by 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575, 1980 U.S. LEXIS 69 (1980).

In a rape case the prosecution must establish the fact of sexual intercourse (that is, penetration of the female sexual organ by the sexual organ of the male), forcibly and against the will of the complainant. *United States v. Bryant*,

420 F.2d 1327, 1969 U.S. App. LEXIS 9743 (C.A.D.C. 1969).

In order to convict for rape, jury has to find that defendant had sexual intercourse with complaining witness, and act was committed forcibly and against her will. D.C. Code 1981, § 22-2801. *Greene v. United States*, 571 A.2d 218, 1990 D.C. App. LEXIS 52 (1990).

Elements necessary to establish offense of common-law rape are sexual intercourse with a female, committed forcibly and against her will. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Prohibition against common-law rape is intended to protect females capable of giving consent from forcible sexual intercourse. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Two elements of offense of rape are sexual penetration of victim and that that penetration was against her will. D.C. Code § 22-2801. *Smother v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

— Intent, nature and elements of offenses.

Specific intent is not an element of rape even though it is an element of lesser included offense of assault with intent to commit rape. D.C. Code § 22-2801. *United States v. Thornton*, 498 F.2d 749, 1974 U.S. App. LEXIS 8356 (C.A.D.C. 1974).

Specific intent to commit rape is not required to warrant conviction thereof. D.C. Code 1940, § 22-2801. *McGuinn v. U.S.*, 191 F.2d 477, 1951 U.S. App. LEXIS 2575 (C.A.D.C. 1951).

— Merger, nature and elements of offenses.

Defendant's convictions for assault with a dangerous weapon and first-degree sexual abuse did not merge under Double Jeopardy Clause, as each conviction required an element the other did not; sexual assault statute required a "sexual act," which was not required for a conviction of assault with a deadly weapon, and the assault with a deadly weapon statute required use of a "dangerous weapon," which the sexual assault statute did not require. *Scott v. United States*, 953 A.2d 1082, 2008 D.C. App. LEXIS 379 (2008).

Each of defendant's and codefendant's two convictions for kidnapping and first-degree sexual abuse did not merge for double jeopardy purposes; each offense had at least one element that the other did not have. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Persons liable.

Criminal liability for aiding and abetting carnal knowledge may not attach merely for accused's presence during commission of unlawful coitus. D.C. Code §§ 22-105, 22-2801. In

re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Physical presence at time of rape is not essential to conviction of aiding and abetting rape. *Barnes v. United States*, 381 F.2d 263, 1967 U.S. App. LEXIS 6016 (C.A.D.C. 1967).

Persons on whom offense may be committed.

Even women of easy virtue may be victims of rape, and they deserve the full protection of the law. *United States v. Saunders*, 736 F. Supp. 698, 1990 U.S. Dist. LEXIS 5594 (1990).

In proscribing rape, the law makes no distinction based on an alleged victim's virtue or lack of virtue and it matters not whether rape victim has chosen in life to follow Mother Teresa's inspiring example or the less uplifting examples of Catherine the Great or Polly Adler. *United States v. Saunders*, 736 F. Supp. 698, 1990 U.S. Dist. LEXIS 5594 (1990).

Pleas.

Government did not breach plea agreement by submitting 17-page memorandum in aid of sentencing which described the underlying facts of sexual abuse with which defendant was charged, defendant's history, and the effects of the crime on the victim, even though memorandum allegedly went well beyond what government was expected to do to meet its bargain, where government recommended a term of five to fifteen years of incarceration, as agreed; government's description of the alleged events was presented to ensure that defendant received the maximum amount of incarceration plea agreement would allow, and government did not actively pursue a longer sentence than plea agreement warranted. *Louis v. United States*, 862 A.2d 925, 2004 D.C. App. LEXIS 633 (2004).

Defendant's guilty pleas to first-degree sexual abuse and kidnapping were knowingly and voluntarily made, where defendant initiated the plea negotiations after being moved by the victim's trial testimony, defendant told the court he had sufficient opportunity to discuss an insanity defense with his lawyer and that he did not intend to pursue it, and defendant cogently told the court that his reason for the pleas was that he did not want to put the victim through any more humiliation. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Sufficient factual basis existed for trial court's accepting guilty plea to first-degree sexual abuse, entered after defendant heard trial testimony of victim; victim's testimony would be sufficient by itself to convict, and defendant stated during the plea colloquy that he knew the victim was not lying and that he agreed

with her testimony. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Defendant's motion to withdraw pre-sentence guilty pleas to first-degree sexual abuse and kidnapping should not have been granted on ground it would be "fair and just," where defendant never asserted his legal innocence, government would have been prejudiced if the motion were granted, in that it was presented in the middle of trial, and defendant received effective assistance of counsel. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Trial court, in prosecution for armed robbery, kidnapping, and sexual abuse, did not violate defendant's and codefendant's Sixth Amendment right of confrontation by limiting defendant's and codefendant's cross-examination of witness concerning witness's mental state to date charged offenses occurred and during any other time about witness might have testified; evidence of witness's mental condition at another time in his life was not relevant to witness's perception of events on the night offenses occurred. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Presumptions and burden of proof.

On charge of assault with intent to commit rape, defendant's intent may be inferred from conduct. D.C. Code § 22-501. *Higgins v. United States*, 401 F.2d 396, 1968 U.S. App. LEXIS 6310 (C.A.D.C. 1968).

In prosecution for rape and robbery, the defendant did not have the obligation of making out a complete defense. *McKenzie v. U.S.*, 126 F.2d 533, 1942 U.S. App. LEXIS 4206 (1942).

In rape prosecution, Government was not required to establish that acts of sexual intercourse were forcibly consummated; it was enough that victims were shown to have had at that time reasonable belief induced by threats that they faced death or serious bodily harm. D.C. Code § 22-2801. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

Purposes and legislative intent.

Societal interests which Congress sought to protect by enactment of provisions penalizing felony-murder and rape are separate and distinct; rape statute is to protect women from sexual assault while felony-murder statute purports to protect human life by permitting jury to infer requisite intent from fact that felony was committed. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), re-

versed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

Questions of law and fact.

Credit cards found in automobile, belonging to companion of rape victim, provided enough corroboration to allow jury to consider case against defendant. *United States v. Gambrell*, 449 F.2d 1148, 1971 U.S. App. LEXIS 8716 (C.A.D.C. 1971).

Circumstantial evidence that defendant was attacker justified submitting rape case to jury notwithstanding that 80-year-old victim was unable to identify defendant as assailant. *Clemons v. United States*, 314 F.2d 278, 1963 U.S. App. LEXIS 6274 (C.A.D.C. 1963), writ of certiorari denied by 374 U.S. 845, 83 S. Ct. 1906, 10 L. Ed. 2d 1066, 1963 U.S. LEXIS 1148 (1963), writ of certiorari denied by 386 U.S. 921, 87 S. Ct. 888, 17 L. Ed. 2d 793, 1967 U.S. LEXIS 2382 (1967).

Question of whether testimony of complaining witness made out a case of rape was one of law. *Farrar v. U.S.*, 275 F.2d 868, 1959 U.S. App. LEXIS 2908 (C.A.D.C. 1959).

In rape prosecution, issue of voluntariness of confessions was for jury to determine. D.C. Code 1951, § 22-2801. *De Lorenzo v. U.S.*, 219 F.2d 506, 1955 U.S. App. LEXIS 2935 (C.A.D.C. 1955).

In prosecution for carnally knowing a female child, evidence upon question of defendant's guilt was for jury. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.; D.C. Code 1951, § 22-2801. *Crawford v. U.S.*, 198 F.2d 976, 1952 U.S. App. LEXIS 3266 (C.A.D.C. 1952).

Where there is evidence upon which it could be concluded that a confession is voluntary, the confession is to go to the jury under proper instructions. *Catow v. U.S.*, 131 F.2d 16, 1942 U.S. App. LEXIS 2695 (1942).

In prosecution for rape and robbery, where pistol which victim stated assailant used, clothing which she said he had stolen and money which he had taken were not found in possession of defendant, neighbors testified to good character of defendant and to his having a night job at which he worked regularly, and thorough examination by police failed to shake statement of defendant that he had never seen the prosecuting witness before, such circumstances were important enough to be called to the attention of the jury to be weighed together with evidence in support of legal presumption of innocence. *McKenzie v. U.S.*, 126 F.2d 533, 1942 U.S. App. LEXIS 4206 (1942).

Sentence of life without parole for first-degree sexual abuse, imposed under statute allowing court to increase life sentence to life without parole for certain sex crimes if victim sustained serious bodily injury as result of offense, did not violate Apprendi, where jury also returned conviction for second-degree mur-

der, finding as an essential element that victim suffered injuries from which she died, and thus necessarily made corollary finding that victim's injuries involved a substantial risk of death so as to satisfy definition of "serious injury." *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434 (2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Evidence, including testimony of police officer as to what rape victim said at scene of crime, testimony of nurse and physician who examined and talked with victim at hospital, and testimony of two witnesses who participated in crime but who testified for the Government, was sufficient for jury in prosecution on charges of rape and felony-murder. D.C. Code 1981, §§ 22-2401, 22-2801. *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

In prosecution for rape while armed and sodomy, trial court properly denied motion for acquittal, although identification of defendant by an accomplice was uncorroborated. D.C. Code §§ 22-2801, 22-3202, 22-3502. *Sellman v. United States*, 386 A.2d 303, 1978 D.C. App. LEXIS 514 (1978).

Evidence tending to establish that murder victim had been forcibly raped and that defendant had been in the victim's room at the approximate time of the events giving rise to the charges was sufficient to warrant trial court's submission to jury of questions whether defendant was guilty of felony-murder and rape. D.C. Code §§ 22-2401, 22-2801. *Whalen v. United States*, 379 A.2d 1152, 1977 D.C. App. LEXIS 269 (1977), reversed by 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715, 1980 U.S. LEXIS 15 (1980).

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Review.

By pleading guilty to first-degree sexual abuse and kidnapping, defendant waived appellate review of contention that the trial court erred in refusing to grant a continuance to permit defense counsel to prepare adequately for trial and to allow defendant to consider a "combination" plea offer made by the government four days before the trial date. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App.

LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Though on interlocutory appeal from trial court's ruling that victim's statement to police officer and nurse that she had been raped was inadmissible, the Court of Appeals reversed, ordinary principles of "law of the case" did not apply and ruling on interlocutory appeal did not affect right of defendant, in subsequent appeal from judgment of conviction, to claim as error reversal by trial court on remand of ruling appealed from during trial. D.C. Code 1981, §§ 22-2801, 23-104(d, e). *Leasure v. United States*, 458 A.2d 726, 1983 D.C. App. LEXIS 337 (1983).

Validity.

Trial court, in 1975, the year in which defendant was found to have committed rape, was required to instruct jury that an accused could not be convicted of rape without some evidence, direct or circumstantial, which corroborated victim's testimony, and retroactive application of rule that corroboration be abolished as a requirement to conviction of rape to an offense defendant was charged to have committed one year earlier had effect of imposing an ex post facto rule and was unconstitutional. *Bowyer v. United States*, 422 A.2d 973, 1980 D.C. App. LEXIS 385 (1980).

Weight and sufficiency of evidence.

— Armed perpetrator, weight and sufficiency of evidence.

"Armed" element required for armed rape conviction was established by evidence that defendant had previously used hot clothes iron to burn victim's breasts and abdomen and that victim feared additional bodily harm if she refused to comply with defendant's orders to have sexual intercourse, even though defendant did not demand sex from victim before or immediately after assaulting victim with iron and did not reach for or mention iron during rape. D.C. Code 1981, § 22-3202(a). *Johnson v. United States*, 613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

To obtain conviction for armed rape when instrument is not per se dangerous weapon, government must show something more than mere presence of weapon. *Johnson v. United States*, 613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

Although no direct evidence was introduced in rape case to establish that defendant was in fact armed with dangerous weapon during incident, complainant's insistence that defendant did have a knife permitted trial court and jury to find that he did, and thus permitted conviction for armed rape, under rule that reasonable inferences must be drawn in favor of the government. D.C. Code 1981, §§ 22-2801, 22-2901,

22-3202. *Boyd v. United States*, 473 A.2d 828, 1984 D.C. App. LEXIS 328 (1984).

Evidence was sufficient to support defendant's conviction of six counts of armed kidnapping, five counts of armed rape, two counts of armed robbery, and one count each of assault with a deadly weapon and armed assault with intent to commit sodomy. D.C. Code §§ 22-502, 22-2101, 22-2801, 22-2901, 22-3202, 22-3502. *Davis v. United States*, 367 A.2d 1254, 1976 D.C. App. LEXIS 448 (1976), writ of certiorari denied by 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114, 1977 U.S. LEXIS 3112 (1977).

— **Carnal knowledge, weight and sufficiency of evidence.**

Complainant witness' reference to "when he was already inside of me" was sufficient to prove element of sexual penetration necessary for rape conviction. (Per Reid, J., with two Judges concurring.) D.C. Code 1981, § 22-3202; § 22-2801 (repealed). *Bolanos v. United States*, 718 A.2d 532, 1998 D.C. App. LEXIS 186 (1998).

Direct medical evidence of penetration is not required for conviction of carnal knowledge; penetration of the female organs may be proved by circumstantial evidence. D.C. Code § 22-2801. *Williams v. United States*, 357 A.2d 865, 1976 D.C. App. LEXIS 287 (1976).

Though penetration is an essential element of offense of rape, it may be proven by circumstantial evidence and direct medical testimony on subject is not required. *United States v. Fuller*, 243 F. Supp. 203, 1965 U.S. Dist. LEXIS 9004 (D.D.C.1965).

— **Corroboration of victim, weight and sufficiency of evidence.**

With respect to the corpus delicti of a sex offense, it is not always necessary to introduce independent evidence to corroborate each and every element of the offense; rather, independent corroborative evidence will be regarded as sufficient when it would permit the jury to conclude beyond a reasonable doubt that the complainant's account of the crime was not a fabrication. *United States v. Wiley*, 492 F.2d 547, 1973 U.S. App. LEXIS 7557 (C.A.D.C. 1973).

Judicially created rule requiring corroboration in prosecution for sex offenses is abolished entirely, regardless of sex or age of victim or perpetrator. *Gary v. United States*, 499 A.2d 815, 1985 D.C. App. LEXIS 520 (1985), writ of certiorari denied by 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, 1986 U.S. LEXIS 936, 54 U.S.L.W. 3630 (1986), writ of certiorari denied by 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568, 1986 U.S. LEXIS 2180, 54 U.S.L.W. 3840 (1986).

Where corroboration rule was still in force in the District of Columbia at the time of defen-

dant's trial for rape, the corroboration rule applied both in the trial court and on appeal. D.C. Code § 22-2801. *Davis v. United States*, 370 A.2d 1337, 1977 D.C. App. LEXIS 431 (1977), writ of certiorari denied by 434 U.S. 853, 98 S. Ct. 168, 54 L. Ed. 2d 123, 1977 U.S. LEXIS 3184 (1977).

Under the corroboration rule formerly in effect in the District of Columbia, it was not necessary that every element of the corpus delicti be corroborated; the amount of corroboration depended on the circumstances of each case. *Davis v. United States*, 370 A.2d 1337, 1977 D.C. App. LEXIS 431 (1977), writ of certiorari denied by 434 U.S. 853, 98 S. Ct. 168, 54 L. Ed. 2d 123, 1977 U.S. LEXIS 3184 (1977).

Requirement of corroboration of rape victim's testimony serves no legitimate purpose; victim of rape and other sex-related offenses is not so presumptively lacking in credence that corroboration of her testimony is required to withstand motion for judgment of acquittal. D.C. Code §§ 11-721(e), 22-2801, 49-301; U.S. Const. art. 3, § 3. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

— **Force, weight and sufficiency of evidence.**

In rape prosecution, testimony of complaining witness and the circumstantial evidence supporting it, which were sufficient to show that the intercourse occurred and took place by force and against her will in the sense that her resistance was overcome by physical force and threats which put her in fear of her life, sustained jury's implicit finding that the act was without the "consent" of the complaining witness. *Ewing v. U.S.*, 135 F.2d 633, 1942 U.S. App. LEXIS 2445 (1942).

Evidence did not support affirmative defense consent instruction in prosecution for first-degree sexual assault, which placed the burden of persuasion on defendant to prove consent by a preponderance of the evidence; defendant's defense at trial was limited to denying victim's claim that he forced her to perform sexual acts by threatening her with a pistol, and that victim, who was a prostitute, participated in their sexual encounter without coercion on his part, in exchange for cash, and then fabricated her accusation of a forcible sexual assault to exact revenge for defendant's refusal to pay her for all the sexual services he enjoyed, and defendant never claimed that victim was a willing participant despite his having held her at gunpoint, nor was there any evidence to support such a claim. *Hatch v. United States*, 35 A.3d 1115, 2011 D.C. App. LEXIS 682 (2011).

Evidence in rape prosecution was sufficient to show that rape victims submitted only after they were threatened with death or serious bodily harm. D.C. Code§ 22-2801. *Arnold v.*

United States, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

— **Identification, weight and sufficiency of evidence.**

In view of fact that prosecutrix in carnal knowledge prosecution, positively identified defendant the day following the crime, and fact that her description of event was supported by her prompt report, condition of her clothing, welts on her neck, and her reported emotional condition, and in view of absence of evidence casting doubt on her trustworthiness or credibility of her testimony that she had abundant and unfettered opportunity to observe defendant prior to the crime, her identification did not require further corroboration because of minimal danger of falsification. D.C. Code 1961, § 22-2801. *Thomas v. United States*, 387 F.2d 191, 1967 U.S. App. LEXIS 6527 (C.A.D.C. 1967).

Defendant's fingerprints placing him at scene of crime, his disputed confession placing him there, and complainant's prompt report to police were adequate corroboration of rape though complainant was unable to identify defendant as attacker confronting her in the dark. *Hughes v. U.S.*, 306 F.2d 287, 1962 U.S. App. LEXIS 4654 (C.A.D.C. 1962).

— **In general.**

The quantum of proof required in prosecutions for a sex offense will depend upon such factors as the age and impressionability of the complainant and the presence or absence of any apparent motive. *United States v. Wiley*, 492 F.2d 547, 1973 U.S. App. LEXIS 7557 (C.A.D.C. 1973).

Every case involving an alleged rape must be evaluated on its own merits, and no magical quantitative balancing test utilizing a "check-list of factors" is either appropriate or workable. *United States v. Jones*, 477 F.2d 1213, 1973 U.S. App. LEXIS 11120 (C.A.D.C. 1973).

Jury could have found defendant not guilty of rape if it determined either that government did not prove that act was accomplished by force or that defendant proved, by preponderance of the evidence, that complainant consented to sexual act. D.C. Code 1981, § 22-4101(4). *Russell v. United States*, 698 A.2d 1007, 1997 D.C. App. LEXIS 178 (1997).

Evidence, which included defendant's repeated and escalating threats, defendant's forcing victim to commit sodomy, victim's ultimate escape, and victim's reactions after escape, supported jury conclusion that victim feared for her life in prosecution for assault with intent to commit rape while armed. D.C. Code 1981, §§ 22-501, 22-3202. *Glascow v. United States*, 514 A.2d 455, 1986 D.C. App. LEXIS 409 (1986).

Conviction for rape was amply supported by evidence that sperm was found in victim's vagina and other circumstances showing that defendant was responsible. D.C. Code § 22-2801. *Smothers v. United States*, 403 A.2d 306, 1979 D.C. App. LEXIS 397 (1979).

Absence of defendant's pubic hair at scene of alleged rape was not indicative of innocence; evidence showed that defendant had left his trousers on and simply opened his zipper to have intercourse and thus presence or absence of his pubic hair on victim's sheet, panties, or person in that context was insignificant with respect to issue of his presence on night of rape. D.C. Code § 22-2801. *Smith v. United States*, 363 A.2d 667, 1976 D.C. App. LEXIS 378 (1976).

— **Testimony or statement of accused, weight and sufficiency of evidence.**

Trial court did not abuse its discretion, in first-degree sexual abuse prosecution in which defendants maintained that their sexual acts with alleged victim were consensual, in limiting cross-examination of alleged victim concerning her "common practices" as a prostitute in order to show her purported motive to fabricate what actually took place, i.e., protecting another individual who fled the scene from pandering charges; desired cross-examination may well have violated Rape Shield Law, and defendants had other opportunities to explore alleged victim's bias within confines of trial court's limitations. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

In prosecution for rape, evidence was sufficient to support trial court's conclusion that defendant's testimony concerning alleged coercive remarks by police was not to be believed, since defendant clearly had interest in outcome. D.C. Code 1981, §§ 22-2801, 22-3202. *Staton v. United States*, 466 A.2d 1245, 1983 D.C. App. LEXIS 497 (1983).

§ 22-3003. Second degree sexual abuse.

A person shall be imprisoned for not more than 20 years and may be fined in an amount not to exceed \$200,000, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

(1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or

(2) Where the person knows or has reason to know that the other person is:

- (A) Incapable of appraising the nature of the conduct;
- (B) Incapable of declining participation in that sexual act; or
- (C) Incapable of communicating unwillingness to engage in that sexual act.

(May 23, 1995, D.C. Law 10-257, § 202, 42 DCR 53; June 3, 1997, D.C. Law 11-275, § 13(b), 44 DCR 1408.)

Cross references. — Sentencing, supervised release, and good time credit for felonies under this section committed on or after August 5, 2000, see § 24-403.01.

Section references. — This section is referred to in §§ 22-3007 and 22-2010.

Prior Codifications. — 1981 Ed., § 22-4103.

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 11-275. — For legislative history of D.C. Law 11-275, see Historical and Statutory Notes following § 22-3002.

CASE NOTES

ANALYSIS

Admissibility of evidence.
Competency examination.
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Admissibility of evidence.

In assessing credibility of a mentally retarded rape prosecutrix a jury may be aided in its task by the results of a psychiatric examination, even when such examination is not necessary to the judge's determination of competency. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Competency examination.

Whether a psychiatric examination of a mentally retarded rape prosecutrix should be ordered to aid the jury in assessing credibility is a judgment, involving a balancing of need against dangers, which is committed to the discretion of the trial judge. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Consent.

Where offense involves a female child under 16 years of age, only remaining element of corpus delicti is penetration, for when a child under the age of consent is involved the law conclusively presumes force and the question of consent is immaterial. D.C. Code § 22-2801. *United States v. Jones*, 477 F.2d 1213, 1973 U.S. App. LEXIS 11120 (C.A.D.C. 1973).

Force.

Statute dispensing with element of "forcibly"

in cases involving rape of child under 16 years of age would be read to apply in prosecution for assault with intent to rape where victim although 27 years of age had mind of child of about 7 years old. D.C. Code §§ 22-501, 22-2801. *United States v. Medley*, 452 F.2d 1325, 1971 U.S. App. LEXIS 6916 (C.A.D.C. 1971).

In general.

Generally, sexual assault charges by mentally abnormal girl should be subjected to great scrutiny. D.C. Code §§ 22-501, 22-2801, 22-3202. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Questions of law or fact.

Competency of mentally retarded 18-year-old prosecutrix to testify in prosecution for assault with intent to commit rape while armed, assault with a dangerous weapon and carrying a dangerous weapon, was a threshold question of law committed to the trial court's discretion; it remained for the jury, however, to assess credibility of the witness and the weight to be given her testimony. D.C. Code §§ 22-501, 22-502, 22-3202, 22-3204. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Mental retardation may be so severe, capabilities so impaired and the testimony so potentially prejudicial that it should be barred completely by the judge; or there may be sufficient indications of a mentally retarded witness' capacity and of the reliability of his testimony that it should be heard and assessed by the jury, albeit with a cautionary instruction. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Dangers which must be considered in determining whether a mentally retarded rape pros-

ecutrix is a competent witness must also be considered by the jury in assessing her credibility, particularly since the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Review.

Where trial judge found that prosecutrix, a mentally retarded girl of 18, demonstrated an understanding of her duty to tell the truth and a capability to observe and remember, a comprehensible narrative emerged from her testimony, before allowing prosecutrix to testify the court noted a substantial corroboration of her testimony and judge had benefit of testimony of girl's father as to her retardation, the court's determination of competency, without a psychiatric examination, would not be disturbed. *United States v. Benn*, 476 F.2d 1127, 1972 U.S. App. LEXIS 6483 (C.A.D.C. 1972).

Weight and sufficiency of evidence.

Evidence in prosecution for assault with in-

tent to rape 27-year-old female who had mentality of 7-year-old child and who did not testify was insufficient to sustain conviction on such charge but did sustain conviction for assault. *United States v. Medley*, 452 F.2d 1325, 1971 U.S. App. LEXIS 6916 (C.A.D.C. 1971).

Evidence was sufficient to establish that victim, a prostitute, only engaged in sexual acts with defendant, a police officer, because she had a reasonable fear of being arrested, in support of conviction for four counts of second-degree sexual abuse; defendant approached victim while wearing his full police uniform, victim stated that she thought she would be arrested, that she asked defendant if he was going to arrest her, that she repeatedly stated that she did not want to go upstairs with defendant, that defendant pressured her until she agreed, and that when they got upstairs they immediately undressed without discussing a price or whether the victim consented. *Way v. United States*, 982 A.2d 1135, 2009 D.C. App. LEXIS 548 (2009).

§ 22-3004. Third degree sexual abuse.

A person shall be imprisoned for not more than 10 years and may be fined in an amount not to exceed \$100,000, if that person engages in or causes sexual contact with or by another person in the following manner:

- (1) By using force against that other person;
- (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;
- (3) After rendering that person unconscious; or
- (4) After administering to that person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

(May 23, 1995, D.C. Law 10-257, § 203, 42 DCR 53; June 3, 1997, D.C. Law 11-275, § 13(c), 44 DCR 1408.)

Section references. — This section is referred to in §§ 22-3007 and 22-3010.

Prior Codifications. — 1981 Ed., § 22-4104.

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see His-

torical and Statutory Notes following § 22-3001.

Legislative history of Law 11-275. — For legislative history of D.C. Law 11-275, see Historical and Statutory Notes following § 22-3002.

CASE NOTES

Lesser included offenses.

Taking indecent liberties is lesser included offense of carnal knowledge. D.C. Code 1973,

§§ 22-2801, 22-3501(a). In re C.D., 437 A.2d 171, 1981 D.C. App. LEXIS 382 (1981).

§ 22-3005. Fourth degree sexual abuse.

A person shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$50,000, if that person engages in or causes sexual contact with or by another person in the following manner:

(1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or

(2) Where the person knows or has reason to know that the other person is:

(A) Incapable of appraising the nature of the conduct;

(B) Incapable of declining participation in that sexual contact; or

(C) Incapable of communicating unwillingness to engage in that sexual contact.

(May 23, 1995, D.C. Law 10-257, § 204, 42 DCR 53; June 3, 1997, D.C. Law 11-275, § 13(d), 44 DCR 1408.)

Section references. — This section is referred to in §§ 22-3007 and 22-3010.

Prior Codifications. — 1981 Ed., § 22-4105.

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see His-

torical and Statutory Notes following § 22-3001.

Legislative history of Law 11-275. — For legislative history of D.C. Law 11-275, see Historical and Statutory Notes following § 22-3002.

§ 22-3006. Misdemeanor sexual abuse.

Whoever engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission, shall be imprisoned for not more than 180 days and, in addition, may be fined in an amount not to exceed \$1,000.

(May 23, 1995, D.C. Law 10-257, § 205, 42 DCR 53.)

Cross references. — Consent defense to sexual abuse, see § 22-3007.

Prior Codifications. — 1981 Ed., § 22-4106.

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

CASE NOTES

ANALYSIS

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Discovery.

Double jeopardy.

In general.

Indictment and information.

Intent.

New trial.

Presumptions and burden of proof.

Right to jury trial.

Separate acts.

Weight and sufficiency of evidence.

Admissibility of evidence.

Prior crimes evidence, namely evidence of defendant's prior sexual contact with victim, was admissible in prosecution of defendant for misdemeanor sexual abuse of his stepdaughter; there was close familial relationship between defendant and victim, defendant had lived in the home with victim and her mother since victim was two years old, the prior abuse started when victim was very young and occurred at reasonably frequent intervals without meaningful interruption, defendant had made sexual contact with victim two or three times a week for approximately eight years,

beginning when victim was eight, and evidence of the prior sexual contact was integral to the prosecution's case as proof of defendant's intent. *Steward v. United States*, 6 A.3d 1268, 2010 D.C. App. LEXIS 616 (2010).

Attempt.

The crime of attempt misdemeanor sexual abuse requires proof of all the elements of simple assault (including an attempted assault), and requires additional mens rea which the latter does not, and therefore, simple assault is a lesser-included offense of attempt misdemeanor sexual abuse. *Nkop v. United States*, 945 A.2d 617, 2008 D.C. App. LEXIS 121 (2008).

Attempt misdemeanor sexual abuse requires an intent to accomplish a sexual touching, with an overt act that comes within close proximity of completion. *Nkop v. United States*, 945 A.2d 617, 2008 D.C. App. LEXIS 121 (2008).

For the attempt offense of misdemeanor sexual abuse, the government must prove the defendant (1) intended to commit the crime, and (2) committed an overt act towards completion of the crime that (3) came within dangerous proximity of completing the crime. *Nkop v. United States*, 945 A.2d 617, 2008 D.C. App. LEXIS 121 (2008).

Discovery.

Government's failure to disclose results of tests performed by FBI on sex kit, which was compiled from examination of victim a few hours after alleged assault took place, did not amount to violation under Brady, in prosecution for misdemeanor sexual abuse; results of tests were far from unequivocally favorable to either side, and although defendant maintained that because tests revealed that there was very little blood in alleged victim's underwear, he could have used sex kit evidence to discredit mother's testimony that she saw blood, mother's testimony was not that she observed dramatic amount of bleeding, but rather that bleeding was of a more limited nature. *Powell v. United States*, 880 A.2d 248, 2005 D.C. App. LEXIS 411 (2005).

Double jeopardy.

Separate convictions and sentences for misdemeanor sexual abuse based on contact with defendant's mouth to victim's inner thigh and breast that occurred in single course of conduct violated prohibition against double jeopardy. *Cullen v. United States*, 886 A.2d 870, 2005 D.C. App. LEXIS 625 (2005).

In general.

Defendant should have known that his eleven-year-old daughter could not validly consent to his sexual advances, and therefore, defendant could be convicted of attempted misdemeanor sexual abuse pursuant to statute pro-

viding that whoever engages in a sexual act with another person and who should have knowledge that the act was committed without that other person's permission shall be imprisoned; term "permission," as used in statute, was synonym for "consent," and law stated that children were legally incapable of consenting to sexual activity with adults. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Misdemeanor sexual abuse indictment, which alleged sexual touching of victim's genitalia, was not constructively amended in light of evidence presented that he touched victim's inner thigh; it could not fairly be said that defendant was convicted on the basis of a complex of facts "distinctly different" from facts alleged by grand jury, as events reflected in trial judge's findings and those alleged in indictment occurred on same day, at the same time, at the same location, and between same individuals, and common sense dictated that to reach victim's genitalia, defendant's hand in all probability touched her inner thigh. *Carter v. United States*, 826 A.2d 300, 2003 D.C. App. LEXIS 302 (2003).

Even though there was variance between misdemeanor sexual abuse indictment, which alleged sexual touching of victim's genitalia and evidence presented at trial that defendant touched victim's inner thigh, defendant, whose sole defense was consent, neither claimed prejudice nor made any evidentiary showing that variance impaired his defense. *Carter v. United States*, 826 A.2d 300, 2003 D.C. App. LEXIS 302 (2003).

Notwithstanding her failure explicitly to mention portion of victim's thigh with which defendant had contact, judge, who had misdemeanor sexual abuse statute in hand, effectively found defendant guilty of a sexual touching of the inner thigh, based on victim's testimony that defendant was attempting to push his hand between her clenched legs towards her vagina. *Carter v. United States*, 826 A.2d 300, 2003 D.C. App. LEXIS 302 (2003).

Victim's testimony that defendant tried to force his hand down her thighs in his unsuccessful attempt to reach her vagina, but was prevented from doing so by tightness which she held her legs together, was sufficient to support conviction for misdemeanor sexual abuse for the sexual touching of complainant's inner thigh. *Carter v. United States*, 826 A.2d 300, 2003 D.C. App. LEXIS 302 (2003).

Defense counsel's decision not to pursue a line of questioning of complainant about possible financial motive for bringing prosecution for sexual abuse was reasonable trial strategy, and thus could not constitute ineffective assistance. *Harkins v. United States*, 810 A.2d 895, 2002 D.C. App. LEXIS 654 (2002).

There are two essential elements to misdemeanor sexual abuse: (1) that the defendant committed a sexual act or sexual contact, and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact. *Harkins v. United States*, 810 A.2d 895, 2002 D.C. App. LEXIS 654 (2002).

For a defendant to be found guilty of misdemeanor sexual abuse by way of sexual contact, the government must prove the specific intent to use, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. *Harkins v. United States*, 810 A.2d 895, 2002 D.C. App. LEXIS 654 (2002).

Evidence supported finding that defendant had specific intent to commit misdemeanor sexual abuse, as element of crime; evidence showed that defendant rubbed against victim's thigh on subway train, persisted even after victim moved, touched victim's buttock as she went to another seat, followed her to two other seats, and dropped business card in victim's newspaper with statement, "Give me a call sometime, baby." *Harkins v. United States*, 810 A.2d 895, 2002 D.C. App. LEXIS 654 (2002).

The essential elements of misdemeanor sexual abuse (MSA) are: (1) that the defendant committed a "sexual act" or "sexual contact" as statutorily defined; and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual conduct. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

When prosecuting misdemeanor sexual abuse (MSA) based on alleged sexual contact or penetration of the anus or vulva, the government must prove an element of intent, i.e., the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Non-violent sexual touching simple assault is lesser-included offense of misdemeanor sexual abuse (MSA); MSA includes all elements of non-violent sexual touching assault, plus at least one additional element of intent not found in latter, i.e., intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Evidence in bench trial for misdemeanor sexual abuse (MSA) supported consideration of lesser-included offense of simple assault; there was rational basis for concluding that defendant's acts, which allegedly involved touching victims' breasts, buttocks, and vaginal areas with spray can, were not undertaken with intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person, but would nonetheless be offensive to people of

reasonable sensibility. *Mungo v. United States*, 772 A.2d 240, 2001 D.C. App. LEXIS 103 (2001).

Defendant's Sixth Amendment right of confrontation was not violated, in sexual abuse prosecution arising from alleged assault against then-13-year-old complaining witness, by order precluding defense counsel from cross-examining complaining witness about questions her mother asked when, at the same time she told mother of charged incident, she also reported an alleged sexual assault by defendant's father; cross-examination that was permitted allowed defendant to develop theory that mother influenced complaining witness to file a false report against defendant. *Guzman v. United States*, 769 A.2d 785, 2001 D.C. App. LEXIS 69 (2001).

Order entered in sexual abuse prosecution that arose from alleged assault on then-13-year-old complaining witness, precluding cross-examination of complaining witness concerning questions that mother asked her when she told mother of an alleged assault by defendant's father, was not abuse of discretion, where defendant's own objections had resulted in ruling that barred prosecution from eliciting that evidence on direct examination of complaining witness. *Guzman v. United States*, 769 A.2d 785, 2001 D.C. App. LEXIS 69 (2001).

Any error, in sexual abuse prosecution arising from alleged assault on then-13-year-old complaining witness, in ruling that precluded defense from cross-examining complaining witness about questions posed by her mother when she told mother of a separate alleged assault by defendant's father, was not prejudicial so as to warrant reversal of conviction; defense still had considerable leeway to explore theory that mother influenced the filing of a false report against defendant, and defense failed to call mother as witness despite having opportunity to do so. *Guzman v. United States*, 769 A.2d 785, 2001 D.C. App. LEXIS 69 (2001).

Indictment and information.

Failure to state specific date on which offenses allegedly occurred in charging information did not render information unconstitutionally broad; information charged him with engaging in misdemeanor sexual abuse between two specific dates and again between two specific dates, it included elements of offense of misdemeanor sexual abuse and cited relevant code provision that defined offense, and thus defendant had fair notice of charges against him was informed of range of dates when offenses were alleged to have taken place. *Olafisoye v. United States*, 857 A.2d 1078, 2004 D.C. App. LEXIS 446 (2004).

Intent.

The element of intent, with respect to offense of misdemeanor sexual abuse, may be shown by

virtue of touching or attempting to touch a complainant's private area. *Nkop v. United States*, 945 A.2d 617, 2008 D.C. App. LEXIS 121 (2008).

New trial.

Defendant convicted of two counts of misdemeanor child abuse was entitled to evidentiary hearing on his motion for new trial, of which the basis was newly discovered evidence that consisted of letter from defendant's ex-girlfriend in which she alleged that she and victim's mother had concocted a plan to coach and threaten victim into falsely accusing defendant of sexual abuse; evidentiary hearing was necessary to assess ex-girlfriend's credibility, in light of fact that she had not testified at trial and had sent a conflicting undated letter to defendant in jail, and if credible, the information in her letter would exonerate defendant. *Thomas v. United States*, 942 A.2d 1180, 2008 D.C. App. LEXIS 87 (2008).

Presumptions and burden of proof.

To prove misdemeanor sexual abuse, the government must prove the defendant: (1) committed a "sexual act" or "sexual contact"; (2) intended to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; and (3) knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact. *Nkop v. United States*, 945 A.2d 617, 2008 D.C. App. LEXIS 121 (2008).

Defendant failed to meet burden of showing that prosecutor's alleged misrepresentations of evidence, by making arguments to court based on premise that prosecutor knew to be false, could in any reasonable likelihood have affected judgment of trial court in prosecution for misdemeanor sexual abuse. *Powell v. United States*, 880 A.2d 248, 2005 D.C. App. LEXIS 411 (2005).

Because the law makes clear that children are legally incapable of consenting to sexual activity with adults, if the complainant in a misdemeanor sexual abuse or other general sexual assault prosecution was a child at time of alleged offense, an adult defendant who is at least four years older than complainant may not assert consent defense, and in such a case, the child's consent is not valid, and by the same token, unless he was deceived, the defendant is charged with the knowledge that the sexual act or contact was committed without the child's valid permission. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

To prove misdemeanor sexual abuse, the government need only establish that the defendant knew or should have known that the complainant did not give "permission" to the sexual act or contact at issue, and term "permission" is a synonym for "consent." *Davis v. United States*,

873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Right to jury trial.

In order to be entitled to a jury trial for a "petty" offense, a defendant must show that any additional penalties, i.e., penalties other than incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a serious one. *Thomas v. United States*, 942 A.2d 1180, 2008 D.C. App. LEXIS 87 (2008).

An offense is considered "petty," for purposes of constitutional right to jury trial, if it is punishable by a sentence of no more than 180 days of incarceration. *Thomas v. United States*, 942 A.2d 1180, 2008 D.C. App. LEXIS 87 (2008).

Separate acts.

The trial court's refusal to sever the misdemeanor sexual abuse charges related to victim one from the misdemeanor sexual abuse charges related to victim two was erroneous; defendant's defense was that the sexual encounters were consensual, the intent required for the offense was only that defendant had sexual contact with the victims intending to "gratify (his) sexual desire," and the fact that victim one may not have consented to sexual activity showed nothing as to whether victim two consented to sexual activity with defendant. *Robles v. U.S.*, 2012 WL 3600888 (2012).

Defendant's insertion of his finger into victim's vagina was a new criminal act, the product of a new impulse, punishable separately from earlier act of penetrating victim's vagina with his penis, such that two convictions for misdemeanor sexual abuse did not violate Double Jeopardy Clause. *Jenkins v. United States*, 980 A.2d 421, 2009 D.C. App. LEXIS 365 (2009).

Weight and sufficiency of evidence.

Government presented sufficient evidence of each of the elements of misdemeanor sexual abuse, such that defendant was not entitled to judgment of acquittal; government presented sufficient evidence that defendant improperly touched victim's buttocks without her permission and did so with the intent to abuse, humiliate, harass, degrade, or arouse or gratify his sexual desire, victim, who was defendant's stepdaughter, testified that defendant brushed across her back, at which time his penis touched the top part of her butt, and she told him to move, she also testified that she was tired of him brushing up against her in this manner because it had happened a couple of days a week for years. *Steward v. United States*, 6 A.3d 1268, 2010 D.C. App. LEXIS 616 (2010).

Evidence supported finding that, by causing the touching of his own genitalia with victim's body, defendant engaged in "sexual contact," as

required to support conviction for misdemeanor sexual abuse; victim testified that when defendant hugged her, she could feel his hard penis against her. *Pinckney v. United States*, 906 A.2d 301, 2006 D.C. App. LEXIS 496 (2006).

Evidence was sufficient to support defendant's conviction for attempted misdemeanor sexual abuse of his daughter; according to his daughter, defendant committed an overt act that went beyond mere preparation when he exposed himself to her and asked her to rub his penis, and since his eleven-year-old daughter was legally incapable of consenting to defendant's sexual advance, coercion was implicit and need not have been otherwise shown, defendant's intent to obtain illicit sexual gratifi-

cation could be inferred, and his overt acts would have resulted in a completed crime but for fact that his daughter fled, instead of submitting to his request. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Sufficient evidence supported conviction for misdemeanor sexual abuse; victim testified that defendant touched her breasts with his hand and her genitalia with a vacuum cleaner hose, and defendant's intent to derive gratification from his actions was inferable from his testimony, during which he characterized incidents as "good times." *Olafisoye v. United States*, 857 A.2d 1078, 2004 D.C. App. LEXIS 446 (2004).

§ 22-3007. Defense to sexual abuse.

Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.

(May 23, 1995, D.C. Law 10-257, § 206, 42 DCR 53; Dec. 10, 2009, D.C. Law 18-88, § 213, 56 DCR 7413.)

Prior Codifications. — 1981 Ed., § 22-4107.

Effect of amendments. — D.C. Law 18-88 deleted "defense, which the defendant must establish by a preponderance of the evidence," following "defense".

Emergency legislation. — For temporary (90 day) amendment of section, see § 213 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 213 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CASE NOTES

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Admissibility of evidence.
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Questions of law and fact.
Validity.
Weight and sufficiency of evidence.

Admissibility of evidence.

Evidence was sufficient to support defendant's conviction for attempted misdemeanor sexual abuse of his daughter; according to his daughter, defendant committed an overt act that went beyond mere preparation when he exposed himself to her and asked her to rub his penis, and since his eleven-year-old daughter was legally incapable of consenting to defendant's sexual advance, coercion was implicit

and need not have been otherwise shown, defendant's intent to obtain illicit sexual gratification could be inferred, and his overt acts would have resulted in a completed crime but for fact that his daughter fled, instead of submitting to his request. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Evidence that defendants beat complaining witness approximately one week before alleged rapes was relevant to issue whether sexual contact between defendants and witness was consensual, as defendants claimed, or rape, as prosecutor contended, and thus, evidence was admissible in rape prosecution. D.C. Code 1981, § 22-3202; § 22-2801 (repealed). *Bolanos v. United States*, 718 A.2d 532, 1998 D.C. App. LEXIS 186 (1998).

In rape prosecution, evidence of specific acts of sexual intercourse with defendant himself

should be admitted where either there may be an issue of identity at trial or to rebut the Government's evidence that prosecutrix did not consent to sexual intercourse on the particular occasion. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

Construction and application.

In rape prosecution, "consent" is not shown when the evidence discloses resistance is overcome by threats which put the woman in fear of death or grave bodily harm or by those combined with some degree of physical force. *Ewing v. U.S.*, 135 F.2d 633, 1942 U.S. App. LEXIS 2445 (1942).

In determining whether defendant has proved consent as affirmative defense to rape charge, voluntariness is not the standard; correct standard is whether reasonable person would think that complainant's "words or overt actions indicate[d] a freely given agreement to the sexual act or contact in question." D.C. Code 1981, § 22-4101(4). *Russell v. United States*, 698 A.2d 1007, 1997 D.C. App. LEXIS 178 (1997).

The fact that a woman consented to sexual intercourse on one occasion is not substantial evidence that she consented on another, but in fact may indicate the contrary. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

Consent by alleged rape victim is not shown when the evidence discloses resistance overcome by threats which put the woman in fear of death or great bodily harm, or by these combined with some degree of physical force. *Harley v. United States*, 373 A.2d 898, 1977 D.C. App. LEXIS 320 (1977).

Examination of witnesses.

In prosecution for rape and housebreaking, wherein defendant admitted sex relations and testified that prosecutrix had consented, prosecutor was properly allowed to impeach defendant's credibility by reading affidavit, which defendant had made as indigent defendant to secure subpoena and in which defendant had stated that witness whom he sought to subpoena could establish alibi for him. D.C. Code 1961, §§ 22-1801, 22-2801; Fed. Rules Crim. Proc. rule 17(b), 18 U.S.C. *Smith v. U.S.*, 312 F.2d 867, 1962 U.S. App. LEXIS 3335 (C.A.D.C. 1962).

Instructions.

In rape prosecution, wherein defendant relied on defense of consent of prosecutrix, trial court properly gave instruction requiring corroboration of prosecutrix' testimony that she did not consent to the intercourse. *United States v. Green*, 429 F.2d 754, 1970 U.S. App. LEXIS 8665 (C.A.D.C. 1970).

In prosecution for rape and sodomy, defendant's prayers for instructions assuming as fact that complaining witness did not offer opposition should have been denied. D.C. Code 1940, §§ 22-2801, 22-3502. *McGuinn v. U.S.*, 191 F.2d 477, 1951 U.S. App. LEXIS 2575 (C.A.D.C. 1951).

In prosecution for rape and sodomy, defendant's prayer for instruction requiring that complaining witness' fear be mortal to negative her consent was properly denied, as fear of grave bodily harm was sufficient. D.C. Code 1940, §§ 22-2801, 22-3502. *McGuinn v. U.S.*, 191 F.2d 477, 1951 U.S. App. LEXIS 2575 (C.A.D.C. 1951).

In prosecution for rape and sodomy, court properly instructed jury that there must be absence of consent by complaining witness to warrant conviction, unless consent was induced by putting her in fear of grave bodily harm or death or by exercise of actual force against her person. D.C. Code 1940, §§ 22-2801, 22-3502. *McGuinn v. U.S.*, 191 F.2d 477, 1951 U.S. App. LEXIS 2575 (C.A.D.C. 1951).

In criminal cases, defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility, and even though the sole testimony in support of the defense is the defendant's own testimony. *Tatum v. U.S.*, 190 F.2d 612, 1951 U.S. App. LEXIS 2469 (C.A.D.C. 1951).

Erroneous affirmative defense consent instruction in prosecution for first-degree sexual assault, which placed the burden of persuasion on defendant to prove consent by a preponderance of the evidence created a reasonable likelihood that the jury applied the instruction so as to impermissibly shift the burden of persuasion to the defense on the critical element of force, in violation of due process; instruction was confusing, trial court never explained how jury could reconcile the affirmative defense of consent with the government's burden of proving the use of force, but instead, perplexingly told the jury it had to consider whether victim consented even if it initially found the government had established the element of force., and while trial court properly told jury it could consider evidence of consent in deciding whether the government had met its burden of proving force, it never explicitly warned the jury that defendant's burden to prove consent by a preponderance of the evidence was irrelevant to that determination. *Hatch v. United States*, 35 A.3d 1115, 2011 D.C. App. LEXIS 682 (2011).

Instruction on government's burden of proof in first-degree sexual abuse prosecution, which did not inform jury that it could consider defendant's evidence on affirmative defense of consent in deciding whether government proved

that act was accomplished by force, violated due process; when defendant raised affirmative defense and evidence was presented that was relevant to that defense, jury was free to consider that evidence, unless legislature properly provided otherwise, in connection with its determination whether government proved elements of offense beyond reasonable doubt, and jury had to be told that it could consider the evidence for that purpose. U.S. Const.Amend. 5; D.C. Code 1981, § 22-4102. *Hicks v. United States*, 707 A.2d 1301, 1998 D.C. App. LEXIS 99 (1998).

Standard general instruction on government's burden of proof in rape prosecution, which did not inform jury that it could consider defendant's evidence on affirmative defense of consent in deciding whether government proved that act was accomplished by force, violated due process; when defendant raised affirmative defense and evidence was presented by either party that was relevant to defense, jury was free to consider that evidence, unless legislature properly provided otherwise, in connection with its determination whether government proved elements of offense beyond reasonable doubt, and jury had to be told that it could consider evidence for that purpose. U.S. Const.Amend. 5; D.C. Code 1981, § 22-4102. *Russell v. United States*, 698 A.2d 1007, 1997 D.C. App. LEXIS 178 (1997).

In enacting amended rape statute, District of Columbia Council did not exclude consent evidence as relevant to government's burden of proof and, therefore, evidence relating to consent is relevant to question of force, and failure to instruct jury in that regard, if requested, violates due process. U.S.C. Const.Amend. 5; D.C. Code 1981, § 22-4102. *Russell v. United States*, 698 A.2d 1007, 1997 D.C. App. LEXIS 178 (1997).

Presumptions and burden of proof.

Because the law makes clear that children are legally incapable of consenting to sexual activity with adults, if the complainant in a misdemeanor sexual abuse or other general sexual assault prosecution was a child at time of alleged offense, an adult defendant who is at least four years older than complainant may not assert consent defense, and in such a case, the child's consent is not valid, and by the same token, unless he was deceived, the defendant is charged with the knowledge that the sexual act or contact was committed without the child's valid permission. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

When non-violent sexual touching is prosecuted as a simple assault, the prosecution must establish that the complainant did not consent to being touched, but if the complainant was a child at the time of the assault, the defense of consent is unavailable. *Davis v. United States*,

873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

To prove lack of consent in rape case, Government was not required to establish that victim submitted solely because accused had weapon, and it was enough that victim's resistance was overcome through use of physical force and threats, such that she reasonably believed that she would be harmed if she did not submit, and victim's testimony that defendant grabbed her around the neck from behind, held what she thought was knife to her throat and threatened to kill her if she did not accompany him permitted finding of want of consent. D.C. Code 1981, §§ 22-2801, 22-3202. *Boyd v. United States*, 473 A.2d 828, 1984 D.C. App. LEXIS 328 (1984).

Questions of law and fact.

Complainant's testimony, combined with tears in her clothing and evidence that she had been beaten was sufficient to present question for jury as to nonconsent in rape case. *United States v. Green*, 429 F.2d 754, 1970 U.S. App. LEXIS 8665 (C.A.D.C. 1970).

Evidence in rape prosecution was sufficient to submit issue of victim's consent to jury. D.C. Code § 22-2801. *Johnson v. United States*, 426 F.2d 651, 1970 U.S. App. LEXIS 10205 (C.A.D.C. 1970).

Validity.

Defendant should have known that his eleven-year-old daughter could not validly consent to his sexual advances, and therefore, defendant could be convicted of attempted misdemeanor sexual abuse pursuant to statute providing that whoever engages in a sexual act with another person and who should have knowledge that the act was committed without that other person's permission shall be imprisoned; term "permission," as used in statute, was synonym for "consent," and law stated that children were legally incapable of consenting to sexual activity with adults. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Affirmative defense provision requiring defendant to establish consent by preponderance of evidence does not violate due process where legislature did not exclude consent evidence as relevant to government's burden of proof on elements of offense. U.S. Const.Amend. 5; D.C. Code 1981, § 22-4107. *Russell v. United States*, 698 A.2d 1007, 1997 D.C. App. LEXIS 178 (1997).

Weight and sufficiency of evidence.

In rape prosecution, testimony of complaining witness and the circumstantial evidence supporting it, which were sufficient to show that the intercourse occurred and took place by force and against her will in the sense that her resistance was overcome by physical force and

threats which put her in fear of her life, sustained jury's implicit finding that the act was without the "consent" of the complaining witness. *Ewing v. U.S.*, 135 F.2d 633, 1942 U.S. App. LEXIS 2445 (1942).

Evidence did not support affirmative defense consent instruction in prosecution for first-degree sexual assault, which placed the burden of persuasion on defendant to prove consent by a preponderance of the evidence; defendant's defense at trial was limited to denying victim's claim that he forced her to perform sexual acts by threatening her with a pistol, and that victim, who was a prostitute, participated in their sexual encounter without coercion on his part, in exchange for cash, and then fabricated her accusation of a forcible sexual assault to

exact revenge for defendant's refusal to pay her for all the sexual services he enjoyed, and defendant never claimed that victim was a willing participant despite his having held her at gunpoint, nor was there any evidence to support such a claim. *Hatch v. United States*, 35 A.3d 1115, 2011 D.C. App. LEXIS 682 (2011).

Evidence in rape prosecution, which revealed sequence of events which established that defendant utilized physical force and threats to overcome victim's resistance and that victim's final submission to defendant was solely result of her fear of bodily injury to herself and to her infant son, was sufficient to establish lack of consent. D.C. Code § 22-2801. *Smith v. United States*, 363 A.2d 667, 1976 D.C. App. LEXIS 378 (1976).

§ 22-3008. First degree child sexual abuse.

Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined an amount not to exceed \$250,000. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.

(May 23, 1995, D.C. Law 10-257, § 207, 42 DCR 53; June 8, 2001, D.C. Law 13-302, § 7(b), 47 DCR 7249.)

Cross references. — Sentencing, supervised release, and good time credit for felonies under this section committed on or after August 5, 2000, see § 24-403.01.

Section references. — This section is referred to in §§ 22-3010 to 22-3012.

Prior Codifications. — 1981 Ed., § 22-4108.

Effect of amendments. — D.C. Law 13-302 added the last two sentences.

Emergency legislation. — For temporary (90-day) amendment of section, see § 7(b) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of section, see § 7(b) of the Sentencing Reform Congressional Review Emergency Amendment Act

of 2001 (D.C. Act 13-462, November 7, 2000, 47 DCR 9443).

For temporary (90 day) amendment of section, see § 7(b) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 7(b) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

CASE NOTES

ANALYSIS

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Admissibility of evidence.

In prosecution for asserted taking of indecent liberties with child and asserted carnal knowledge, where examining physician was out of jurisdiction and unavailable, report of his medical examination was not admissible. *D.C. Code 1951, §§ 22-2801, 22-3501(a)*. *Whittaker v. U.S.*, 281 F.2d 631, 1960 U.S. App. LEXIS 4010 (C.A.D.C. 1960).

Testimony of expert witness on the sexual victimization of children was admissible in prosecution of defendant, who was a teacher, for sexually abusing and assaulting students; expert's "grooming" testimony was beyond the ken of a lay trier of fact and would be helpful to the jurors in their consideration of the evidence, and expert's testimony helped to explain not only how a child molester could accomplish his crimes without violence, but also why a child victim would acquiesce and be reluctant to turn against her abuser. *Jones v. United States*, 990 A.2d 970, 2010 D.C. App. LEXIS 136 (2010).

Child victim's statement to foster mother, in which she stated that juvenile "did bad things to me" and "we were in the bedroom and he pulled his pants down and he pulled my pants down and when he was done he ran into the bathroom," was not admissible as an excited utterance, in juvenile adjudication proceeding; the statement was made six months after the startling event occurred, and victim became distraught only upon reflecting upon what had happened to her. *In re L.L.*, 974 A.2d 859, 2009 D.C. App. LEXIS 243 (2009).

Testimony of physician who had examined child at hospital, that child said that his mother's boyfriend struck him in the face and back with a closed fist because he told his mother that the boyfriend was sexually abusing his sister, was admissible under "medical diagnosis" exception to rule against hearsay, in prosecution for first-degree child sexual abuse and cruelty to children; child's statement was relevant to his diagnosis and treatment, and medical record containing statement, which record had been admitted into evidence, was accompanied by kind of testimony and cross-examination that tested statement's reliability. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

In reviewing trial court rulings on alleged ineffectiveness of counsel, the Court of Appeals accepts trial court findings of fact unless they lack evidentiary support, and the Court reviews questions of law de novo. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

A sexual assault qualifies as serious occurrence for purposes of holding that a statement qualifies as an excited or spontaneous utterance. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Two-year-old victim's mother's testimony regarding allegations of another sexual assault by defendant was admissible as excited utterance exception to prohibition against hearsay in sexual abuse prosecution involving five-year-old victim; two-year-old was crying at time she told her mother what defendant had done to her, victim only revealed what had happened when her mother took her to bathroom and found she could not urinate, and mother first learned of assault, reported it to police, and took victim to hospital all on same day. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Five-year-old sexual abuse victim adopted statements from videotape taken with child advocacy counselor, and thus, tape was admissible as substantive evidence; videotape contained statements made while victim was not under oath, and because victim testified, after being impeached with videotape, that defendant had in fact done what record revealed, victim adopted those portions of videotape used to impeach her. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Medical expert's testimony regarding the identification of fissure or tear, during victim's rectal examination, was admissible as other act evidence, in prosecution for first-degree child sexual assault; such evidence was directly linked to victim's testimony that defendant had engaged in anal sex with her over extended period of time, and in particular on the day before she was examined. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

Police officer's testimony that victim had reported that defendant "had beaten her" was admissible as other act evidence, in prosecution for first-degree child sexual abuse; victim's statement was closely intertwined with the report of sexual abuse and placed the charged crime in context, because the beating was the immediate cause of her finally deciding to go to the police despite defendant's threats. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

Defendant did not make precise demonstration, in prosecution for first-degree child sexual abuse, of probative value of evidence of victim's alleged prior sexual activity with her cousin;

defense counsel could only proffer that she had evidence that victim and cousin “were caught in the basement at least fooling around, if not having sex at one point. My evidence is they were having sex,” without proffering any evidence suggesting that this information was credible and without explaining how victim’s alleged sexual activity with cousin would undercut medical testimony regarding victim. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

If the statement of fault involves a child who has been sexually assaulted by a member of her household, it may be admissible under the medical diagnosis exception to the hearsay rule, because the injury being treated is no longer just physical but psychological and emotional as well, and because such statements are relevant to preventing reoccurrence of the abuse. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

Medical expert’s testimony that victim’s medical records indicated that victim had told medical personnel that she had intercourse with defendant “yesterday,” that she also had rectal intercourse, that she had had sexual intercourse two to three times per week with defendant in basement of their home and in living room, and that first incident of sexual abuse or sexual activity occurred when she was about five years old, was admissible under medical diagnosis exception to hearsay rule, in prosecution for first-degree child sexual abuse. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

Medical expert’s testimony that victim’s medical records indicated that victim had told medical personnel that defendant “had sexually abused her,” that she “was molested at his home after school,” and that “it happened a lot of times” was admissible under prior identification exception to hearsay rule, in prosecution for first-degree child sexual abuse; no details of the incidents themselves were divulged in the statements. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

Detective’s testimony that victim told her, during interview at police headquarters, that “she was assaulted by [defendant]” was admissible under prior identification exception to hearsay rule, in prosecution for first-degree child sexual abuse. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

In prosecution for incest and child sexual abuse, expert testimony from state’s clinical psychologist regarding behavior of sexually abused children was properly admitted with limitations precluding expert from making ultimate conclusions on whether victim was truthful or whether defendant was guilty, as information was beyond average juror’s understanding, where expert discussed ability of children to sequence events, and she made obser-

vations that child victims of incest do not always promptly report such abuse, and that children, unlike adults, display range of responses to abuse, including not visibly reacting. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In child sexual abuse cases, expert testimony regarding behavior of sexually abused children is admissible as part of the government’s case-in-chief because it provides a useful profile to the jury of the range of behaviors exhibited by victims; thus, such expert testimony is admissible in cases where the government successfully proffers that the facts and evidence to be presented at trial are likely to be inconsistent with a lay juror’s expectations as to how a child sexual abuse victim should respond to such a traumatizing event. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

Trial court did not abuse its discretion in prosecution for child sexual abuse and threat to injure a child by denying defendant’s motion to exclude photographs of his home, even though defendant claimed such photographs had little probative value; record showed trial court spent time reviewing each of the government’s proposed photographic exhibits, and court determined that some of the pictures were useful in illustrating testimony of victim. *Shorter v. United States*, 792 A.2d 228, 2001 D.C. App. LEXIS 672 (2001).

Complainant’s statements to her friend that she was having sex with defendant were admissible in prosecution for first-degree child sexual abuse under “report of rape rule,” even if 14-year-old complainant was a willing participant, where defendant claimed complainant falsely implicated him because she did not want her mother to find out she was having sex with teenage boys, exclusion of statements would have misled jury into believing that complainant implicated defendant only when she was questioned by an authority figure, and trial court instructed jury that statements could only be considered in judging complainant’s credibility as a witness. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

Complainant’s statements to her friend that she was having sex with defendant was admissible as substantive evidence in prosecution for first-degree child sexual abuse, as statements fell under the prior identification exception to the hearsay rule because her statements identified defendant as the person she was having sex with but included no details of the sexual

incidents. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

Testimony recounting details of the complainant's descriptions of the assault would not be admissible under the prior identification exception. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

Evidence of uncharged acts of sexual abuse and vaginal intercourse against child complainant were admissible on theory of predisposition to gratify special desires with that particular victim, in prosecution for various sex offenses, including rape and sexual abuse. D.C. Code 1981, §§ 22-4102, 22-4108; §§ 22-2801, 22-3501 (repealed). *Graham v. United States*, 746 A.2d 289, 2000 D.C. App. LEXIS 30 (2000).

Juvenile's mother could testify as to nonconfidential matter of juvenile's date of birth and age, in juvenile delinquency proceeding based on charge of child sexual abuse through sexual contact with child at least four years younger than juvenile. D.C. Code 1981, §§ 22-4101(3, 9), 22-4109. In re E.F., 740 A.2d 547, 1999 D.C. App. LEXIS 256 (1999).

In prosecution for armed rape, indecent acts with a minor, and various related offenses involving two teenaged girls, evidence of other sex crimes involving defendant and three other teenaged girls was admissible to prove that defendant had an unusual preference for having sexual relations with young girls. *Johnson v. United States*, 610 A.2d 729, 1992 D.C. App. LEXIS 175 (1992).

Resolving conflicting expert testimony about whether anal penetration had occurred was jury issue in prosecution for oral and anal sodomy of complainant, who was nine years old at time of alleged offense. D.C. Code 1981, § 22-3502(b). *Barrera v. United States*, 599 A.2d 1119, 1991 D.C. App. LEXIS 323 (1991).

If promptness of report of sex crime made by victim, and circumstance of spontaneity, tend to preclude fabrication, testimony falls under "spontaneous utterance" hearsay exception, but if declaration loses character of spontaneous utterance and becomes calm narrative of past event, it will be inadmissible under such exception, and trial judge has discretion to decide when statement about sex crime is spontaneous utterance. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Where, of conversations including earliest which took place next day after assault and others taking place after lapse of 10 and 12 days in response to questioning, none took place while child was still in throes of traumatic episode following sex offense, statements were hearsay and not admissible under spontaneous utterance exception for truth of attempted rape itself, but were admissible under "complaint of rape" doctrine, not for truth of

matter asserted but for fact that statement was made. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, in view of threat made against child so that she feared reprisal, there was explanation for delay in her report of occurrence, and thus fact of complaint was admissible, but not details of occurrence, testimony being offered only to bolster credibility of complainant, and thus testimony should be limited to fact that complaint was made, without details, and jury was to be instructed that such evidence was to be considered solely for purpose of corroboration of testimony of complainant. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Arguments and conduct of counsel.

Statement of counsel for defendant in closing argument to jury in prosecution for rape of nine year old, that verdict of guilty was proper under the circumstances and evidence, was a defect affecting "substantial rights" within meaning of rule that plain errors or defects affecting "substantial rights" may be noticed on appeal though they were not brought to attention of the trial court. D.C. Code 1940, § 22-2801; Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C. *Tatum v. U.S.*, 190 F.2d 612, 1951 U.S. App. LEXIS 2469 (C.A.D.C. 1951).

In prosecution for carnally knowing and abusing a female child of the age of nine years, refusal to permit defendant's counsel to argue the sociological aspects of the case as a matter of extenuation of the crime was not error. D.C. Code 1940, § 22-2801. *Holmes v. U.S.*, 171 F.2d 1022, 1948 U.S. App. LEXIS 2938 (C.A.D.C. 1948).

While prosecutor's statement during rebuttal argument of trial for first-degree child sexual abuse, in which he described the complainant as among "the most vulnerable [type of kids] in our society," and "the kind of kid who is going to get sexually assaulted when she's making unwise choices," would better have been left unsaid, it had no substantial influence on the jury's verdict and thus did not require reversal of defendant's conviction; the court immediately gave a curative instruction, the record provided no basis to rebut the presumption that the jury understood and followed it, and the prosecutor immediately ceased this line of argument. *Teoume-Lessane v. United States*, 931 A.2d 478, 2007 D.C. App. LEXIS 684 (2007), writ of certiorari denied by 555 U.S. 927, 129 S. Ct. 301, 172 L. Ed. 2d 220, 2008 U.S. LEXIS 6025, 77 U.S.L.W. 3206 (2008).

Prosecutor's comments during closing argument of trial for first-degree child sexual abuse, specifically his characterization the defense's assertions that the evidence of penetration was insufficient as "laughable" and "ridiculous," were not improper; the comments were squarely within the category of commenting on the evidence and were delivered at a time when the prosecutor was specifically focusing on the futility of defendant's attempt to deny the government's evidence on sexual penetration. *Teoume-Lessane v. United States*, 931 A.2d 478, 2007 D.C. App. LEXIS 684 (2007), writ of certiorari denied by 555 U.S. 927, 129 S. Ct. 301, 172 L. Ed. 2d 220, 2008 U.S. LEXIS 6025, 77 U.S.L.W. 3206 (2008).

Prosecutor's statements during closing argument, to the effect that defendant's presence in court allowed him to fabricate a story in response to the government's evidence, were not improper, during prosecution for first-degree child sexual abuse; while the Constitution would allow such comments even without specific indications of tailoring, the government was particularly justified in using the tactic in defendant's case, where it could pinpoint aspects of defendant's testimony that seemed unusually coincidental to the government's presentation. *Teoume-Lessane v. United States*, 931 A.2d 478, 2007 D.C. App. LEXIS 684 (2007), writ of certiorari denied by 555 U.S. 927, 129 S. Ct. 301, 172 L. Ed. 2d 220, 2008 U.S. LEXIS 6025, 77 U.S.L.W. 3206 (2008).

Defense counsel's withdrawal of his objection to double hearsay testimony of one of child's treating physicians, which consisted of physician reading medical record prepared by child's other treating physician that reported that child's grandmother had stated that child told grandmother that defendant had "put [a] pillow over my body and put his fingers in my privates[.]" constituted trial strategy, and, thus could not amount to ineffective assistance, in prosecution for first-degree child sexual abuse and cruelty to children; defense counsel finally decided, as matter of trial strategy, to permit admission of first and second level written hearsay in medical record, even for truth of statements made, in lieu of risking live testimony by a hostile witness, the grandmother, and the sympathetic alleged victim, the child. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Refusal to prohibit contact between government and five-year-old sexual abuse victim over course of her testimony was not abuse of discretion; prosecutor did not wish to talk to victim about substance of her testimony, but rather to ensure that she would come on time, and that child advocacy counselor could talk to victim and try and determine whether she would in fact be able to testify, prosecutor stated that she was willing to comply with court's terms not to

discuss testimony directly, and court was fully justified in not separating five-year-old victim from child advocacy counselor who was treating her. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Prosecutor's statement made during rebuttal closing argument that five-year-old sexual abuse victim, who had given portion of her testimony from jury room via closed circuit television, was aware of defendant's presence nearby in courtroom, was not improper prosecutorial overreaching, but was based on reasonable inference by prosecutor, in view of accessibility of jury room from courtroom, movement of other persons from jury room to courtroom, and victim's interaction with trial judge during her testimony. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Trial court did not commit plain error by failing to intervene, sua sponte, and by failing to prohibit cross-examination and closing argument concerning defendant's change of story about his sexual relations with teenage cousin, in prosecution for rape and unlawful carnal knowledge of child under 16 years of age. D.C. Code 1981, § 22-2801 (repealed). *Roberts v. United States*, 743 A.2d 212, 1999 D.C. App. LEXIS 301 (1999).

Competency of witnesses.

With children of tender years, it is proper for a trial judge to conduct a preliminary voir dire on issue of testimonial maturity; questioning at such hearing should be handled in a way that is meaningful and not by inquiry that borders on the casual and uses leading questions. *United States v. Schoefield*, 465 F.2d 560, 1972 U.S. App. LEXIS 9659 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 881, 93 S. Ct. 210, 34 L. Ed. 2d 136, 1972 U.S. LEXIS 1700 (1972).

Ultimate test of competency of a young child as a witness is whether he has the requisite intelligence and mental capacity to understand, recall and narrate his impressions of an occurrence. *United States v. Schoefield*, 465 F.2d 560, 1972 U.S. App. LEXIS 9659 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 881, 93 S. Ct. 210, 34 L. Ed. 2d 136, 1972 U.S. LEXIS 1700 (1972).

Where 12-year-old complainant was student in sixth grade and transcript revealed intelligent comprehension in terms of answering questions, there was no basis for claim that trial judge, who was not requested to conduct preliminary voir dire as to testimonial maturity, was clearly erroneous either in proceeding without a preliminary voir dire or in accepting testimony of complainant and her 13-year-old brother. *United States v. Schoefield*, 465 F.2d 560, 1972 U.S. App. LEXIS 9659 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 881,

93 S. Ct. 210, 34 L. Ed. 2d 136, 1972 U.S. LEXIS 1700 (1972).

Decision of the trial judge as to competency of a young child as a witness may not be upset on appeal unless clearly erroneous; such rule applies not only to his ultimate decision on testimonial maturity but also to the examination he chooses to conduct to appraise capacity. *United States v. Schoefield*, 465 F.2d 560, 1972 U.S. App. LEXIS 9659 (C.A.D.C. 1972), writ of certiorari denied by 409 U.S. 881, 93 S. Ct. 210, 34 L. Ed. 2d 136, 1972 U.S. LEXIS 1700 (1972).

While expert witness on sexual victimization of children lacked formal academic training in psychology, he spent over twenty years in the Behavioral Science Unit studying the sexual victimization of children, and he had shared his conclusions with, and undoubtedly had received feedback from, other professionals working in the same or related areas, including mental health specialists, and thus, he was qualified as expert to testify about sexual victimization of children in prosecution of defendant, who was a teacher, for sexually abusing and assaulting students; expert was qualified to describe the behavior patterns he had observed in hundreds of cases, and his "psychological" testimony was grounded in those observations and correspondingly modest in scope. *Jones v. United States*, 990 A.2d 970, 2010 D.C. App. LEXIS 136 (2010).

It was not abuse of discretion to find that child sexual abuse victim who was seven years old at time of trial and six years old at time of abuse was competent to testify; trial court found that victim knew difference between truth and falsehood based on victim's responses to preliminary examination, and, notwithstanding court's observation that child was hazy on some details, court also concluded that child was able to recall details sufficiently to be considered competent to testify. *Barnes v. United States*, 600 A.2d 821, 1991 D.C. App. LEXIS 344 (1991).

Before child witness can be found competent to testify, child must be able to recall events which are subject of testimony, and child must understand difference between truth and falsehood and appreciate duty to tell truth. *Barnes v. United States*, 600 A.2d 821, 1991 D.C. App. LEXIS 344 (1991).

Trial court's determination of competency of child witness is question of law which is committed to its sound discretion; Court of Appeals will not disturb trial court's decision unless it is clearly erroneous, recognizing that trial court has opportunity to observe witness' demeanor and conduct at trial. *Barnes v. United States*, 600 A.2d 821, 1991 D.C. App. LEXIS 344 (1991).

Court of Appeals may consider actual testimony of child witness when evaluating whether trial court's exercise of discretion in allowing

child to testify was clearly erroneous; if trial transcript reveals that complainant had intelligent comprehension in answering questions posed to her, trial court's finding of competency will be upheld even absent voir dire. *Barnes v. United States*, 600 A.2d 821, 1991 D.C. App. LEXIS 344 (1991).

Inconsistencies in testimony of complainant, who was ten years old at time of trial, and gaps in complainant's memory and knowledge were issues that affected credibility to be given complainant's testimony, not his competence as witness. *Barrera v. United States*, 599 A.2d 1119, 1991 D.C. App. LEXIS 323 (1991).

Determination of whether child is legally competent to testify is matter which rests within broad discretion of trial court; because trial court has opportunity to observe witness' conduct and demeanor at trial, court's decision will not be disturbed on appeal unless shown to be clearly erroneous. *Johnson v. United States*, 364 A.2d 1198, 1976 D.C. App. LEXIS 385 (1976).

Appellate court, in determining whether trial court abused its discretion by permitting child to testify, may properly examine actual testimony of child; however, appellate court cannot review child's conduct and demeanor in courtroom. *Johnson v. United States*, 364 A.2d 1198, 1976 D.C. App. LEXIS 385 (1976).

Corroboration.

Uncorroborated testimony by complainant, who had been nine years old at time of alleged offense, that defendant placed his penis in complainant's mouth and anus and fondled complainant's penis was sufficient to raise jury issue in prosecution for committing indecent act with child under age of 16 and for oral and anal sodomy; independent corroboration was not required. D.C. Code 1981, §§ 22-3501, 22-3502, 23-114. *Barrera v. United States*, 599 A.2d 1119, 1991 D.C. App. LEXIS 323 (1991).

Requirement of corroboration for conviction of a sex offense against a youthful victim was satisfied by testimony of children living with defendant as to indecent acts with another child and children's conversations with each other about defendant's acts, by testimony of other witnesses substantiating children's testimony, and by uncontroverted evidence of defendant's opportunity to commit the crimes. *Jackson v. United States*, 503 A.2d 1225, 1986 D.C. App. LEXIS 264 (1986).

It remains rule that when victim of alleged "sex offense" is nonmature conviction may not be had upon uncorroborated testimony of victim, and thus government must introduce corroborative evidence to meet burden of proof and to survive defense motion for judgment of acquittal, and though corroboration is initially matter for trial court, it is jury's function to decide whether standard of corroborative proof

has been met and thus case must be submitted to jury with specific instructions requiring finding of independent evidence corroborative of victim's testimony as condition precedent to guilty verdict. D.C. Code §§ 22-501, 22-2801, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Age of victim of "sex offense" remains important factor to be considered in determining sufficiency of corroborative evidence, and trial court could properly take into account child victim's maturity in assessing need for corroboration. D.C. Code §§ 22-501, 22-2801, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Where trial court clearly did not intend to dispense with corroboration requirement, in prosecution for assault with intent to commit rape, taking indecent liberties with minor and enticing minor child but pointed to victim's demonstrated maturity throughout proceedings and presence of corroboration and commented that victim was "not immature as a youngster goes," extrinsic evidence of complainant's emotional state tended to support her story and was sufficient corroboration in light of additional factors diminishing risk of accusation, e. g., no motive to fabricate, demeanor at trial, etc., but omission of corroborative instruction was nonetheless error. D.C. Code §§ 22-501, 22-2801, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In prosecution for "sex offense" against nonmature victim, corroboration is required, as general rule as to both corpus delicti and identity of assailant. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Discovery.

Refusal, in criminal prosecution in which accused was convicted of sodomy, taking indecent liberties with a minor and assault with a deadly weapon and in which three potential government witnesses were of tender age, to grant accused discovery of names and addresses of government witnesses was not abuse of discretion. D.C. Code §§ 22-502, 22-3501(a), 22-3502; D.C. Code SCR, Criminal Rule 16. *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

Double jeopardy.

Repeated acts of forced sexual intercourse, if committed in a single course of conduct, will not be converted into separate rapes, under Double Jeopardy Clause. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Conviction on one count of second-degree child sexual abuse while armed and three

counts of first-degree child sexual abuse while armed did not violate Double Jeopardy Clause; sexual assaults took two hours, and involved various specific types of sexual activity. *Sanchez-Rengifo v. United States*, 815 A.2d 351, 2002 D.C. App. LEXIS 799 (2002).

Double jeopardy precluded defendant's sentencing for both statutory rape and assault with intent to commit common-law rape, based on single act upon 15-year-old girl; statutory rape and common-law rape were merely different means of committing same offense, and thus assault charge, which was lesser-included offense of common-law rape, was also lesser-included offense of statutory rape. D.C. Code 1981, § 22-2801; U.S. Const. Amend. 5. *Brown v. United States*, 576 A.2d 731, 1990 D.C. App. LEXIS 147 (1990).

Examination of witnesses.

In prosecution for carnally knowing and abusing a female child under the age of 16 years, child's statement which had been given to the police, and which was used to impeach the child's testimony exonerating defendant, did not constitute direct evidence of the crime charged. D.C. Code 1951, § 22-2801. *Wheeler v. U.S.*, 211 F.2d 19, 1953 U.S. App. LEXIS 2711 (C.A.D.C. 1953).

Trial court did not abuse its discretion during prosecution for first-degree child sexual abuse by permitting the government to ask its DNA expert, during re-direct examination, whether the defense, as well as the government, had the right to test certain items of evidence collected during the investigation of the case; trial court granted the government's request on the basis that the defense's questions during cross-examination had attempted to create the impression that the testing had been selectively performed to skew the results by focusing only on the items most damaging to defendant, while ignoring items that could have helped to exculpate him. *Teoume-Lessane v. United States*, 931 A.2d 478, 2007 D.C. App. LEXIS 684 (2007), writ of certiorari denied by 555 U.S. 927, 129 S. Ct. 301, 172 L. Ed. 2d 220, 2008 U.S. LEXIS 6025, 77 U.S.L.W. 3206 (2008).

Allowing five-year-old sexual abuse victim's testimony to be videotaped and then played to jury, rather than showing jury live closed circuit testimony, was not abuse of discretion; victim's testimony was replayed because trial court took testimony directly after conducting limited voir dire in jury room, court proceeded in this manner in order to accommodate victim's limited energy and attention span, and by using taped testimony, court ensured that victim's actual testimony could be taken in as compressed amount of time as possible, without having to delay her while jury were brought in after voir dire was completed and her substantive testimony began. *Williams v. United*

States, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Taking five-year-old sexual abuse victim's testimony by way of closed circuit television during prosecution and after victim had already begun her testimony was not error; unsuccessful attempt to get courtroom testimony was added assurance that welfare of victim permitted, if not compelled, remote testimony, and by beginning testimony in courtroom in defendant's presence, trial court at least attempted to afford usual trial confrontation before deciding to use closed circuit television. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Record supported finding that five-year-old sexual abuse victim feared defendant, such that taking victim's testimony by way of closed circuit television was warranted; although on first day of victim's testimony, she pointed to defendant and waved and smiled at him when she entered courtroom, once prosecutor began to question victim about defendant's conduct, she would not respond, she broke down and cried in witness room, she told child advocacy counselor that she refused to answer because she was afraid of defendant, and prosecutor relayed that victim could say the words, she just could not say them in front of defendant. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

A finding of necessity, which was required before a child witness could testify outside the presence of defendant, requires that the trial court: (1) hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify, (2) find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant, and (3) must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis. *Ahmed v. United States*, 856 A.2d 560, 2004 D.C. App. LEXIS 449 (2004), writ of certiorari denied by 544 U.S. 955, 125 S. Ct. 1719, 161 L. Ed. 2d 536, 2005 U.S. LEXIS 2891, 73 U.S.L.W. 3569 (2005).

To protect from further harm child witnesses who have allegedly been abused, the trial court may allow the witness to testify outside the presence of the defendant through closed-circuit television. *Ahmed v. United States*, 856 A.2d 560, 2004 D.C. App. LEXIS 449 (2004), writ of certiorari denied by 544 U.S. 955, 125 S. Ct. 1719, 161 L. Ed. 2d 536, 2005 U.S. LEXIS 2891, 73 U.S.L.W. 3569 (2005).

Defendant's confrontation rights were not violated when the trial court allowed child victim to testify outside the presence of defendant, during sexual abuse prosecution; trial court found that allowing the victim to testify

via closed circuit television was necessary due to the victim's continued fear of testifying in front of defendant, the fact that the victim ran away and spent the night on the street rather than go to court and testify, and the fact that child victim was experiencing psychological trauma from testifying in front of defendant, her father. *Ahmed v. United States*, 856 A.2d 560, 2004 D.C. App. LEXIS 449 (2004), writ of certiorari denied by 544 U.S. 955, 125 S. Ct. 1719, 161 L. Ed. 2d 536, 2005 U.S. LEXIS 2891, 73 U.S.L.W. 3569 (2005).

Cross-examination of victim regarding her knowledge of her cousin's allegations of sexual assault against third party, to show that accusations of sexual assault were "tossed around" in environment in which victim was raised and that victim was attempting to emulate her cousins by making similar accusations, involved a subject collateral to the case being tried and would have served only to confuse and distract jury from actual issues in the case, and thus, failure to allow such cross-examination did not violate Confrontation Clause, in prosecution for first-degree child sexual abuse. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

In prosecution for incest and child sexual abuse, defendant was not denied his right of confrontation when trial court, during cross-examination of state's psychological expert, precluded defendant from asking specific questions regarding suggestibility of children on ground that such questions were beyond scope of the direct examination testimony; although expert's direct examination testimony on children's ability to access their memories may have raised suggestibility issue, trial court allowed defendant opportunity to establish his main point on cross-examination that suggestibility can influence accuracy of children's memories. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for child sexual abuse and incest, victim's failure to mention in first trial that defendant gave her rides on his back into his bedroom before abusing her, which was her testimony on retrial, did not amount to an inconsistency by omission such that defendant could use it for impeachment purposes; victim was asked in first trial whether defendant did something that saddened or hurt her, but her testimony regarding the piggy back rides would not have been an appropriate response to such a question. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for child sexual abuse and incest, victim's failure to mention in first trial that she was sexually abused in the bathtub of defendant's apartment, which was her testimony on retrial, did not amount to an inconsistency by omission such that defendant could use it for impeachment purposes; fact was not sufficiently material that the failure to mention it amounted to an inconsistency, as the question posed in the first trial concerned abuse that occurred after family split up, and victim's testimony about bathtub incident was that it occurred while family was still living together. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for child sexual abuse and incest, victim's failure to mention in first trial that a spirit moved her to tell her mother about the abuse, which was her testimony on retrial, did not amount to an inconsistency by omission such that defendant could use it for impeachment purposes; question posed in first trial, inquiring why she did not tell her mother about the abuse, did not naturally call for her statement in second trial, which was in response to question regarding what caused her to choose a particular day to tell her mother. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

In prosecution for child sexual abuse and threat to injure a child, defendant was entitled to have a limited voir dire conducted of victim and victim's mother concerning a prior allegation of sexual abuse committed on victim by defendant, for purposes of determining whether victim was subject to cross-examination regarding prior allegation; victim was a crucial government witness, defendant could have shown that victim was biased if victim did fabricate prior charge of sexual abuse committed by defendant, and defendant's proffer of facts that supported claimed false allegation was not scanty or conclusory. *Shorter v. United States*, 792 A.2d 228, 2001 D.C. App. LEXIS 672 (2001).

Supreme Court ruling in *Craig* that state statutory procedure allowing use of one way closed circuit television for child abuse victim testimony outside of presence of defendant based upon adequate showing of necessity is not premised on existence of state enabling statute; all that is required is trial court findings reflecting compliance with three "necessity" criteria specified in *Craig*. U.S.C. Const.Amend. 6. *Rural Hicks-Bey v. United States*, 649 A.2d 569, 1994 D.C. App. LEXIS 205 (1994), writ of certiorari denied by 516 U.S.

897, 116 S. Ct. 251, 133 L. Ed. 2d 176, 1995 U.S. LEXIS 6583, 64 U.S.L.W. 3247 (1995).

In prosecution for carnal knowledge, trial court properly permitted minor victim to testify at trial over closed-circuit television, out of presence of defendant and judge, despite lack of enabling legislation in jurisdiction to permit such a procedure; presence of a statute was not a prerequisite to constitutionality of proposed procedure, and trial court made findings that use of procedure was necessary to protect welfare of victim, that victim would be traumatized by presence of defendant, and that emotional distress suffered by victim was more than de minimis. U.S. Const.Amend. 6; D.C. Code 1981, § 22-2801. *Rural Hicks-Bey v. United States*, 649 A.2d 569, 1994 D.C. App. LEXIS 205 (1994), writ of certiorari denied by 516 U.S. 897, 116 S. Ct. 251, 133 L. Ed. 2d 176, 1995 U.S. LEXIS 6583, 64 U.S.L.W. 3247 (1995).

In prosecution for sodomy, taking indecent liberties with a minor and assault with a deadly weapon, questioning of complainant as to, inter alia, "Why is it that the first time you said the man tried to do it and later you said that he did do it" did not constitute "impeachment", for purposes of statute permitting party to impeach its own witness only if party is taken by surprise by witness' testimony, but rather a permissible effort to obtain an "explanation" for established inconsistent statements. D.C. Code §§ 14-102, 22-502, 22-3501(a), 22-3502. *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

Harmless or prejudicial error.

In prosecution for carnally knowing a female child, admission of testimony of mother that child had accused defendant in statement made to mother on night of attack did not require reversal, even if error, in view of fact that neither such testimony when made nor the trial court's reference thereto in charge as exception to hearsay rule was objected to, and its admission was not included among grounds for new trial sought below. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.; D.C. Code 1951, § 22-2801. *Crawford v. U.S.*, 198 F.2d 976, 1952 U.S. App. LEXIS 3266 (C.A.D.C. 1952).

Court of Appeals would review for plain error issue of whether trial court had erred in responding to jury's request during deliberations to see various written statements that had been referred to by witnesses and lawyers but had not been admitted into evidence, in prosecution for first-degree child sexual abuse and cruelty to children, as defense counsel failed to move for admission of written statements into evidence and did not object to trial court's responsive instruction. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Trial court's response to jury's request during deliberations to see various written statements

that witnesses and lawyers had referred to but that had not been admitted into evidence, which was to tell jury that they had heard all of the evidence and had been provided with all exhibits that had been admitted into evidence, was not plain error, in prosecution for first-degree child sexual abuse and cruelty to children; defense counsel had not requested that trial court place statements before jury, or even that court reporter read testimony containing statements to jury, and thus trial court did not plainly err in declining to reopen trial to introduce statements in evidence. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Determination that five-year-old sexual abuse victim was competent to testify was not reversible error; although victim initially testified that she did not remember what had happened, child advocacy counselor testified that inability to recall was indicative of stress, victim was able to give limited testimony about offenses charged, voir dire of victim demonstrated she understood difference between truth and falsehood and understood duty to tell the truth, and victim agreed with prosecutor that it would be bad if she lied. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Parallel proceedings against father for civil child neglect and criminal child sexual abuse, arising out of same incident, did not jeopardize fairness or integrity of father's child neglect hearing. *In re J.W.*, 837 A.2d 40, 2003 D.C. App. LEXIS 697 (2003).

Defendant was not unduly prejudiced by admission of hearsay testimony involving delayed report of sexual assault on complainant, who was nine years old at time of alleged offense, and, therefore, admission of hearsay and denial of motion for mistrial were not reversible error; defense counsel did not raise timely objection and, on cross-examination, was able to highlight inconsistencies between complainant's testimony and that of 12-year-old friend to whom complainant had made delayed report, even though trial court ignored defendant's request that there be no jury instruction dealing with delayed report. *Barrera v. United States*, 599 A.2d 1119, 1991 D.C. App. LEXIS 323 (1991).

Admission of serologist's testimony as to blood type of person whose blood and semen were found on alleged sodomy victim's clothing, and as to percent of population having that type of blood, was harmless; victim provided three separate identifications of defendant, reported assault immediately, and provided a detailed description of assailant to police, results of victim's medical examination were consistent with rectal sodomy and stab wound that victim reported, and victim's neighbor testified that he saw victim and stranger walking down

sidewalk toward victim's house at time of incident. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Concurrent nature of sentences for sodomy and taking indecent liberties with minor convictions did not preclude reversal of indecent liberties conviction and remand with directions to vacate defendant's sentence for that offense. D.C. Code 1981, §§ 22-3501(a), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Denial, in prosecution for sodomy, taking indecent liberties with a minor and assault with a deadly weapon, of formal introduction of documents reflecting prior inconsistent statements of complaining witness was not reversible error where there was both extensive cross-examination and pointed final argument with regard to such inconsistent statements. D.C. Code §§ 22-502, 22-3501(a), 22-3502. *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

In prosecution for sodomy, taking indecent liberties with minor and assault with a deadly weapon, refusal to grant accused access to complaining witness' subpoenaed school records, which reflected no prior homosexual or other serious behavioral problems, was not reversible error. D.C. Code §§ 22-502, 22-3501(a), 22-3502. *Davis v. United States*, 315 A.2d 157, 1974 D.C. App. LEXIS 364 (1974).

Indictment or information.

Evidence was sufficient to establish that charge of first degree sexual abuse occurred during time period specified in indictment so as to support conviction for first degree sexual abuse; although prosecutor did not establish time frame for when abuse happened, during testimony victim gave while being impeached with her prior videotaped statement, however, victim relayed that she was three years old when defendant started abusing her, and victim would still have been three when time period associated with instant offense began. *Williams v. United States*, 859 A.2d 130, 2004 D.C. App. LEXIS 452 (2004).

Evidence supporting fifth count of indictment for first-degree child sexual abuse did not present a variance from or constructive amendment of indictment that would warrant dismissal, where fifth count simply charged that, on or about a particular month, defendant engaged in sexual intercourse with complainant, indictment did not particularize any other specific facts of the incident, this was precisely the conduct of which defendant was convicted, and actual date of offense varied from charged date by no more than approximately two weeks. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

Defendant's double jeopardy guarantee was not compromised by generality of language of

indictment charging first-degree child sexual abuse, as defendant could rely not only upon the indictment but also upon other parts of the present record in the event that future proceedings should be taken against him. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

Period of time covered by each count of indictment charging rape and unlawful carnal knowledge of child under 16 years of age arising from series of acts against defendant's cousin was not so protracted that defendant was denied fair notice of crime with which he was charged. U.S. Const. Amends. 5, 6; D.C. Code 1981, § 22-2801 (repealed); Criminal Rule 7(c). *Roberts v. United States*, 743 A.2d 212, 1999 D.C. App. LEXIS 301 (1999).

Prosecutor did not constructively amend indictment charging rape and unlawful carnal knowledge of child under 16 years of age arising from series of acts against defendant's cousin; all evidence presented by Government relating to defendant's sexual assaults on cousin during period specified in indictment fell within course of conduct charged therein. U.S.C. Const. Amends. 5, 6; D.C. Code 1981, § 22-2801 (repealed); Criminal Rule 7(c). *Roberts v. United States*, 743 A.2d 212, 1999 D.C. App. LEXIS 301 (1999).

Indictment charging rape and unlawful carnal knowledge of child under 16 years of age arising from series of acts against defendant's cousin was not unduly vague; although indictment was hardly a model of clarity, and although its shortcomings were compounded by a singularly infelicitous bill of particulars, indictment passed constitutional muster. U.S.C. Const. Amends. 5, 6; D.C. Code 1981, § 22-2801 (repealed); Criminal Rule 7(c). *Roberts v. United States*, 743 A.2d 212, 1999 D.C. App. LEXIS 301 (1999).

Grand jury charged a series of individual acts, that is, a course of conduct, in each count of indictment charging rape and unlawful carnal knowledge of child under 16 years of age, and Government was entitled, at trial, to present evidence of offenses which fell within that course of conduct. U.S. Const. Amends. 5, 6; D.C. Code 1981, § 22-2801 (repealed); Criminal Rule 7(c). *Roberts v. United States*, 743 A.2d 212, 1999 D.C. App. LEXIS 301 (1999).

Indictment charging defendant with sodomy, taking indecent liberties with a minor child, and enticing a minor child, in 17 counts with seven separate incidents involving three children and setting out four different time frames within a period of 18 months in which the offenses occurred was sufficient to inform appellant of charges against him and did not fail for lack of specificity of times and dates in light of child complainants' inability to recall events by specific time and date. *Jackson v. United*

States, 503 A.2d 1225, 1986 D.C. App. LEXIS 264 (1986).

Evidence failed to show that defendant was prejudiced by lack of particularity of informations which did not contain the particular facts constituting the charged offenses of attempted forcible rape of, simple assault upon, and threats against a 12-year-old girl. D.C. Code 1961, § 22-2801. *Bush v. United States*, 215 A.2d 853, 1966 D.C. App. LEXIS 134 (App. 1966).

Instructions.

Failure of trial judge in prosecution for carnal knowledge of female under 16 years of age to instruct on lesser included offense was not reversible error where no objection was taken to portion of charge given and no such instruction was requested. D.C. Code § 22-2801. *United States v. Dews*, 417 F.2d 753, 1969 U.S. App. LEXIS 11752 (C.A.D.C. 1969).

In prosecution on two-count indictment for taking indecent liberties with child and for carnal knowledge, court acted properly at close of government's case when it granted partial judgment of not guilty under second count, stating that there was no evidence to support carnal knowledge charge but submitting to jury lesser included offense of assault with intent to commit carnal knowledge, but court erred in failing to instruct that jury was first to consider included charge of assault with intent to commit carnal knowledge and was only to consider alleged taking of indecent liberties with child if it found defendant not guilty of the former crime. D.C. Code 1951, §§ 22-2801, 22-3501(a). *Whittaker v. U.S.*, 281 F.2d 631, 1960 U.S. App. LEXIS 4010 (C.A.D.C. 1960).

In prosecution for rape of nine year old girl, evidence as to alleged insanity of defendant was sufficient to raise issue, so as to require submission of issue to jury under guidance of instructions. D.C. Code 1940, § 22-2801. *Tatum v. U.S.*, 190 F.2d 612, 1951 U.S. App. LEXIS 2469 (C.A.D.C. 1951).

Trial court's response to jury's inquiry during deliberations as to what they were to do if they knew of a prior statement only through lawyer's questions, which was to tell jury that facts were established by a witness's answer, not by a lawyer's question, was not abuse of discretion, in prosecution for first-degree child sexual abuse and cruelty to children, as trial court's response was direct, balanced, and neutral response to question, as law required. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Fact that victims were testifying about events that had occurred three to seven years earlier was not special circumstance warranting special instruction on credibility of young witnesses, in prosecution for first-degree child

sexual abuse. *Brown v. United States*, 840 A.2d 82, 2004 D.C. App. LEXIS 2 (2004).

In prosecution for indecent acts with child under age of 16 years, court did not err in modifying instructions stating “[c]hildren are likely to be more suggestible than adults” by substituting “may” for “are likely to”; instructions given fully informed jury of factors to be considered in evaluating child witness’ testimony and left to their judgment weight to be accorded each factor, and modification did not deprive defendant of his fabrication argument, as defendant had opportunity to place any evidence of fabrications before jury. *Barnes v. United States*, 600 A.2d 821, 1991 D.C. App. LEXIS 344 (1991).

Merger of offenses.

Trial court’s findings that juvenile was responsible for kidnapping and child sexual abuse did not merge in delinquency proceeding, where offense of kidnapping required proof of asportation or confinement, and offense of child sexual abuse required proof on an actual or attempted sexual act. *In re D.W.*, 989 A.2d 196, 2010 D.C. App. LEXIS 78 (2010).

Because sodomy and enticing a minor are not necessarily “continuous” by nature, offenses do not merge under first phase of Blockburger analysis, i.e., that there may be instances where defendant could be convicted of both sodomy and enticing, even though offenses are part of single incident. D.C. Code 1981, §§ 22-3501(b), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Offense of enticement of minor merged with crime of sodomy; asportation of victim to bedroom was part of continuous offense and there was no evidence of break in time or any new motive evincing a “fresh impulse” having occurred between defendant’s pursuit of victim and final act of penetration in victim’s bedroom. D.C. Code 1981, §§ 22-3501, 22-3501(d), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Crime of enticing a minor child merges with sodomy. D.C. Code 1981, §§ 22-3501, 22-3501(d), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Convictions for taking indecent liberties with two children living with defendant merged with defendant’s convictions for sodomy so that defendant should not have been convicted and sentenced for both offenses. *Jackson v. United States*, 503 A.2d 1225, 1986 D.C. App. LEXIS 264 (1986).

Nature and elements of offenses.

Elements of offense of carnal knowledge are penetration with a child under the age of 16. D.C. Code § 22-2801. *United States v. Wiley*, 492 F.2d 547, 1973 U.S. App. LEXIS 7557 (C.A.D.C. 1973).

Where offense involves a female child under 16 years of age, only remaining element of corpus delicti is penetration, for when a child under the age of consent is involved the law conclusively presumes force and the question of consent is immaterial. D.C. Code § 22-2801. *United States v. Jones*, 477 F.2d 1213, 1973 U.S. App. LEXIS 11120 (C.A.D.C. 1973).

The elements of the crime of carnally knowing and abusing a female child under statute of the District of Columbia are penetration of a child under the age of 16. D.C. Code 1951, § 22-2801. *Wheeler v. U.S.*, 211 F.2d 19, 1953 U.S. App. LEXIS 2711 (C.A.D.C. 1953).

Minor cannot consent to sexual intercourse in a meaningful way when age gap involves 35-year-old man and 14-year-old girl. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

Elements required to establish offense of carnal knowledge or statutory rape are sexual intercourse with a female child under age of 16 regardless of whether force was used or assent given. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Statutory proscription against carnal knowledge is intended to protect females below age of 16, regardless of use of force or consent, from any sexual relationship. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Presumptions and burden of proof.

Carnal knowledge of a female under the age of consent is “rape”, the law conclusively presuming force. D.C. Code 1940, § 22-2801. *Hall v. U.S.*, 171 F.2d 347, 1948 U.S. App. LEXIS 2845 (C.A.D.C. 1948).

Principals and accessories.

Female may be charged as a principal under statute prohibiting carnal knowledge or abuse of a female child under 16 years of age if she has aided or abetted commission of the particular crime even though female is physically incapable of committing the prohibited act. D.C. Code §§ 22-105, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

Questions of law and fact.

Evidence was for jury in prosecution for committing indecent act with child under age of 16 and for oral and anal sodomy, even if independent corroborating evidence was needed along with testimony of complainant, who was nine years old at time of alleged offense; issue was for jury, even though defense attempted to discredit and rebut circumstantial evidence. D.C. Code 1981, §§ 22-3501, 22-3502, 23-114. *Barrera v. United States*, 599 A.2d 1119, 1991 D.C. App. LEXIS 323 (1991).

Although competency of child to testify is question of law committed to trial court, it

remains for jury to assess credibility of witness and weight to be given the testimony. *Robinson v. United States*, 357 A.2d 412, 1976 D.C. App. LEXIS 536 (1976).

Validity.

Statute prohibiting carnal knowledge or abuse of a female child under 16 years of age was not specifically limited to male offenders and did not deny due process to male youths who were convicted under the statute, despite contention that statute invidiously discriminated against male youths who were under 16 years of age and who engaged in consensual sexual intercourse with females under the age of 16 years by making the male participant alone criminally answerable. D.C. Code § 22-2801; U.S. Const. Amend. 5. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

Protection from illicit sexual intercourse of underage females, in contradistinction to male children, provided by statute prohibiting carnal knowledge and abuse of female child was a reasonable classification and did not deny due process to males under age of 16 in view of fact that only members of female sex are susceptible to pregnancy. D.C. Code § 22-2801; U.S. Const. Amend. 5. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

Verdict.

Remand was required for further findings on issue of whether juror number three, who allegedly had not been polled, assented to guilty verdict, in prosecution for first-degree child sexual abuse and cruelty to children, in which trial transcript reflected that only 11 out of 12 jurors had been polled after jury had announced guilty verdict; infirmities in proof on this issue were not enough to demonstrate that trial court's finding that verdict had been unanimous were clearly erroneous, to point that convictions had to be reversed, but they were enough to require greater certainty before one could say with sufficient confidence that juror number three had joined verdict. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Jury did not reach an irrational result by finding defendant guilty of carnal knowledge while acquitting him of rape where evidence established beyond dispute that complainant was 14 years old at time of incident at defendant's home, that she had previously known defendant and considered him a friend, and that complainant's vagina had been penetrated by sexual organ of a male, even though defendant's defense was that he did not engage in any sexual relationship with her. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Weight and sufficiency of evidence.

In prosecution for carnal knowledge of defendant's ten-year-old daughter, testimony of vic-

tim's eight-year-old brother was sufficient to meet corroboration requirement with respect to proof of sex offenses though his responses to questions were badly garbled and generally difficult to understand, where such deficiencies were attributable to inferior language skills and emotional turmoil rather than to any fundamental inability to observe with accuracy. D.C. Code § 22-2801. *United States v. Ashe*, 478 F.2d 661, 1973 U.S. App. LEXIS 10915 (C.A.D.C. 1973).

Evidence sustained conviction of carnal knowledge and incest. D.C. Code 1951, §§ 22-1901, 22-2801. *Lee v. U.S.*, 200 F.2d 134, 1952 U.S. App. LEXIS 2252 (C.A.D.C. 1952).

In prosecution for carnally knowing and abusing a female child under the age of 16 years, evidence was sufficient to establish penetration. *Holmes v. U.S.*, 171 F.2d 1022, 1948 U.S. App. LEXIS 2938 (C.A.D.C. 1948).

Evidence was sufficient to support conviction for first-degree child sexual abuse; child victim stated that defendant called her into his bedroom, and she "[t]urned on the TV and turned on the—[t]he cartoons. And then he come out of the closet [wearing a] white T-shirt and boxers and he put his private in [her] bottom again." *Koonce v. United States*, 993 A.2d 544, 2010 D.C. App. LEXIS 200 (2010).

Evidence was sufficient in delinquency proceeding to support finding that juvenile committed attempted first-degree child sexual abuse; victim testified that juvenile forced her onto her back on the floor, "got on top of [her]," pulled off his shirt and shoes, and then "tried to unbutton [her] pants" and refused to stop when she said "no." *In re D.W.*, 989 A.2d 196, 2010 D.C. App. LEXIS 78 (2010).

Evidence was insufficient to support juvenile adjudication based on first-degree child sexual abuse; evidence established that juvenile was lying on his back naked, five-year-old victim was naked and was sitting on his groin area, that their groin areas were touching, and that juvenile held victim by her hips and was moving her up and down, child victim did not testify about what happened to her, witness who observed the events did not testify that he saw juvenile penetrate victim, and no forensic evidence suggested penetration. *In re L.L.*, 974 A.2d 859, 2009 D.C. App. LEXIS 243 (2009).

Evidence was insufficient to show that defendant penetrated victim's anus with defendant's penis on or about the date alleged, so as to preclude a finding that defendant committed first-degree child sexual abuse as charged, even though evidence presented at trial supported a finding that some type of sexual abuse occurred at some unspecified time; victim's mother testified that "nothing really happened" on the date alleged, and victim corroborated mother's testimony that there was no sexual act on that

date. In re E.H., 967 A.2d 1270, 2009 D.C. App. LEXIS 54 (2009).

Unsworn letter from deputy director of Court Reporting and Recording Division (CRRD), in which director stated that he had reviewed court reporter's notes and concluded that transcript had failed to reflect that juror number three had been polled and assented to verdict, was not competent evidence, on motion in trial court to correct the trial record, to show with sufficient certainty that this juror had joined the others in guilty verdict, in prosecution for first-degree child sexual abuse and cruelty to children, in which trial transcript reflected that only 11 out of 12 jurors had been polled after jury had announced guilty verdict; letter was unverified, and it was inadmissible hearsay. *Jenkins v. United States*, 870 A.2d 27, 2005 D.C. App. LEXIS 39 (2005).

Victim's testimony, without independent corroboration, was sufficient to support convictions for carnal knowledge, incest, first-degree child sexual abuse, taking indecent liberties with a minor, and second-degree child sexual abuse. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

Evidence of two distinct acts supported conviction on one of two counts of first-degree child sexual abuse, although defendant claimed that complainant did not have a specific memory of when acts alleged in those counts had occurred, as evidence was sufficient to establish essential elements of offense as charged, complainant described encounters covered by the two counts as separate and distinct acts, and complainant's testimony concerning count on which defendant was convicted was corroborated by independent testimony. *Williams v. United States*, 756 A.2d 380, 2000 D.C. App. LEXIS 138 (2000).

While minor victim was unable to testify as to occurrences on night in which she was left alone with defendant, conviction for carnal knowledge was supported by testimony of victim's sister, mother and arresting officers about finding 6-year-old victim seminaked and unconscious, that defendant was in apartment, and testimony of examining physician on night of crime that victim was intoxicated on night of crime and had recently been sexually abused. D.C. Code 1981, § 22-2801. *Rural Hicks-Bey v. United States*, 649 A.2d 569, 1994 D.C. App. LEXIS 205 (1994), writ of certiorari denied by 516 U.S. 897, 116 S. Ct. 251, 133 L. Ed. 2d 176, 1995 U.S. LEXIS 6583, 64 U.S.L.W. 3247 (1995).

Purpose of former sex offense corroboration requirement was to protect a defendant from fabricated or mistaken charges and thus level of corroboration required varied with such fac-

tors as age and sex of complainant, existence of a previous relationship between complainant and defendant and other circumstances, and legally sufficient corroboration of victim's testimony was supplied by any evidence, direct or circumstantial, which was extrinsic to testimony of prosecutrix and which would permit jury to conclude beyond reasonable doubt that victim's account of crime was not fabrication. *Williams v. United States*, 385 A.2d 760, 1978 D.C. App. LEXIS 503 (1978).

Absence of unequivocal medical corroboration of penetration does not preclude conviction of carnal knowledge. D.C. Code § 22-2801. In re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

In delinquency proceeding wherein juvenile was charged with aiding and abetting act of carnal knowledge, evidence was sufficient to establish penetration, a necessary element of the underlying offense. D.C. Code § 22-2801. In re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Evidence in delinquency proceeding was sufficient to sustain finding that juvenile was guilty of aiding and abetting act of carnal knowledge of 13-year-old girl. D.C. Code § 22-2801. In re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Testimony of complainant's mother that she saw defendant having intercourse with her eight-year-old daughter, that defendant was behind the girl on the bed, and that, when the complainant's mother pulled her daughter away from the defendant, she saw his erect penis emerge from someplace behind her daughter, and evidence that, a week after the incident, there was a slight amount of blood near the opening of the vagina and the girl's hymen was not intact was sufficient to sustain defendant's conviction for carnal knowledge. D.C. Code § 22-2801. *Williams v. United States*, 357 A.2d 865, 1976 D.C. App. LEXIS 287 (1976).

Testimony of complainant's mother that she saw defendant having intercourse with her eight-year-old daughter, that defendant was behind the girl on the bed, and that, when the complainant's mother pulled her daughter away from the defendant, she saw his erect penis emerge from someplace behind her daughter, and evidence that, a week after the incident, there was a slight amount of blood near the opening of the vagina and the girl's hymen was not intact was sufficient to sustain defendant's conviction for carnal knowledge. D.C. Code § 22-2801. *Williams v. United States*, 357 A.2d 865, 1976 D.C. App. LEXIS 287 (1976).

Where defendant, who was charged with enticing a minor child to a place for purposes of taking immoral, improper or indecent liberties with the child, admitted that the ten-year-old

female complainant was in his apartment at the time in question, where the girl's presence in the apartment was consistent with her version of what took place there, and where, in addition, police officer testified that the building door had been locked, thus corroborating girl's testimony that someone had opened the door for her, those factors, coupled with the

girl's "excited" state when she promptly reported the incident to her mother, enabled fact finder to conclude beyond a reasonable doubt that the girl's account of the crime was not a fabrication. D.C. Code § 22-3501(b). *Moore v. United States*, 306 A.2d 278, 1973 D.C. App. LEXIS 308 (1973).

§ 22-3009. Second degree child sexual abuse.

Whoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$100,000.

(May 23, 1995, D.C. Law 10-257, § 208, 42 DCR 53.)

Cross references. — Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000, see § 24-403.01.

Section references. — This section is referred to in §§ 22-3010 to 22-3012.

Prior Codifications. — 1981 Ed., § 22-4109.

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

CASE NOTES

ANALYSIS

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Juvenile's mother could testify as to nonconfidential matter of juvenile's date of birth and age, in juvenile delinquency proceeding based on charge of child sexual abuse through sexual contact with child at least four years younger than juvenile. D.C. Code 1981, §§ 22-4101(3, 9), 22-4109. In re E.F., 740 A.2d 547, 1999 D.C. App. LEXIS 256 (1999).

Age of child and defendant.

Statute prohibiting sexual contact with child by person who is at least four years older than child imposed a duty on juvenile, under pain of strict liability, to determine age of child before having sexual contact with her, and that being so, common sense dictated that by engaging in forbidden sexual contact with child, juvenile was presumptively in need of rehabilitation. D.C. Code 1981, §§ 16-2301(6), 16-2317(c)(2),

22-4101(3, 9), 22-4109. In re E.F., 740 A.2d 547, 1999 D.C. App. LEXIS 256 (1999).

Guilty pleas.

Trial court did not abuse its discretion by permitting defendant to voluntarily withdraw his guilty plea to child sexual abuse charge; record showed that defense moved orally to withdraw defendant's guilty plea at sentencing hearing and suggested that a trial date be picked, and that when case was transferred to different judge, defense counsel did not attempt to revive the plea and did not object when prosecutor stated that "there had been no requests by the defense about making an additional plea offer." *Ortiz v. United States*, 942 A.2d 1127, 2008 D.C. App. LEXIS 83 (2008).

Indictment and information.

Count of indictment charging defendant with violating statute punishing one who carnally knows a female child under 16 years of age can be joined with count charging defendant with violation of statute punishing any person who takes, or attempts to take, any immoral, improper, or indecent liberties with any child of either sex, under the age of 16 years to arouse or gratify sexual desires, though latter statute provides that it shall not apply to the offenses covered by the prior statute, if jury is told that it cannot find defendant guilty of both counts and can find him guilty under the second count

only if he is found not guilty under the first count. D.C. Code 1951, §§ 22-2801, 22-3501(a, d). *Thompson v. U.S.*, 228 F.2d 463, 1955 U.S. App. LEXIS 4688 (C.A.D.C. 1955).

Instructions.

Instruction that jury could find defendant guilty of both carnal knowledge and taking indecent liberties with minor child as result of same incident was error. D.C. Code §§ 22-2801, 22-3501(a). *United States v. Heard*, 420 F.2d 628, 1969 U.S. App. LEXIS 10741 (C.A.D.C. 1969), writ of certiorari denied by 397 U.S. 1016, 90 S. Ct. 1252, 25 L. Ed. 2d 431, 1970 U.S. LEXIS 2434 (1970).

Where defendant was charged with both carnal knowledge and taking indecent liberties with minor child, jury should have been instructed to first consider carnal knowledge offense and, if they found defendant guilty beyond reasonable doubt, sole verdict should have been guilty of such offense, but if they acquitted defendant of carnal knowledge they should have proceeded to consider whether defendant was guilty or not guilty of crime of indecent liberties. D.C. Code §§ 22-2801, 22-3501(a). *United States v. Heard*, 420 F.2d 628, 1969 U.S. App. LEXIS 10741 (C.A.D.C. 1969), writ of certiorari denied by 397 U.S. 1016, 90 S. Ct. 1252, 25 L. Ed. 2d 431, 1970 U.S. LEXIS 2434 (1970).

In prosecution on two-count indictment for taking indecent liberties with child and for carnal knowledge, court acted properly at close of government's case when it granted partial judgment of not guilty under second count, stating that there was no evidence to support carnal knowledge charge but submitting to jury lesser included offense of assault with intent to commit carnal knowledge, but court erred in failing to instruct that jury was first to consider included charge of assault with intent to commit carnal knowledge and was only to consider alleged taking of indecent liberties with child if it found defendant not guilty of the former crime. D.C. Code 1951, §§ 22-2801, 22-3501(a). *Whittaker v. U.S.*, 281 F.2d 631, 1960 U.S. App. LEXIS 4010 (C.A.D.C. 1960).

Error in trial court's omission of intent element when instructing jury on second-degree child sexual abuse did not affect defendant's substantial rights and, thus, was not plain error; overwhelming evidence supported a conclusion that defendant's actions with minor victims, who were his two daughters, were taken with intent to gratify himself sexually, in that each victim testified that defendant touched her thighs, buttocks, breasts, and vagina, that such touching made her feel uncomfortable, and that defendant disregarded her requests to stop, and one victim also testified that defendant directed her to pose for nude photographs "like the girls in porno maga-

zines." *Green v. United States*, 948 A.2d 554, 2008 D.C. App. LEXIS 244 (2008).

Merger and lesser included offenses.

Defendant may not properly be convicted of both carnal knowledge and taking indecent liberties with minor child as result of one incident. D.C. Code §§ 22-2801, 22-3501(a). *United States v. Heard*, 420 F.2d 628, 1969 U.S. App. LEXIS 10741 (C.A.D.C. 1969), writ of certiorari denied by 397 U.S. 1016, 90 S. Ct. 1252, 25 L. Ed. 2d 431, 1970 U.S. LEXIS 2434 (1970).

Trial court's findings that juvenile was responsible for kidnapping and child sexual abuse did not merge in delinquency proceeding, where offense of kidnapping required proof of asportation or confinement, and offense of child sexual abuse required proof on an actual or attempted sexual act. *In re D.W.*, 989 A.2d 196, 2010 D.C. App. LEXIS 78 (2010).

If defendant was charged only with rape, trial court erred in finding him guilty of separate, uncharged offense of taking indecent liberties with a child; however, if government charged defendant with both rape and carnal knowledge, trial court could have found defendant guilty of taking indecent liberties with a child a lesser included offense of carnal knowledge. D.C. Code 1973, §§ 16-2305(d), 22-2801, 22-3501(a). *In re C.D.*, 437 A.2d 171, 1981 D.C. App. LEXIS 382 (1981).

Presumptions and burden of proof.

Statute prohibiting sexual contact with child by person who is at least four years older than child does not require proof of scienter to convict. D.C. Code 1981, §§ 22-4101(3, 9), 22-4109. *In re E.F.*, 740 A.2d 547, 1999 D.C. App. LEXIS 256 (1999).

Review.

Where defendant who was charged with both carnal knowledge and with taking indecent liberties with minor child did not request that jury consider indecent liberties charge only after an acquittal of carnal knowledge and jury convicted defendant on both charges after being erroneously instructed that conviction on one charge should not influence verdict on other charge, proper remedy was to remand case with instruction to vacate judgment of conviction of taking indecent liberties with minor child. D.C. Code §§ 22-2801, 22-3501(a). *United States v. Heard*, 420 F.2d 628, 1969 U.S. App. LEXIS 10741 (C.A.D.C. 1969), writ of certiorari denied by 397 U.S. 1016, 90 S. Ct. 1252, 25 L. Ed. 2d 431, 1970 U.S. LEXIS 2434 (1970).

Defendant preserved for appellate review, beyond mere plain error review, a claim that trial court failed to apply the proper legal standard under first prong of Dyer test for admission of expert testimony, i.e., whether the subject matter was so distinctively related to some science, profession, business, or occupa-

tion as to be beyond the ken of “the average lay person,” when denying admission of defendant’s proffered expert testimony on children’s cognitive processes and the pressures and factors that can prompt a child to make false complaints of sexual abuse, in jury-waived prosecution for two counts of aggravated second-degree child sexual abuse; when trial judge articulated the first prong of Dyas test as being whether the proffered expert testimony was outside of the judge’s personal ken or personal expertise or was not helpful to the judge, defense counsel argued that the question was broader than trial judge’s personal knowledge and experience, and government counsel had specifically referenced the Dyas test and had quoted it in its written opposition to defendant’s notice about his proposed expert. *Girardot v. United States*, 996 A.2d 341, 2010 D.C. App. LEXIS 280 (2010).

Weight and sufficiency of evidence.

Evidence was sufficient to support second-degree child sexual abuse conviction; eleven-year-old victim testified that thirty-three-year-old defendant pushed “his private part” against her “bottom” and that he moved himself “from side to side, well, forward and backward”

against her, and when asked repeatedly by the government what she felt rubbing against her buttocks, victim testified that it was defendant’s genitals and not the zipper on his pants. *Ortiz v. United States*, 942 A.2d 1127, 2008 D.C. App. LEXIS 83 (2008).

Jury’s verdict finding defendant guilty of second-degree child sexual abuse was not substantially swayed by testifying victim’s two-week stay with and receipt of gifts from detective and her family; jury heard victim’s testimony that she was never told what to say by detective or the prosecutor, and defense counsel’s theory in opening, closing, and cross-examination was that victim fabricated her account of events due to pressure from detective and the prosecutor. *Ortiz v. United States*, 942 A.2d 1127, 2008 D.C. App. LEXIS 83 (2008).

Victim’s testimony, without independent corroboration, was sufficient to support convictions for carnal knowledge, incest, first-degree child sexual abuse, taking indecent liberties with a minor, and second-degree child sexual abuse. *Mindombe v. United States*, 795 A.2d 39, 2002 D.C. App. LEXIS 71 (2002), writ of certiorari denied by 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200, 2003 U.S. LEXIS 1790, 71 U.S.L.W. 3566 (2003).

§ 22-3009.01. First degree sexual abuse of a minor.

Whoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with that minor or causes that minor to engage in a sexual act shall be imprisoned for not more than 15 years and may be fined in an amount not to exceed \$150,000, or both.

(May 23, 1995, D.C. Law 10-257, § 208a, as added Apr. 24, 2007, D.C. Law 16-306, § 216(b), 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) addition, see § 216(b) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 216(b) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 216(b)

of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 216(b) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

§ 22-3009.02. Second degree sexual abuse of a minor.

Whoever, being 18 years of age or older, is in a significant relationship with a minor and engages in a sexual contact with that minor or causes that minor to engage in a sexual contact shall be imprisoned for not more than 7 ½ years and may be fined in an amount not to exceed \$75,000, or both.

(May 23, 1995, D.C. Law 10-257, § 208b, as added Apr. 24, 2007, D.C. Law 16-306, § 216(c), 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) addition, see § 216(c) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 216(c) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 216(c)

of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 216(c) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

§ 22-3009.03. First degree sexual abuse of a secondary education student.

Any teacher, counselor, principal, coach, or other person of authority in a secondary level school who engages in a sexual act with a student under the age of 20 years enrolled in that school or school system, or causes that student to engage in a sexual act, shall be imprisoned for not more than 10 years, fined in an amount not to exceed \$100,000, or both.

(May 23, 1995, D.C. Law 10-257, § 208c, as added Oct. 23, 2010, D.C. Law 18-239, § 204, 57 DCR 5405.)

Legislative history of Law 18-239. — Law 18-239, the “Prohibition Against Human Trafficking Amendment Act of 2010”, was introduced in Council and assigned Bill No. 18-70, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted

on first and second readings on March 16, 2010, and June 1, 2010, respectively. Signed by the Mayor on June 21, 2010, it was assigned Act No. 18-444 and transmitted to both Houses of Congress for its review. D.C. Law 18-239 became effective on October 23, 2010.

§ 22-3009.04. Second degree sexual abuse of a secondary education student.

Any teacher, counselor, principal, coach, or other person of authority in a secondary level school who engages in sexual conduct with a student under the age of 20 years enrolled in that school or school system, or causes that student to engage in sexual conduct, shall be imprisoned for not more than 5 years, fined in an amount not to exceed \$50,000, or both.

(May 23, 1995, D.C. Law 10-257, § 208d, as added Oct. 23, 2010, D.C. Law 18-239, § 204, 57 DCR 5405.)

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-3009.03.

§ 22-3010. Enticing a child or minor.

(a) Whoever, being at least 4 years older than a child or being in a significant relationship with a minor, (1) takes that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02, or (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or

minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined in an amount not to exceed \$50,000, or both.

(b) Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact, or (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined in an amount not to exceed \$50,000, or both.

(c) No person shall be consecutively sentenced for enticing a child or minor to engage in a sexual act or sexual contact under subsection (a)(2) of this section and engaging in that sexual act or sexual contact with that child or minor, provided, that the enticement occurred closely associated in time with the sexual act or sexual contact.

(May 23, 1995, D.C. Law 10-257, § 209, 42 DCR 53; Apr. 24, 2007, D.C. Law 16-306, § 216(d), 53 DCR 8610; Mar. 25, 2009, D.C. Law 17-353, § 173(b), 56 DCR 1117.)

Cross references. — Sentencing, supervised release, and good time credit for felonies under this section committed on or after August 5, 2000, see § 24-403.01.

Section references. — This section is referred to in §§ 22-3011 and 22-3012.

Prior Codifications. — 1981 Ed., § 22-4110.

Effect of amendments. — D.C. Law 16-306 rewrote the section, which had read as follows: “Whoever, being at least 4 years older than a child, takes that child to any place, or entices, allures, or persuades a child to go to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 and 22-3009 shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$50,000.”

D.C. Law 17-353 validated a previously made technical correction in subsec. (a).

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(d) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(d) of Omnibus Public Safety Congressional Review Emergency Amendment

Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(d) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 216(d) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 17-353. — Law 17-353, the “Technical Amendments Act of 2008”, was introduced in Council and assigned Bill No. 17-994 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 2, 2008, and December 16, 2008, respectively. Signed by the Mayor on January 15, 2009, it was assigned Act No. 17-687 and transmitted to both Houses of Congress for its review. D.C. Law 17-353 became effective on March 25, 2009.

CASE NOTES

ANALYSIS

Discovery.

Indictment and information.

Merger of offenses.

Review.

Weight and sufficiency of evidence.

Discovery.

In a prosecution for enticing a minor child,

government could, in response to child's mother's testimony that child had recanted, call an expert in child sexual abuse, without providing defendant advance notice; under the circumstances, the government acted in a timely manner to disclose its desire to call an expert, to proffer the substance of the expert's testimony, and to provide information regarding the expert's credentials. Criminal Rule 16. *Oliver v. United States*, 711 A.2d 70, 1998 D.C. App. LEXIS 90 (1998).

Indictment and information.

Prosecution did not rely on distinctly different complex of facts at trial from those set forth in indictment, and thus no constructive amendment to indictment occurred warranting reversal of defendant's convictions of sexual offenses committed against child, although there was evidence that defendant might have sexually assaulted child in two separate incidents, where indictment charged that between dates specified defendant enticed child, took indecent liberties with child, and committed sodomy with child, this was precise conduct of which defendant was convicted, and jury was instructed that defendant could be convicted of only one incident. *Pace v. United States*, 705 A.2d 673, 1998 D.C. App. LEXIS 12 (1998).

Merger of offenses.

Defendant's conviction for kidnapping did not merge with his conviction for enticing a child; each of two crimes required proof of a factual element which the other did not. *Blackledge v. United States*, 871 A.2d 1193, 2005 D.C. App. LEXIS 155 (2005).

Because sodomy and enticing a minor are not necessarily "continuous" by nature, offenses do

not merge under first phase of Blockburger analysis, i.e., that there may be instances where defendant could be convicted of both sodomy and enticing, even though offenses are part of single incident. D.C. Code 1981, §§ 22-3501(b), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Offense of enticement of minor merged with crime of sodomy; asportation of victim to bedroom was part of continuous offense and there was no evidence of break in time or any new motive evincing a "fresh impulse" having occurred between defendant's pursuit of victim and final act of penetration in victim's bedroom. D.C. Code 1981, §§ 22-3501, 22-3501(d), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Crime of enticing a minor child merges with sodomy. D.C. Code 1981, §§ 22-3501, 22-3501(d), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Review.

Concurrent nature of sentences for sodomy and taking indecent liberties with minor convictions did not preclude reversal of indecent liberties conviction and remand with directions to vacate defendant's sentence for that offense. D.C. Code 1981, §§ 22-3501(a), 22-3502. *Watson v. United States*, 524 A.2d 736, 1987 D.C. App. LEXIS 337 (1987).

Weight and sufficiency of evidence.

Defendant's conviction for kidnapping did not merge with his conviction for enticing a child; each of two crimes required proof of a factual element which the other did not. *Blackledge v. United States*, 871 A.2d 1193, 2005 D.C. App. LEXIS 155 (2005).

§ 22-3010.01. Misdemeanor sexual abuse of a child or minor.

(a) Whoever, being 18 years of age or older and more than 4 years older than a child, or being 18 years of age or older and being in a significant relationship with a minor, engages in sexually suggestive conduct with that child or minor shall be imprisoned for not more than 180 days, or fined in an amount not to exceed \$1,000, or both.

(b) For the purposes of this section, the term "sexually suggestive conduct" means engaging in any of the following acts in a way which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person:

- (1) Touching a child or minor inside his or her clothing;
- (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks;
- (3) Placing one's tongue in the mouth of the child or minor; or
- (4) Touching one's own genitalia or that of a third person.

(May 23, 1995, D.C. Law 10-257, §. 209a, as added Apr. 24, 2007, D.C. Law 16-306, § 216(e), 53 DCR 8610.)

Emergency legislation. — For temporary (90 day) addition, see § 216(e) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 216(e) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 216(e) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 216(e) of Omnibus Public Safety Second Congressio-

nal Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) addition of section, see § 511(a) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) addition of section, see § 511(a) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

§ 22-3010.02. Arranging for a sexual contact with a real or fictitious child.

(a) It is unlawful for a person to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person. For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.

(b) A person who violates subsection (a) of this section shall be imprisoned for not more than 5 years, fined an amount not to exceed \$50,000, or both.

(May 23, 1995, D.C. Law 10-257, § 209b, as added June 3, 2011, D.C. Law 18-377, § 11(a), 58 DCR 1174.)

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

§ 22-3011. Defenses to child sexual abuse and sexual abuse of a minor.

(a) Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.

(b) Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.

(May 23, 1995, D.C. Law 10-257, § 210, 42 DCR 53; Apr. 24, 2007, D.C. Law

16-306, § 216(f), 53 DCR 8610; June 3, 2011, D.C. Law 18-377, § 11(b), 58 DCR 1174.)

Prior Codifications. — 1981 Ed., § 22-4111.

Effect of amendments. — D.C. Law 16-306, in the section heading, substituted “abuse and sexual abuse of a minor” for “abuse”; and substituted “§ 22-3010.01” for “§ 22-3010” both times it appears.

D.C. Law 18-377, in subsec. (b), substituted “Marriage or domestic partnership between the defendant and the child” for “Marriage between the defendant and the child” and substituted “child or minor” for “child”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(f) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(f) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(f) of Omnibus Public Safety Congressional Review Emergency Amendment

Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 216(f) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 511(b) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 511(b) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

CASE NOTES

ANALYSIS

Insanity.

Nature and elements of offense.

Presumption and burden of proof.

Purposes.

Subsequent marriage.

Insanity.

In prosecution for taking immoral liberties with female child under 16 years of age where significant evidence was introduced that defendant might have been of unsound mind at time of alleged crime including evidence of delusions and hearing of voices, court should have instructed jury on issue of sanity and failure of court to do so required new trial. D.C. Code 1951, § 22-3501(a). *Goforth v. U.S.*, 269 F.2d 778, 1959 U.S. App. LEXIS 3536 (C.A.D.C. 1959).

Where significant evidence was introduced on trial of defendant for taking immoral liberties with female child that defendant might have been of unsound mind at time of alleged crime including evidence of delusions and hearing of voices, prosecution had burden of proving sanity beyond a reasonable doubt. D.C. Code 1951, § 22-3501(a). *Goforth v. U.S.*, 269 F.2d 778, 1959 U.S. App. LEXIS 3536 (C.A.D.C. 1959).

Where trial counsel, in prosecution for taking indecent liberties with a child, did not utilize defense of insanity because counsel thought the evidence did not warrant it and because he felt that, in good conscience, he could not urge it upon the court, defendant was not denied the effective assistance of counsel because of failure to raise defense of insanity, and hence his motion to vacate judgment for such reason would be denied. D.C. Code 1951, § 22-3501(a); 18 U.S.C. § 2255. *U.S. v. Plummer*, 171 F.Supp. 1, 1959 U.S. Dist. LEXIS 3527 (D.D.C.1959).

Nature and elements of offense.

Elements of offense of carnal knowledge are penetration with a child under the age of 16. D.C. Code § 22-2801. *United States v. Wiley*, 492 F.2d 547, 1973 U.S. App. LEXIS 7557 (C.A.D.C. 1973).

Where offense involves a female child under 16 years of age, only remaining element of corpus delicti is penetration, for when a child under the age of consent is involved the law conclusively presumes force and the question of consent is immaterial. D.C. Code § 22-2801. *United States v. Jones*, 477 F.2d 1213, 1973 U.S. App. LEXIS 11120 (C.A.D.C. 1973).

The elements of the crime of carnally knowing and abusing a female child under statute of the District of Columbia are penetration of a

child under the age of 16. D.C. Code 1951, § 22-2801. *Wheeler v. U.S.*, 211 F.2d 19, 1953 U.S. App. LEXIS 2711 (C.A.D.C. 1953).

Defendant should have known that his eleven-year-old daughter could not validly consent to his sexual advances, and therefore, defendant could be convicted of attempted misdemeanor sexual abuse pursuant to statute providing that whoever engages in a sexual act with another person and who should have knowledge that the act was committed without that other person's permission shall be imprisoned; term "permission," as used in statute, was synonym for "consent," and law stated that children were legally incapable of consenting to sexual activity with adults. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Elements required to establish offense of carnal knowledge or statutory rape are sexual intercourse with a female child under age of 16 regardless of whether force was used or assent given. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Statutory proscription against carnal knowledge is intended to protect females below age of 16, regardless of use of force or consent, from any sexual relationship. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Elements required to establish offense of carnal knowledge or statutory rape are sexual intercourse with a female child under age of 16 regardless of whether force was used or assent given. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Elements of carnal knowledge are penetration of a victim under the age of 16. D.C. Code § 22-2801. *In re J.W.Y.*, 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Presumption and burden of proof.

When a child under the age of consent is involved in sexual offense, the law conclusively

presumes force and the question of child's consent is immaterial. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Because the law makes clear that children are legally incapable of consenting to sexual activity with adults, if the complainant in a misdemeanor sexual abuse or other general sexual assault prosecution was a child at time of alleged offense, an adult defendant who is at least four years older than complainant may not assert consent defense, and in such a case, the child's consent is not valid, and by the same token, unless he was deceived, the defendant is charged with the knowledge that the sexual act or contact was committed without the child's valid permission. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Purposes.

Statutory proscription against carnal knowledge is intended to protect females below age of 16, regardless of use of force or consent, from any sexual relationship. D.C. Code § 22-2801. *Ballard v. United States*, 430 A.2d 483, 1981 D.C. App. LEXIS 243 (1981).

Subsequent marriage.

In a prosecution for statutory rape, evidence of subsequent marriage of parties is admissible, in view of Code, § 808, as amended by Act April 19, 1920, 41 Stat. 567, authorizing jury to include death penalty in verdict, and also admissible to impeach prosecutrix's testimony denying marriage or affection for defendant. *Weaver v. U.S.*, 299 F. 893, 1924 U.S. App. LEXIS 3487 (1924).

In a prosecution for statutory rape, evidence of subsequent marriage of parties is admissible, in view of Code, § 808, as amended by Act April 19, 1920, 41 Stat. 567, authorizing jury to include death penalty in verdict, and also admissible to impeach prosecutrix's testimony denying marriage or affection for defendant, and exclusion was not harmless because jury did not assess death penalty. *Weaver v. U.S.*, 299 F. 893, 1924 U.S. App. LEXIS 3487 (1924).

§ 22-3012. State of mind proof requirement.

In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child.

(May 23, 1995, D.C. Law 10-257, § 211, 42 DCR 53.)

Prior Codifications. — 1981 Ed., § 22-4112.

Legislative history of Law 10-257. — For

legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

§ 22-3013. First degree sexual abuse of a ward, patient, client, or prisoner.

Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution; anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions; or any official custodian of a ward, patient, client, or prisoner, who engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client, or prisoner to engage in or submit to a sexual act shall be imprisoned for not more than 10 years or fined in an amount not to exceed \$100,000, or both.

(May 23, 1995, D.C. Law 10-257, § 212, 42 DCR 53; May 17, 1996, D.C. Law 11-119, § 6(a), 43 DCR 528; Apr. 24, 2007, D.C. Law 16-306, § 216(g), 53 DCR 8610.)

Section references. — This section is referred to in § 22-3017.

Prior Codifications. — 1981 Ed., § 22-4113.

Effect of amendments. — D.C. Law 16-306 rewrote the section.

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(g) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 8643).

For temporary (90 day) amendment of section, see § 216(g) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(g) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section,

see § 216(g) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 11-119. — Law 11-119, the “Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and transmitted to both Houses of Congress for its review. D.C. Law 11-119 became effective May 17, 1996.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

ANALYSIS

Examination of witnesses.

Review.

Sentence and punishment.

Weight and sufficiency of evidence.

Examination of witnesses.

In prosecution for carnal knowledge, trial court properly permitted minor victim to testify at trial over closed-circuit television, out of presence of defendant and judge, despite lack of enabling legislation in jurisdiction to permit such a procedure; presence of a statute was not a prerequisite to constitutionality of proposed procedure, and trial court made findings that use of procedure was necessary to protect well-

fare of victim, that victim would be traumatized by presence of defendant, and that emotional distress suffered by victim was more than de minimis. U.S. Const. Amend. 6; D.C. Code 1981, § 22-2801. *Rural Hicks-Bey v. United States*, 649 A.2d 569, 1994 D.C. App. LEXIS 205 (1994), writ of certiorari denied by 516 U.S. 897, 116 S. Ct. 251, 133 L. Ed. 2d 176, 1995 U.S. LEXIS 6583, 64 U.S.L.W. 3247 (1995).

Review.

Defendant's sentence for first-degree sexual abuse of a ward could not be reviewed for reasonableness on appeal; sentence, which was within statutory limits, was unreviewable aside from constitutional considerations. *R.W.*

v. United States, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by 558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

Court of Appeals would decline to review trial court's decision that victim's transgender status signified "reduced physical capacity" for purposes of voluntary sentencing guidelines in prosecution for first-degree sexual abuse of a ward; guidelines were entirely voluntary, and trial court judges were free to apply or ignore them as they saw fit without interference by Court of Appeals. *R.W. v. United States*, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by 558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

Sentence and punishment.

Trial court, which concluded that defendant, a corrections officer, knew of and took advantage of transgender status of victim, who was an inmate, and which found that transgender status conferred particular vulnerability, did not rely on materially false or unreliable evidence in determining defendant's sentence for first-degree sexual abuse of a ward, and thus defendant's due process rights were not violated; defendant did not deny that he knew of victim's transgender status, and victim testified that she did not scream for help during encounter and was afraid to report it, fearing that because people perceived her as "faggot" or "punk," no one at prison would have believed her accusations. *R.W. v. United States*, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by 558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

Non-consensual nature of defendant's contact with victim warranted a longer sentence than might have been appropriate if victim had consented to the contact in prosecution for first-degree sexual abuse of a ward. *R.W. v. United States*, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by

558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

Defendant's 84-month sentence for first-degree sexual abuse of a ward was not so grossly disproportionate to offense that it offended Eighth Amendment; sentence was intended to reflect victim's particular vulnerability as transgender inmate in all-male prison unit, and encounter between victim and defendant, who was corrections officer, was non-consensual. *R.W. v. United States*, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by 558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

Weight and sufficiency of evidence.

Sufficient evidence existed that sexual act occurred to support conviction for first-degree sexual abuse of a ward, although sperm fraction taken from victim's mouth matched victim's DNA and defendant was excluded as source of either sperm fraction or non-sperm fraction; evidence indicated that defendant, a corrections officer, stuck his penis in mouth of victim, who was an inmate, and ejaculated in victim's mouth. *R.W. v. United States*, 958 A.2d 259, 2008 D.C. App. LEXIS 417 (2008), writ of certiorari denied by 558 U.S. 902, 130 S. Ct. 260, 175 L. Ed. 2d 176, 2009 U.S. LEXIS 5869, 78 U.S.L.W. 3178 (2009).

While minor victim was unable to testify as to occurrences on night in which she was left alone with defendant, conviction for carnal knowledge was supported by testimony of victim's sister, mother and arresting officers about finding 6-year-old victim seminaked and unconscious, that defendant was in apartment, and testimony of examining physician on night of crime that victim was intoxicated on night of crime and had recently been sexually abused. D.C. Code 1981, § 22-2801. *Rural Hicks-Bey v. United States*, 649 A.2d 569, 1994 D.C. App. LEXIS 205 (1994), writ of certiorari denied by 516 U.S. 897, 116 S. Ct. 251, 133 L. Ed. 2d 176, 1995 U.S. LEXIS 6583, 64 U.S.L.W. 3247 (1995).

§ 22-3014. Second degree sexual abuse of a ward, patient, client, or prisoner.

Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution; anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions; or any official custodian of a ward, patient, client, or prisoner, who engages in a sexual contact with a ward, patient, client, or prisoner, or causes a ward, patient, client, or prisoner, to engage in or submit to a sexual contact shall be

imprisoned for not more than 5 years or fined in an amount not to exceed \$50,000, or both.

(May 23, 1995, D.C. Law 10-257, § 213, 42 DCR 53; Apr. 24, 2007, D.C. Law 16-306, § 216(h), 53 DCR 8610.)

Section references. — This section is referred to in § 22-3017.

Prior Codifications. — 1981 Ed., § 22-4114.

Effect of amendments. — D.C. Law 16-306 rewrote the section.

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(h) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(h) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(h) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 216(h) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

§ 22-3015. First degree sexual abuse of a patient or client.

(a) A person is guilty of first degree sexual abuse who purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature, and engages in a sexual act with another person who is a patient or client of the actor, or is otherwise in a professional relationship of trust with the actor; and

(1) The actor represents falsely that the sexual act is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided;

(2) The nature of the treatment or service provided by the actor and the mental, emotional, or physical condition of the patient or client are such that the actor knows or has reason to know that the patient or client is impaired from declining participation in the sexual act;

(3) The actor represents falsely that he or she is licensed as a particular type of professional; or

(4) The sexual act occurs during the course of a consultation, examination, treatment, therapy, or other provision of professional services.

(b) Any person found guilty pursuant to subsection (a) of this section shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$100,000.

(May 23, 1995, D.C. Law 10-257, § 214, 42 DCR 53; May 17, 1996, D.C. Law 11-119, § 6(b), 43 DCR 528; Apr. 24, 2007, D.C. Law 16-306, § 216(i), 53 DCR 8610.)

Section references. — This section is referred to in § 22-3017.

Prior Codifications. — 1981 Ed., § 22-4115.

Effect of amendments. — D.C. Law 16-

306, in subsec. (a)(1), deleted “or” from the end; in subsec. (a)(2), substituted a semicolon for a period; and added subsecs. (a)(3) and (4).

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(i) of

Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(i) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(i) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of sec-

tion, see § 216(i) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 11-119. — For legislative history of D.C. Law 11-119, see Historical and Statutory Notes following § 22-3013.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CASE NOTES

ANALYSIS

Actions for negligence or malpractice.

— In general.

— Limitation of actions, actions for negligence or malpractice.

— Pleadings, actions for negligence or malpractice.

— Questions of law and fact, actions for negligence or malpractice.

Actions for negligence or malpractice.

— **In general.**

Consent to sexual acts, freely and competently given, is defense to medical malpractice claim based on sexual contact between physician and patient. *McCracken v. Walls-Kaufman*, 717 A.2d 346, 1998 D.C. App. LEXIS 170 (1998).

For purposes of medical malpractice claim against chiropractor based on his sexual contact with patient, it would be incumbent upon patient to adduce expert testimony establishing, to a reasonable degree of medical certainty, that the injuries claimed were proximately caused by the chiropractor's breach of an applicable standard of care. *McCracken v. Walls-Kaufman*, 717 A.2d 346, 1998 D.C. App. LEXIS 170 (1998).

— **Limitation of actions, actions for negligence or malpractice.**

Patient's mental state could not serve to toll statute of limitations on her husband's loss of consortium claim against chiropractor who allegedly sexually assaulted patient. *McCracken v. Walls-Kaufman*, 717 A.2d 346, 1998 D.C. App. LEXIS 170 (1998).

— **Pleadings, actions for negligence or malpractice.**

Allegations that chiropractor had tortiously engaged in sexual acts with patient during the

time he was treating her and that chiropractor had discussed numerous personal matters with patient and counseled her about them, thus going beyond the usual chiropractor-patient relationship, were sufficient to state claim for medical malpractice. *McCracken v. Walls-Kaufman*, 717 A.2d 346, 1998 D.C. App. LEXIS 170 (1998).

— **Questions of law and fact, actions for negligence or malpractice.**

Whether particular patient is capable of consenting to sexual relationship with physician is question of fact to be determined by jury in medical malpractice action; it cannot be said as a matter of law that any patient who is involved to some degree in a relationship of trust and confidence with a medical professional and has received advice and counseling is incapable of consenting to a sexual relationship with that professional. *McCracken v. Walls-Kaufman*, 717 A.2d 346, 1998 D.C. App. LEXIS 170 (1998).

Fact question as to whether patient, who was allegedly sexually assaulted by chiropractor, was rendered non compos mentis when a substantial portion of her right of action accrued, so as to toll statute of limitations, precluded summary judgment for chiropractor on sexual assault claim. D.C. Code 1981, § 12-301(4). *McCracken v. Walls-Kaufman*, 717 A.2d 346, 1998 D.C. App. LEXIS 170 (1998).

Expert testimony regarding patient's mental state following alleged sexual assault by chiropractor was not necessary to withstand chiropractor's motion for summary judgment on sexual assault claim on statute of limitations grounds. D.C. Code 1981, § 12-301(4). *McCracken v. Walls-Kaufman*, 717 A.2d 346, 1998 D.C. App. LEXIS 170 (1998).

§ 22-3016. Second degree sexual abuse of a patient or client.

(a) A person is guilty of second degree sexual abuse who purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature, and engages in a sexual contact with another person who is a patient or client of the actor, or is otherwise in a professional relationship of trust with the actor; and

(1) The actor represents falsely that the sexual contact is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided;

(2) The nature of the treatment or service provided by the actor and the mental, emotional, or physical condition of the patient or client are such that the actor knows or has reason to know that the patient or client is impaired from declining participation in the sexual contact;

(3) The actor represents falsely that he or she is licensed as a particular type of professional; or

(4) The sexual contact occurs during the course of a consultation, examination, treatment, therapy, or other provision of professional services.

(b) Any person found guilty pursuant to subsection (a) of this section shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$50,000.

(May 23, 1995, D.C. Law 10-257, § 215, 42 DCR 53; Apr. 24, 2007, D.C. Law 16-306, § 216(j), 53 DCR 8610.)

Section references. — This section is referred to in § 22-3017.

Prior Codifications. — 1981 Ed., § 22-4116.

Effect of amendments. — D.C. Law 16-306, in subsec. (a)(1), deleted “or” from the end; in subsec. (a)(2), substituted a semicolon for a period; and added subsecs. (a)(3) and (4).

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(j) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(j) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(j) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 216(j) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

§ 22-3017. Defenses to sexual abuse of a ward, patient, or client.

(a) Consent is not a defense to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018.

(b) That the defendant and victim were married or in a domestic partnership at the time of the offense is a defense, which the defendant must prove by

a preponderance of the evidence, to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018.

(May 23, 1995, D.C. Law 10-257, § 216, 42 DCR 53; Dec. 10, 2009, D.C. Law 18-88, § 404(b), 56 DCR 7413.)

Prior Codifications. — 1981 Ed., § 22-4117.

Effect of amendments. — D.C. Law 18-88, in subsec. (b), substituted “That the defendant and victim were married or in a domestic partnership” for “Marriage between the defendant and victim”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 404(b) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 404(b) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

§ 22-3018. Attempts to commit sexual offenses.

Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than ½ of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed ½ of the maximum fine authorized for the offense.

(May 23, 1995, D.C. Law 10-257, § 217, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-3007, 22-3011, 22-3012, and 22-3017.

Prior Codifications. — 1981 Ed., § 22-4118.

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

CASE NOTES

ANALYSIS

Indictment and information.

Instructions.

Lesser included offenses.

Nature and elements of offense.

Pleas.

Weight and sufficiency of evidence.

Indictment and information.

Counts of indictment charging defendant with assaulting female persons with intent to carnally know and abuse such persons did not charge offenses under District of Columbia law where victims were females over 16 years of age. D.C. Code §§ 22-501, 22-2801. *United States v. Hutchinson*, 478 F.2d 997, 1973 U.S. App. LEXIS 9991 (C.A.D.C. 1973).

Where counts of original indictment on which defendant was convicted failed properly to charge offense of assault with intent to commit

forcible rape, right to be free of double jeopardy did not bar retrial on new indictment properly charging such offense. D.C. Code §§ 22-501, 22-2801; U.S. Const. Amend. 5. *Hutchinson v. United States*, 339 A.2d 381, 1975 D.C. App. LEXIS 401 (1975).

Although complaining witness' name did not appear in body of attempted forcible rape information, her identity was readily available from the other two informations, i.e., simple assault and threats, under which defendant was also tried, from the evidence, and from the list of witnesses in the attempted rape information, and guilty verdict thus cured lack of particularity, if any, in that information. D.C. Code 1961, § 22-2801. *Bush v. United States*, 215 A.2d 853, 1966 D.C. App. LEXIS 134 (App. 1966).

Indictment charging defendant with unlawfully attempting to commit crime of rape on specified day against form of statute clearly spelled out charge of attempted forcible rape.

D.C. Code 1961, § 22-2801; General Sessions Court Rules, Criminal Division, rule 6(a). *Bush v. United States*, 215 A.2d 853, 1966 D.C. App. LEXIS 134 (App. 1966).

Instructions.

Trial court's erroneous failure to give requested instruction that consent is a defense to charge of assault with intent to commit sodomy was harmless since there was neither direct nor persuasive evidence in record to suggest that complainant consented to defendant's behavior, and in view of jury's rejection of findings of consent to kidnapping and rape, offenses which took place both before and after the intervening sexual assault. D.C. Code 1981, §§ 22-503, 22-2101, 22-2801, 22-2901, 22-3502, 23-1327(a). *Jenkins v. United States*, 506 A.2d 1120, 1986 D.C. App. LEXIS 304 (1986), writ of certiorari denied by 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99, 1986 U.S. LEXIS 3765, 55 U.S.L.W. 3234 (1986).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, reviewing court could not say that absence of corroboration instruction was not so clearly prejudicial to substantial rights as to jeopardize very fairness and integrity of trial, and, instruction being vital to case because corroborative evidence was marginal although legally sufficient, it could not be said that error was harmless. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b); D.C. Code SCR, SC Rules 30, 52(b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

Lesser included offenses.

Assault with intent to rape is lesser offense included in charge of rape. D.C. Code 1961, § 22-2801. *Johnson v. United States*, 350 F.2d 784, 1965 U.S. App. LEXIS 4556 (C.A.D.C. 1965).

Nature and elements of offense.

Specific intent is not an element of rape even though it is an element of lesser included offense of assault with intent to commit rape. D.C. Code § 22-2801. *United States v. Thornton*, 498 F.2d 749, 1974 U.S. App. LEXIS 8356 (C.A.D.C. 1974).

Assault with intent to rape is established by use of and intent to use some physical force for purpose of achieving sexual gratification, but requires an intent to persist in such force even in face of and for purpose of overcoming victim's resistance. D.C. Code § 22-2801. *United States v. Huff*, 442 F.2d 885, 1971 U.S. App. LEXIS 11498 (C.A.D.C. 1971).

For the attempt offense of misdemeanor sexual abuse, the government must prove the defendant (1) intended to commit the crime, and (2) committed an overt act towards completion of the crime that (3) came within danger-

ous proximity of completing the crime. *Nkop v. United States*, 945 A.2d 617, 2008 D.C. App. LEXIS 121 (2008).

Defendant should have known that his eleven-year-old daughter could not validly consent to his sexual advances, and therefore, defendant could be convicted of attempted misdemeanor sexual abuse pursuant to statute providing that whoever engages in a sexual act with another person and who should have knowledge that the act was committed without that other person's permission shall be imprisoned; term "permission," as used in statute, was synonym for "consent," and law stated that children were legally incapable of consenting to sexual activity with adults. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

Pleas.

Trial court should hold hearing on defendant's presentence motion to be allowed to withdraw plea of guilty to offense of assault with intent to commit carnal knowledge, based on allegations of perjured testimony by complaining witness, where government opposition to motion had not been served on court-appointed defense counsel or defendant prior to denial of motion, and government's opposition failed to controvert allegations of defendant's motion and gave erroneous reasons for dismissal of charge against codefendant who had elected to go to trial. D.C. Code 1961, § 22-2801; Fed. Rules Crim. Proc. rules 11, 29(a), 32(d), 49(a, b), 18 U.S.C. *Hawk v. United States*, 340 F.2d 792, 1964 U.S. App. LEXIS 3623 (C.A.D.C. 1964).

Weight and sufficiency of evidence.

Evidence, including the testimony of an eyewitness involving all three defendants in the assault upon victim, was sufficient to support verdict of jury finding defendants guilty of felony-murder and assault with intent to commit rape while armed. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Evidence in prosecution for assault with intent to commit rape was insufficient to establish that defendant intended to achieve sexual intercourse by force and violence and against will of prosecutrix. D.C. Code §§ 22-2801, 22-2901. *United States v. Tremble*, 470 F.2d 1272, 1972 U.S. App. LEXIS 6814 (C.A.D.C. 1972).

Evidence was sufficient to support defendant's conviction for attempted misdemeanor sexual abuse of his daughter; according to his daughter, defendant committed an overt act that went beyond mere preparation when he exposed himself to her and asked her to rub his penis, and since his eleven-year-old daughter was legally incapable of consenting to defen-

dant's sexual advance, coercion was implicit and need not have been otherwise shown, defendant's intent to obtain illicit sexual gratification could be inferred, and his overt acts would have resulted in a completed crime but for fact that his daughter fled, instead of submitting to his request. *Davis v. United States*, 873 A.2d 1101, 2005 D.C. App. LEXIS 257 (2005).

In prosecution for attempted carnal knowledge of female child under 16 years of age, determination that charged offense had actually been committed was supported by numerous circumstantial details in addition to complainant's testimony, including cuts on

complainant's foot and hand, disheveled appearance, prompt report to police, complainant's ability to point out light string in room where incident allegedly took place and discovery in that room of girdle which complainant had left behind after incident. D.C. Code §§ 22-103, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

Medical evidence of sexual intercourse was not required to sustain conviction of attempted carnal knowledge of female child under 16 years of age. D.C. Code §§ 22-103, 22-2801. *In re W.E.P.*, 318 A.2d 286, 1974 D.C. App. LEXIS 412 (1974).

§ 22-3019. No immunity from prosecution for spouses or domestic partners.

No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided.

(May 23, 1995, D.C. Law 10-257, § 218, 42 DCR 53; Apr. 24, 2007, D.C. Law 16-306, § 216(k), 53 DCR 8610.)

Prior Codifications. — 1981 Ed., § 22-4119.

Effect of amendments. — D.C. Law 16-306 rewrote the section, which had read as follows: "§ 22-3019. No spousal immunity from prosecution. No actor is immune from prosecution under any section of this subchapter because of marriage or cohabitation with the victim; provided, however, that marriage of the parties may be asserted as an affirmative defense in a prosecution under this subchapter where it is expressly so provided."

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(k) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(k) of Omnibus Public Safety

Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8689).

For temporary (90 day) amendment of section, see § 216(k) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 216(k) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

§ 22-3020. Aggravating circumstances.

(a) Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1½ times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists:

- (1) The victim was under the age of 12 years at the time of the offense;

(2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim;

(3) The victim sustained serious bodily injury as a result of the offense;

(4) The defendant was aided or abetted by 1 or more accomplices;

(5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or

(6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.

(b) It is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply under subsection (a)(4) of this section.

(c) No person who stands convicted of an offense under this subchapter shall be sentenced to increased punishment (or enhanced penalty) by reason of the aggravating factors set forth in subsection (a) of this section, unless prior to trial or before entry of a plea of guilty, the United States Attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the aggravating factors to be relied upon.

(May 23, 1995, D.C. Law 10-257, § 219, 42 DCR 53; May 17, 1996, D.C. Law 11-119, § 6(c), 43 DCR 528; June 8, 2001, D.C. Law 13-302, § 7(c), 47 DCR 7249.)

Cross references. — Sexually violent offense defined, sex offender registration, see § 22-4101.

Prior Codifications. — 1981 Ed., § 22-4120.

Effect of amendments. — D.C. Law 13-302 substituted “a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse,” for “a life sentence without parole, if life imprisonment is the maximum penalty prescribed for the offense.”.

Emergency legislation. — For temporary (90-day) amendment of section, see § 7(c) of the Sentencing Reform Emergency Amendment Act of 2000 (D.C. Act 13-410, August 11, 2000, 47 DCR 7271).

For temporary (90 day) amendment of sec-

tion, see § 7(c) of Sentencing Reform Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-2, February 2, 2001, 48 DCR 2239).

For temporary (90 day) amendment of section, see § 7(c) of Sentencing Reform Second Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-51, May 2, 2001, 48 DCR 4370).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 11-119. — For legislative history of D.C. Law 11-119, see Historical and Statutory Notes following § 22-3013.

Legislative history of Law 13-302. — For Law 13-302, see notes following § 22-722.

CASE NOTES

ANALYSIS

Armed with dangerous weapon.
Coparticipants.
Other offenses.

Armed with dangerous weapon.

Jury instruction did not constructively amend indictment with respect to armed rape charge, even though indictment charged rape

“while armed with a stick and a firearm” and judge instructed jury that defendants could be “armed with” weapons or have had them “readily available”; court properly instructed jury that they were not required to find that defendants were actually armed with stick or firearm while rape was in progress, but that it would be sufficient if they found stick or firearm readily available to defendants at time of rape. (Per

Reid, J., with two Judges concurring.) D.C. Code 1981, § 22-3202; § 22-2801 (repealed). *Bolanos v. United States*, 718 A.2d 532, 1998 D.C. App. LEXIS 186 (1998).

In order to obtain conviction for armed rape, government must prove beyond reasonable doubt that defendant committed rape while armed with or when having readily available any dangerous or deadly weapon. D.C. Code 1981, § 22-3202(a). *Johnson v. United States*, 613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

Hot clothes iron was "dangerous weapon" needed to support conviction for armed rape where victim testified that defendant's use of hot iron resulted in serious burns to victim's chest and abdomen. D.C. Code 1981, § 22-3202(a). *Johnson v. United States*, 613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

"Armed" element required for armed rape conviction was established by evidence that defendant had previously used hot clothes iron to burn victim's breasts and abdomen and that victim feared additional bodily harm if she refused to comply with defendant's orders to have sexual intercourse, even though defendant did not demand sex from victim before or immediately after assaulting victim with iron and did not reach for or mention iron during rape. D.C. Code 1981, § 22-3202(a). *Johnson v. United States*, 613 A.2d 888, 1992 D.C. App. LEXIS 213 (1992).

Although no direct evidence was introduced in rape case to establish that defendant was in fact armed with dangerous weapon during incident, complainant's insistence that defendant did have a knife permitted trial court and jury to find that he did, and thus permitted conviction for armed rape, under rule that reasonable inferences must be drawn in favor of the government. D.C. Code 1981, §§ 22-2801, 22-2901, 22-3202. *Boyd v. United States*, 473 A.2d 828, 1984 D.C. App. LEXIS 328 (1984).

Coparticipants.

In prosecution of defendants on murder and rape charges, trial court did not abuse its discretion in denying motion of defendant brothers for a severance from codefendant, who had fatally stabbed the victim, notwithstanding defendants' claim that the evidence against the codefendant was much stronger than the evidence against them. D.C. Code §§ 22-501, 22-2401, 22-2403, 22-2801, 22-3202. *United States v. Heinlein*, 490 F.2d 725, 1973 U.S. App. LEXIS 7581 (C.A.D.C. 1973).

Other offenses.

In prosecution for carnally knowing a female child, allowing child to testify, over objection that defendant had abused her similarly on previous occasions was proper in view of fact that there was independent evidence which

pointed to defendant as having committed the offense charged. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.; D.C. Code 1951, § 22-2801. *Crawford v. U.S.*, 198 F.2d 976, 1952 U.S. App. LEXIS 3266 (C.A.D.C. 1952).

Sentence of life without parole for first-degree sexual abuse, imposed under statute allowing court to increase life sentence to life without parole for certain sex crimes if victim sustained serious bodily injury as result of offense, did not violate Apprendi, where jury also returned conviction for second-degree murder, finding as an essential element that victim suffered injuries from which she died, and thus necessarily made corollary finding that victim's injuries involved a substantial risk of death so as to satisfy definition of "serious injury." *Jones v. United States*, 828 A.2d 169, 2003 D.C. App. LEXIS 434 (2003), writ of certiorari denied by 540 U.S. 1166, 124 S. Ct. 1182, 157 L. Ed. 2d 1214, 2004 U.S. LEXIS 915, 72 U.S.L.W. 3487 (2004).

Sentence of life in prison for conviction of first-degree sexual abuse was properly enhanced to remove the possibility of parole, where defendant was convicted in a foreign jurisdiction of two rape offenses against two different victims. *Kyle v. United States*, 759 A.2d 192, 2000 D.C. App. LEXIS 215 (2000), writ of certiorari denied by 531 U.S. 1100, 121 S. Ct. 834, 148 L. Ed. 2d 716, 2001 U.S. LEXIS 569, 69 U.S.L.W. 3458 (2001).

Evidence of uncharged acts of sexual abuse and vaginal intercourse against child complainant were admissible on theory of predisposition to gratify special desires with that particular victim, in prosecution for various sex offenses, including rape and sexual abuse. D.C. Code 1981, §§ 22-4102, 22-4108; §§ 22-2801, 22-3501 (repealed). *Graham v. United States*, 746 A.2d 289, 2000 D.C. App. LEXIS 30 (2000).

Denial of motion to sever counts of indictment in proceeding in which accused was convicted of four rape offenses and other offenses was not abuse of discretion, in view of similar characteristics of such offenses, in which assailant entered through rear of apartments, awoke victims, threatened them with weapon, demanded silence and submission and committed no act of violence if there was compliance with his orders, in which, in three of the cases, he sought to prevent victims from getting good look at him and cut or threatened to cut phone lines and in which he cut off any pants worn by victims. D.C. Code §§ 22-502, 22-1801(a), 22-2801, 22-3202, 23-311(a), 23-313; D.C. Code SCR, Criminal Rules 8(a), 14. *Bridges v. United States*, 381 A.2d 1073, 1977 D.C. App. LEXIS 304 (1977), writ of certiorari denied by 439 U.S. 842, 99 S. Ct. 135, 58 L. Ed. 2d 141, 1978 U.S. LEXIS 2828 (1978).

Trial court in prosecution of defendant for two rapes did not abuse its discretion in deny-

ing severance of one rape count from another where, while two rapes occurred at different times, method employed by rapist in each case was strikingly similar. D.C. Code §§ 22-2801,

23-311(a); D.C. Code SCR, Criminal Rules 8(a), 14. *Arnold v. United States*, 358 A.2d 335, 1976 D.C. App. LEXIS 534 (1976).

Subchapter III. Admission of Evidence in Sexual Abuse Offense Cases.

§ 22-3021. Reputation or opinion evidence of victim's past sexual behavior inadmissible.

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under subchapter II of this chapter, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.

(b) For the purposes of this subchapter, "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under subchapter II of this chapter is alleged.

(May 23, 1995, D.C. Law 10-257, § 301, 42 DCR 53.)

Prior Codifications. — 1981 Ed., § 22-4121.

Legislative history of Law 10-257. — For

legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

CASE NOTES

ANALYSIS

Consent.

In general.

Purpose.

Sexual relations between complainant and defendant.

Victim reputation.

Consent.

Evidence of rape victim's alleged prior acts of prostitution with persons other than defendant and evidence of her alleged reputation in the community as a prostitute was inadmissible in rape prosecution to show that victim consented to have intercourse with defendant. D.C. Code 1981, § 22-2801. *Brewer v. United States*, 559 A.2d 317, 1989 D.C. App. LEXIS 106 (1989), writ of certiorari denied by 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066, 1990 U.S. LEXIS 764, 58 U.S.L.W. 3528 (1990).

In cases of rape, credibility of complaining witness must be weighed by jury on evidence that is directly related to whether complainant consented to sexual act with accused and not on evidence of her prior sexual relations with others or her reputation for unchastity. 18 U.S.C. §§ 5005 et seq., 5010(c); D.C. Code § 22-

2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In general.

In rape prosecution, there can be unusual circumstances where defense may inquire into specific sexual acts by prosecutrix with others when probative value of evidence is clearly demonstrated and is shown to outweigh prejudicial effect. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

Purpose.

The Rape Shield Law was enacted as a safeguard against unwarranted invasions of privacy and also serves to exclude legally irrelevant evidence that may distract the jury or lead it to discount the complainant's injury because of societal stereotypes and prejudices. *Scott v. United States*, 953 A.2d 1082, 2008 D.C. App. LEXIS 379 (2008).

Sexual relations between complainant and defendant.

In rape prosecution, evidence of specific acts of sexual intercourse with defendant himself should be admitted where either there may be an issue of identity at trial or to rebut the

Government's evidence that prosecutrix did not consent to sexual intercourse on the particular occasion. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

Victim reputation.

Trial court did not abuse its discretion, in first-degree sexual abuse prosecution in which defendants maintained that their sexual acts with alleged victim were consensual, in limiting cross-examination of alleged victim concerning her "common practices" as a prostitute in order to show her purported motive to fabricate what actually took place, i.e., protecting another individual who fled the scene from pandering charges; desired cross-examination may well have violated Rape Shield Law, and defendants had other opportunities to explore alleged victim's bias within confines of trial court's limitations. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

In rape prosecution, testimony as to reputation of prosecutrix for unchastity should not be admitted except in most unusual cases where probative value is precisely demonstrated and

outweighs the prejudicial effect of the testimony. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, prejudicial effect of proffered testimony of two defense witnesses pertaining to prosecutrix' reputation for unchastity clearly outweighed its probative value and was properly excluded. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, a woman's reputation for unchastity is of very slight probative value since it is neither relevant to her credibility as a witness nor material on the issue whether on occasion of alleged crime she consented or was forced to submit to an act of sexual intercourse. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

Testimony in prosecution for taking indecent liberties with a minor that complainant had a reputation both for unchastity and as an agitator would have been irrelevant and its exclusion did not constitute an abuse of discretion. D.C. Code § 22-3501. *Springs v. United States*, 311 A.2d 499, 1973 D.C. App. LEXIS 385 (1973).

§ 22-3022. Admissibility of other evidence of victim's past sexual behavior.

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under subchapter II of this chapter, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subsection (b) of this section and is constitutionally required to be admitted; or

(2) Admitted in accordance with subsection (b) of this section and is evidence of:

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or bodily injury; or

(B) Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

(b)(1) If the person accused of committing an offense under subchapter II of this chapter intends to offer under subsection (a) of this section, evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of

due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph, and the accompanying offer of proof, shall be filed under seal and served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (a) of this section, the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. If the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers, or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(May 23, 1995, D.C. Law 10-257, § 302, 42 DCR 53.)

Prior Codifications. — 1981 Ed., § 22-4122.

Legislative history of Law 10-257. — For

legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

CASE NOTES

ANALYSIS

Admissibility of evidence.

- In general.
- Invited comment, admissibility of evidence.
- Prior sexual relations between complainant and defendant, admissibility of evidence.
- Proof of consent, admissibility of evidence.
- Subsequent allegations by complainant, admissibility of evidence.
- Weighing of probative and prejudicial effect of evidence, admissibility of evidence.
- Examination of witnesses.
- Instructions.
- Review.

Admissibility of evidence.

— In general.

Under the Rape Shield Law, defense counsel's burden at a hearing on the admissibility of evidence of a victim's past sexual behavior is to precisely demonstrate the probative value of the evidence the defense seeks to present. *Watts v. United States*, 971 A.2d 921, 2009 D.C. App. LEXIS 169 (2009).

In rape prosecution, testimony that complaining witness had engaged in sexual relations with others on prior occasions was not admissible under any exceptions to general rule prohibiting admission of character evidence based upon proof of past acts. Federal Rules of Evidence, rule 404(a, b), 18 U.S.C.; D.C. Code §§ 14-305, 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In a sex offense case, evidence of a victim's sexual history with someone other than the defendant is generally inadmissible, even if the victim is a prostitute. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

— Invited comment, admissibility of evidence.

Prosecutor did not open door to evidence of rape victim's alleged prior acts of prostitution, character, or alleged reputation as prostitute by asking witness if defendant had ever indicated whether he had paid victim for sex. D.C. Code 1981, §§ 22-503, 22-2801, 22-3502. *Brewer v.*

United States, 559 A.2d 317, 1989 D.C. App. LEXIS 106 (1989), writ of certiorari denied by 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066, 1990 U.S. LEXIS 764, 58 U.S.L.W. 3528 (1990).

— **Prior sexual relations between complainant and defendant, admissibility of evidence.**

In prosecution for sex offenses, evidence of prior acts between the same parties is admissible as showing a disposition to commit the act charged, the probabilities being that the emotional predisposition or passion will continue. *Bracey v. U.S.*, 142 F.2d 85, 1944 U.S. App. LEXIS 3260 (1944).

Query: Whether in a prosecution for sex offense, evidence of similar prior acts between accused and a third party is admissible as showing disposition to commit the act charged, the probabilities being as great in such case as in case of similar prior acts between parties to offense charged that the emotional predisposition or passion to commit the offense will continue. *Bracey v. U.S.*, 142 F.2d 85, 1944 U.S. App. LEXIS 3260 (1944).

In a prosecution for statutory rape on one under age of consent, testimony concerning similar acts between the parties prior to offense charged is admissible. *Weaver v. U.S.*, 299 F. 893, 1924 U.S. App. LEXIS 3487 (1924).

Defendant charged with sexual abuse failed to meet his threshold burden, under the Rape Shield Law, of demonstrating the probative value of victim's statement that she had consensual sex without a condom two days before the alleged crime; the statement could have supported the defense theory that defendant was victim's prior consensual-sex partner, thus providing an innocent explanation for presence of his semen inside her, only if victim's partner ejaculated inside victim's vagina, and on that point, defendant made no proffer whatsoever, and he did not request an in camera evidentiary hearing. *Watts v. United States*, 971 A.2d 921, 2009 D.C. App. LEXIS 169 (2009).

In rape prosecution, evidence of specific acts of sexual intercourse with defendant himself should be admitted where either there may be an issue of identity at trial or to rebut the Government's evidence that prosecutrix did not consent to sexual intercourse on the particular occasion. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

— **Proof of consent, admissibility of evidence.**

Sexual assault defendant was not entitled, under Rape Shield Law, to admission of evidence of complainant's proclivity for "rough sex" in order to demonstrate that complainant's injuries were the result of consensual sex with

her former boyfriend, where, during voir dire procedure, complainant denied that she sustained the injuries from consensual sex, defense counsel did not seek to voir dire former boyfriend to establish that his sexual encounters with complainant were particularly "rough," and defendant did not offer any evidence to support his claim that complainant's injuries were the result of her having engaged in rough sex with someone else. *Scott v. United States*, 953 A.2d 1082, 2008 D.C. App. LEXIS 379 (2008).

Evidence of rape victim's alleged prior acts of prostitution with persons other than defendant and evidence of her alleged reputation in the community as a prostitute was inadmissible in rape prosecution to show that victim consented to have intercourse with defendant. D.C. Code 1981, § 22-2801. *Brewer v. United States*, 559 A.2d 317, 1989 D.C. App. LEXIS 106 (1989), writ of certiorari denied by 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066, 1990 U.S. LEXIS 764, 58 U.S.L.W. 3528 (1990).

The fact that a woman consented to sexual intercourse on one occasion is not substantial evidence that she consented on another, but in fact may indicate the contrary. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In cases of rape, credibility of complaining witness must be weighed by jury on evidence that is directly related to whether complainant consented to sexual act with accused and not on evidence of her prior sexual relations with others or her reputation for unchastity. 18 U.S.C. §§ 5005 et seq., 5010(c); D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In prosecution for sex offense, trial court should permit exploration of victim's moral character and extrinsic sexual conduct only where such evidence would be directly relevant to act which defendant has been charged with having committed; and court bears responsibility for excluding from record matters which by their cumulative, prejudicial, or inflammatory qualities, might render objective and impartial resolution of basic issue of guilt unattainable and court should insure that probative value of proffered line of inquiry will outweigh any such potential defects. In re J.W.Y., 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

— **Subsequent allegations by complainant, admissibility of evidence.**

In a prosecution for carnal knowledge of a female child, the fact that prosecutrix made complaint subsequent to the offense is admissible, though the particular facts stated in the complaint are not admissible, except when elicited in cross-examination, or to confirm her testimony after it has been impeached, or unless the complaint was part of the *res gestae*.

Harris v. U.S., 269 F. 481, 1920 U.S. App. LEXIS 1867 (1920).

— **Weighing of probative and prejudicial effect of evidence, admissibility of evidence.**

Under the Rape Shield Law, if the defense succeeds in crossing the threshold relevance hurdle for the admission of evidence of a victim's past sexual behavior, the trial court must then consider whether the probative value of the evidence outweighs its prejudicial impact. *Watts v. United States*, 971 A.2d 921, 2009 D.C. App. LEXIS 169 (2009).

Factors combining to render probative value of evidence of defendant's ongoing sexual abuse of victim so high as to outweigh its potential for prejudice were that evidence related to prior sexual contact between same parties, incestuous nature of contact, that contact began when victim was very young child and continued, and that knowledge of prior contact was in some degree pivotal to determination of innocence or guilt in light of defendant's defense of physical impossibility, victim's apparent lack of hysteria when reporting abuse to friend, and victim's failure to inform her mother of abuse. *Pounds v. United States*, 529 A.2d 791, 1987 D.C. App. LEXIS 415 (1987).

In rape prosecution, there can be unusual circumstances where defense may inquire into specific sexual acts by prosecutrix with others when probative value of evidence is clearly demonstrated and is shown to outweigh prejudicial effect. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, a woman's reputation for unchastity is of very slight probative value since it is neither relevant to her credibility as a witness nor material on the issue whether on occasion of alleged crime she consented or was forced to submit to an act of sexual intercourse. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, prejudicial effect of proffered testimony of two defense witnesses pertaining to prosecutrix' reputation for unchastity clearly outweighed its probative value and was properly excluded. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, there can be unusual circumstances where defense may inquire into specific sexual acts by prosecutrix with others when probative value of evidence is clearly demonstrated and is shown to outweigh prejudicial effect. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, testimony as to reputation of prosecutrix for unchastity should not be admitted except in most unusual cases where

probative value is precisely demonstrated and outweighs the prejudicial effect of the testimony. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, a woman's reputation for unchastity is of very slight probative value since it is neither relevant to her credibility as a witness nor material on the issue whether on occasion of alleged crime she consented or was forced to submit to an act of sexual intercourse. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, testimony as to reputation of prosecutrix for unchastity should not be admitted except in most unusual cases where probative value is precisely demonstrated and outweighs the prejudicial effect of the testimony. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

In rape prosecution, prejudicial effect of proffered testimony of two defense witnesses pertaining to prosecutrix' reputation for unchastity clearly outweighed its probative value and was properly excluded. D.C. Code § 22-2801. *McLean v. United States*, 377 A.2d 74, 1977 D.C. App. LEXIS 381 (1977).

Examination of witnesses.

Trial court did not abuse its discretion, in first-degree sexual abuse prosecution in which defendants maintained that their sexual acts with alleged victim were consensual, in limiting cross-examination of alleged victim concerning her "common practices" as a prostitute in order to show her purported motive to fabricate what actually took place, i.e., protecting another individual who fled the scene from pandering charges; desired cross-examination may well have violated Rape Shield Law, and defendants had other opportunities to explore alleged victim's bias within confines of trial court's limitations. *Kaliku v. United States*, 994 A.2d 765, 2010 D.C. App. LEXIS 261 (2010).

Trial court did not abuse its discretion in sexual abuse prosecution by preventing defendant and codefendant from cross-examining alleged victim about her activities as a prostitute after the night sexual abuse allegedly occurred; admission of such evidence would have tended only to suggest that because alleged victim continued to have sex at some point after being raped, she therefore consented on the night in question, and such was exactly the type of speculation that rape shield law sought to prevent. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Trial court did not compel rape defendant to testify at pretrial hearing on alleged prior consensual sex with complainant; defendant could have rested on his written offer of proof but

chose not to, obviously fearing an adverse ruling on its admissibility if he did not support it with live testimony. *Bobb v. United States*, 758 A.2d 958, 2000 D.C. App. LEXIS 207 (2000), writ of certiorari denied by 531 U.S. 1099, 121 S. Ct. 832, 148 L. Ed. 2d 713, 2001 U.S. LEXIS 552, 69 U.S.L.W. 3458 (2001).

Abuse of discretion standard of review applied to rape defendant's claim that trial court erred by allowing cross-examination of him beyond scope of his direct testimony at pretrial hearing on alleged prior consensual sex with complainant. *Bobb v. United States*, 758 A.2d 958, 2000 D.C. App. LEXIS 207 (2000), writ of certiorari denied by 531 U.S. 1099, 121 S. Ct. 832, 148 L. Ed. 2d 713, 2001 U.S. LEXIS 552, 69 U.S.L.W. 3458 (2001).

Prosecutor was entitled to cross-examine rape defendant as to dates on which alleged consensual sex acts with complainant took place and circumstances under which they allegedly unfolded, at pretrial hearing on alleged prior consensual sex with complainant, given defendant's testimony generally that he had consensual sex with complainant several times during an eight-month period. *Bobb v. United States*, 758 A.2d 958, 2000 D.C. App. LEXIS 207 (2000), writ of certiorari denied by 531 U.S. 1099, 121 S. Ct. 832, 148 L. Ed. 2d 713, 2001 U.S. LEXIS 552, 69 U.S.L.W. 3458 (2001).

Plain error standard of review applied to defendant's claim that trial court violated his Fifth Amendment privilege against self-incrimination by allowing in depth cross examination of him at trial, based on his testimony at pre-trial hearing on alleged prior consensual sex with complainant, where defendant did not raise a Fifth Amendment challenge to use of pre-trial hearing transcript at trial. *Bobb v. United States*, 758 A.2d 958, 2000 D.C. App. LEXIS 207 (2000), writ of certiorari denied by 531 U.S. 1099, 121 S. Ct. 832, 148 L. Ed. 2d 713, 2001 U.S. LEXIS 552, 69 U.S.L.W. 3458 (2001).

In the absence of statutory preclusion, there was nothing in area of Fifth Amendment jurisprudence preventing Government's use of legally obtained pre-trial statements of rape defendant for impeachment purposes. *Bobb v. United States*, 758 A.2d 958, 2000 D.C. App. LEXIS 207 (2000), writ of certiorari denied by 531 U.S. 1099, 121 S. Ct. 832, 148 L. Ed. 2d 713, 2001 U.S. LEXIS 552, 69 U.S.L.W. 3458 (2001).

In prosecution for carnal knowledge and indecent liberties with minor, trial court violated

defendant's Sixth Amendment right to confront witnesses by preventing his cross-examination of key government witness in regard to prior false accusations of sexual activity made by her against other family members. D.C. Code 1981, §§ 22-2801, 22-3501(a); U.S. Const. Amend. 6. *Lawrence v. United States*, 482 A.2d 374, 1984 D.C. App. LEXIS 481 (1984).

Where juvenile charged with aiding and abetting act of carnal knowledge of 13-year-old girl subpoenaed several potential defense witnesses who allegedly would testify as to independent sexual experiences with complainant, government did not act improperly in suggesting to trial court that proffered testimony could result in prosecution of witnesses, which resulted in trial court's appointing independent counsel and witnesses' subsequently announcing their intentions to assert their privilege against self-incrimination with respect to their alleged independent sexual experiences with complainant. U.S. Const. Amend. 5. In re *J.W.Y.*, 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

In delinquency proceeding wherein juvenile was charged with aiding and abetting act of carnal knowledge of 13-year-old girl, defense counsel was properly allowed to cross-examine complainant concerning her previous sexual experience; however, trial court properly excluded testimony from other witnesses concerning complainant's general reputation for unchastity. In re *J.W.Y.*, 363 A.2d 674, 1976 D.C. App. LEXIS 361 (1976).

Instructions.

In a prosecution for rape, an instruction that, if the jury believed that the complaining witness had been impeached as to material facts, they could refuse to credit her whole testimony, is properly refused, because, if granted, it would have encroached on the province of the jury to determine the weight to be given the testimony of the witnesses. *Lyles v. U.S.*, 20 App.D.C. 559, 1902 U.S. App. LEXIS 5480 (1902).

Review.

Appellate review of a trial judge's exclusion or limited admission, under the Rape Shield Law, of evidence of a victim's past sexual behavior on the basis of lack of relevance or insufficient probative value is highly deferential. *Watts v. United States*, 971 A.2d 921, 2009 D.C. App. LEXIS 169 (2009).

§ 22-3023. Prompt reporting.

Evidence of delay in reporting an offense under subchapter II of this chapter to a public authority shall not raise any presumption concerning the credibility or veracity of a charge under subchapter II of this chapter.

(May 23, 1995, D.C. Law 10-257, § 303, 42 DCR 53.)

Prior Codifications. — 1981 Ed., § 22-4123.

Legislative history of Law 10-257. — For

legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

CASE NOTES

ANALYSIS

Admissibility of evidence.
In general.

Admissibility of evidence.

In prosecution for rape and housebreaking, testimony of complainant's mother relating to telephone call made by complainant immediately after alleged attack was properly received in evidence. D.C. Code 1961, §§ 22-1801, 22-2801. *Smith v. U.S.*, 312 F.2d 867, 1962 U.S. App. LEXIS 3335 (C.A.D.C. 1962).

Where female child, whom defendant was charged with having carnally known and abused, went to her grandmother's home three blocks away within an hour, at most, after alleged attack, and when child arrived she was highly distraught, in shock, and crying, and when grandmother asked child what was wrong with her, child replied that defendant just had something to do with her, court probably admitted grandmother's testimony concerning child's statement to grandmother, under the spontaneous exclamation exception to the hearsay rule. D.C. Code 1951, § 22-2801. *Wheeler v. U.S.*, 211 F.2d 19, 1953 U.S. App. LEXIS 2711 (C.A.D.C. 1953).

While the fact that the prosecuting witness, in a prosecution for rape, made complaint recently after the commission of the alleged offense, is admissible generally and as evidence in chief, a statement made by her more than four weeks afterwards to her physician that she had been assaulted is too remote from the

occurrence, and is inadmissible. *Lyles v. U.S.*, 20 App.D.C. 559, 1902 U.S. App. LEXIS 5480 (1902).

In rape prosecution, fact of accusation by prosecutrix tends to corroborate truth of charge, and failure to make prompt complaint casts doubt upon truth of charge. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In prosecution for assault with intent to commit rape, taking indecent liberties with minor child and enticing minor child, in view of threat made against child so that she feared reprisal, there was explanation for delay in her report of occurrence, and thus fact of complaint was admissible, but not details of occurrence, testimony being offered only to bolster credibility of complainant, and thus testimony should be limited to fact that complaint was made, without details, and jury was to be instructed that such evidence was to be considered solely for purpose of corroboration of testimony of complainant. D.C. Code §§ 22-501, 22-2801, 22-3501, 22-3501(a, b). *Fitzgerald v. United States*, 412 A.2d 1, 1980 D.C. App. LEXIS 226 (1980).

In general.

In rape cases and other cases of the nature of a sexual assault, delay in making complaint is a subject for consideration of jury and may seriously affect credibility of complaining witness. *Stitely v. U.S.*, 61 A.2d 491, 1948 D.C. App. LEXIS 189 (Cr.App. 1948).

§ 22-3024. Privilege inapplicable for spouses or domestic partners.

Laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under subchapter II of this chapter where the defendant is or was married to the victim, or is or was a domestic partner of the victim, or where the victim is a child.

(May 23, 1995, D.C. Law 10-257, § 304, 42 DCR 53; Apr. 24, 2007, D.C. Law 16-306, § 216(l), 53 DCR 8610.)

Prior Codifications. — 1981 Ed., § 22-4124.

Effect of amendments. — D.C. Law 16-306 rewrote the section, which had read as follows:

"§ 22-3024. Spousal privilege inapplicable. "Laws attaching a privilege against disclosure of communications between a husband and wife are inapplicable in prosecutions under sub-

chapter II of this chapter where the defendant is or was married to the victim or where the victim is a child.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 216(l) of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 216(l) of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 216(l) of Omnibus Public Safety

Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 216(l) of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

Legislative history of Law 10-257. — For legislative history of D.C. Law 10-257, see Historical and Statutory Notes following § 22-3001.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

CHAPTER 31. SEXUAL PERFORMANCES USING MINORS.

Sec.

22-3101. Definitions.

22-3102. Prohibited acts.

Sec.

22-3103. Penalties.

22-3104. Affirmative defenses.

§ 22-3101. Definitions.

For the purposes of this chapter, the term:

(1) “Knowingly” means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both.

(2) “Minor” means any person under 18 years of age.

(3) “Performance” means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.

(4) “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(5) “Sexual conduct” means:

(A) Actual or simulated sexual intercourse:

(i) Between the penis and the vulva, anus, or mouth;

(ii) Between the mouth and the vulva or anus; or

(iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva;

(B) Masturbation;

(C) Sexual bestiality;

(D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or

(E) Lewd exhibition of the genitals.

(6) “Sexual performance” means any performance or part thereof which includes sexual conduct by a person under 18 years of age.

(Mar. 9, 1983, D.C. Law 4-173, § 2, 29 DCR 5749; Oct. 23, 2010, D.C. Law 18-239, § 205(a), 57 DCR 5405.)

Cross references. — Adult protective services, use or threatened use of violence to force participation in sexual conduct, see § 7-1901.

Corroboration of child witness’ testimony, necessity, see § 23-114.

Section references. — This section is referred to in § 7-1901.

Prior Codifications. — 1981 Ed., § 22-2011.

Effect of amendments. — D.C. Law 18-239, in pars. (2) and (6), substituted “18” for “16”.

Legislative history of Law 4-173. — Law

4-173, the “District of Columbia Protection of Minors Act of 1982,” was introduced in Council and assigned Bill No. 4-305, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on October 19, 1982, and November 16, 1982, respectively. Signed by the Mayor on December 8, 1982, it was assigned Act No. 4-256 and transmitted to both Houses of Congress for its review.

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-3009.03.

CASE NOTES

Instructions.

Trial court provided sufficient guidance to

jury as to meaning of “lewd” for purposes of sexual performance using a minor, even though

trial court did not specifically tell jurors that it was defining “lewd” for them, where trial court explained that sexual conduct meant a lewd exhibition of genitals, that genitals were defined as reproductive organs, “in this case, the vagina,” that lewd exhibition of genitals meant that a minor’s genital or pubic area must have been visibly displayed, that mere nudity was

not enough, and that exhibition in question must have had an unnatural or unusual focus on minor’s genitalia regardless of minor’s intention to engage in sexual activity or whether viewer was sexually aroused. *Green v. United States*, 948 A.2d 554, 2008 D.C. App. LEXIS 244 (2008).

§ 22-3102. Prohibited acts.

(a) It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor.

(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance.

(2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.

(b) It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.

(c) If the sexual performance consists solely of a still or motion picture, then this section:

(1) Shall not apply to the minor or minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission; and

(2) Shall not apply to possession of a still or motion picture by a minor, or by an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.

(d) For the purposes of subsections (b) and (c) of this section, the term:

(1) “Possess,” “possession,” or “possessing” requires accessing the sexual performance if electronically received or available.

(2) “Still or motion picture” includes a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced.

(3) “Transmit” or “transmission” includes distribution, and can occur by any means, including electronically.”

(Mar. 9, 1983, D.C. Law 4-173, § 3, 29 DCR 5749; Oct. 23, 2010, D.C. Law 18-239, § 205(b), 57 DCR 5405.)

Cross references. — Sex offender registration, criminal offense against a victim who is a minor, defined, see § 24-4101.

Section references. — This section is referred to in § 22-3104.

Prior Codifications. — 1981 Ed., § 22-2012.

Effect of amendments. — D.C. Law 18-239 designated the existing text as subsec. (a); in

subsec. (a), substituted “18” for “16”; and added subsecs. (b) to (d).

Legislative history of Law 4-173. — For legislative history of D.C. Law 4-173, see Historical and Statutory Notes following § 22-3101.

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-3009.03.

CASE NOTES

ANALYSIS

Instructions.

Lesser included offenses.

Sufficiency of evidence.

Instructions.

Trial court provided sufficient guidance to jury as to meaning of “lewd” for purposes of sexual performance using a minor, even though trial court did not specifically tell jurors that it was defining “lewd” for them, where trial court explained that sexual conduct meant a lewd exhibition of genitals, that genitals were defined as reproductive organs, “in this case, the vagina,” that lewd exhibition of genitals meant that a minor’s genital or pubic area must have been visibly displayed, that mere nudity was not enough, and that exhibition in question must have had an unnatural or unusual focus on minor’s genitalia regardless of minor’s intention to engage in sexual activity or whether viewer was sexually aroused. *Green v. United States*, 948 A.2d 554, 2008 D.C. App. LEXIS 244 (2008).

Lesser included offenses.

Taking indecent liberties with minor is lesser included offense of assault with intent to com-

mit carnal knowledge. D.C. Code 1981, § 22-501; § 22-3501(a) (repealed). *Spain v. United States*, 665 A.2d 658, 1995 D.C. App. LEXIS 199 (1995).

Assault with intent to commit carnal knowledge and lesser offense of taking indecent liberties with minor child did not merge into one crime where defendant initially pulled child’s pants down and fondled her, and later, after a brief interval which gave defendant a moment to decide whether to retreat or invade another interest, attempted to have sexual intercourse with her. D.C. Code 1981, § 22-501; § 22-3501(a) (repealed). *Spain v. United States*, 665 A.2d 658, 1995 D.C. App. LEXIS 199 (1995).

Sufficiency of evidence.

Evidence was sufficient to support conviction for sexual performance using a minor; victim testified that defendant photographed her nude on 20 separate occasions and that he specifically photographed her genitals on five of those occasions, and victim also testified that defendant told her to “show [her] butt,” turn around and smile, and “pose like the girls in porno magazines,” who victim thought posed in “very disgusting” ways. *Green v. United States*, 948 A.2d 554, 2008 D.C. App. LEXIS 244 (2008).

§ 22-3103. Penalties.

Violation of this chapter shall be a felony and shall be punished by:

(1) A fine of not more than \$5,000 or imprisonment for not more than 10 years, or both for the first offense; or

(2) A fine of not more than \$15,000 or imprisonment for not more than 20 years, or both for the 2nd and each subsequent offense.

(Mar. 9, 1983, D.C. Law 4-173, § 4, 29 DCR 5749.)

Prior Codifications. — 1981 Ed., § 22-2013.

Legislative history of Law 4-173. — For

legislative history of D.C. Law 4-173, see Historical and Statutory Notes following § 22-3101.

§ 22-3104. Affirmative defenses.

(a) Under this chapter it shall be an affirmative defense that the defendant

in good faith reasonably believed the person appearing in the performance was 18 years of age or over.

(b)(1) Except as provided in paragraph (2) of this subsection, in any prosecution for an offense pursuant to § 22-3102(2) it shall be an affirmative defense that the person so charged was:

(A) A librarian engaged in the normal course of his or her employment; or

(B) A motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater.

(2) The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in:

(A) The promotion of a sexual performance for sale, rental, or exhibition;

(B) The direction of any sexual performance; or

(C) The acquisition of the performance for sale, retail, or exhibition.

(c) It shall be an affirmative defense to a charge under § 22-3102 that the defendant:

(1) Possessed or accessed less than 6 still photographs or one motion picture, however produced or reproduced, of a sexual performance by a minor; and

(2) Promptly and in good faith, and without retaining, copying, or allowing any person, other than a law enforcement agency, to access any photograph or motion picture:

(A) Took reasonable steps to destroy each such photograph or motion picture; or

(B) Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.

(Mar. 9, 1983, D.C. Law 4-173, § 5, 29 DCR 5749; Oct. 23, 2010, D.C. Law 18-239, § 205(c), 57 DCR 5405.)

Prior Codifications. — 1981 Ed., § 22-2014.

Effect of amendments. — D.C. Law 18-239, in subsec. (a), substituted “18” for “16”; and added subsec. (c).

Legislative history of Law 4-173. — For

legislative history of D.C. Law 4-173, see Historical and Statutory Notes following § 22-3101.

Legislative history of Law 18-239. — For history of Law 18-239, see notes under § 22-3009.03.

CHAPTER 31A. STALKING.

Sec.

22-3131. Legislative intent.

22-3132. Definitions.

22-3133. Stalking.

Sec.

22-3134. Penalties.

22-3135. Jurisdiction.

§ 22-3131. Legislative intent.

(a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time. The Council recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the Council enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has even more serious or lethal consequences.

(b) The Council enacts this stalking statute to permit the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The Council recognizes that stalking includes a pattern of following or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

(Dec. 10, 2009, D.C. Law 18-88, § 501, 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 501 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 501 of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — Law

18-88, the “Omnibus Public Safety and Justice Amendment Act of 2009”, as introduced in Council and assigned Bill No. 18-151, which was referred to the Committee on Public Safety and the Judiciary. The bill as adopted on first and second readings on June 30, 2009, and July 31, 2009, respectively. Signed by the Mayor on August 26, 2009, it was assigned Act No. 18-189 and transmitted to both Houses of Congress for its review. D.C. Law 18-88 became effective on December 10, 2009.

§ 22-3132. Definitions.

For the purposes of this chapter, the term:

(1) “Any device” means electronic, mechanical, digital or any other equipment, including: a camera, spycam, computer, spyware, microphone, audio or video recorder, global positioning system, electronic monitoring system, listening device, night-vision goggles, binoculars, telescope, or spyglass.

(2) “Any means” includes the use of a telephone, mail, delivery service, e-mail, website, or other method of communication or any device.

(3) “Communicating” means using oral or written language, photographs, pictures, signs, symbols, gestures, or other acts or objects that are intended to convey a message.

(4) “Emotional distress” means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;

(5) “Financial injury” means the monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, member of the specific individual’s household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:

(A) The costs of replacing or repairing any property that was taken or damaged;

(B) The costs of clearing the specific individual’s name or his or her credit, criminal, or any other official record;

(C) Medical bills;

(D) Relocation expenses;

(E) Lost employment or wages; and

(F) Attorney’s fees.

(6) “Personal identifying information” shall have the same meaning as provided in § 22-3227.01(3).

(7) “Specific individual” or “individual” means the victim or alleged victim of stalking.

(8) “To engage in a course of conduct” means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to:

(A) Follow, monitor, place under surveillance, threaten, or communicate to or about another individual;

(B) Interfere with, damage, take, or unlawfully enter an individual’s real or personal property or threaten or attempt to do so; or

(C) Use another individual’s personal identifying information.

(Dec. 10, 2009, D.C. Law 18-88, § 502, 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 502 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-3131.

For temporary (90 day) addition, see § 502 of

§ 22-3133. Stalking.

(a) It is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual:

(1) With the intent to cause that individual to:

(A) Fear for his or her safety or the safety of another person;

(B) Feel seriously alarmed, disturbed, or frightened; or

(C) Suffer emotional distress;

(2) That the person knows would cause that individual reasonably to:

(A) Fear for his or her safety or the safety of another person;

(B) Feel seriously alarmed, disturbed, or frightened; or

(C) Suffer emotional distress; or

(3) That the person should have known would cause a reasonable person in the individual's circumstances to:

- (A) Fear for his or her safety or the safety of another person;
- (B) Feel seriously alarmed, disturbed, or frightened; or
- (C) Suffer emotional distress.

(b) This section does not apply to constitutionally protected activity.

(c) Where a single act is of a continuing nature, each 24-hour period constitutes a separate occasion.

(d) The conduct on each of the occasions need not be the same as it is on the others.

(Dec. 10, 2009, D.C. Law 18-88, § 503, 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 503 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 503 of

Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-3131.

§ 22-3134. Penalties.

(a) Except as provided in subsections (b) and (c) of this section, a person who violates § 22-3133 shall be fined not more than \$1,000, imprisoned for not more than 12 months, or both.

(b) A person who violates § 22-3133 shall be fined not more than \$10,000, imprisoned for not more than 5 years, or both, if the person:

(1) At the time, was subject to a court, parole, or supervised release order prohibiting contact with the specific individual;

(2) Has one prior conviction in any jurisdiction of stalking any person within the previous 10 years;

(3) At the time, was at least 4 years older than the specific individual and the specific individual was less than 18 years of age; or

(4) Caused more than \$ 2,500 in financial injury.

(c) A person who violates § 22-3133 shall be fined not more than \$25,000, imprisoned for not more than 10 years, or both, if the person has 2 or more prior convictions in any jurisdiction for stalking any person, at least one of which was for a jury demandable offense.

(d) A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct.

(Dec. 10, 2009, D.C. Law 18-88, § 504, 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 504 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 504 of

Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-3131.

§ 22-3135. **Jurisdiction.**

(a) An offense shall be deemed to be committed in the District of Columbia if the conduct on at least one occasion was initiated in the District of Columbia or had an effect on the specific individual in the District of Columbia.

(b) A communication shall be deemed to be committed in the District of Columbia if it is made or received in the District of Columbia or, if the specific individual lives in the District of Columbia, it can be electronically accessed in the District of Columbia.

(Dec. 10, 2009, D.C. Law 18-88, § 505, 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 505 of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 505 of

Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-3131.

CHAPTER 31B. TERRORISM.

Sec.

22-3151. Short title.

22-3152. Definitions.

22-3153. Acts of terrorism; penalties.

22-3154. Manufacture or possession of a
weapon of mass destruction.

Sec.

22-3155. Use, dissemination, or detonation of a
weapon of mass destruction.

22-3156. Jurisdiction.

§ 22-3151. Short title.

This chapter may be cited as the “Anti-Terrorism Act of 2002”.

(Oct. 17, 2002, D.C. Law 14-194, § 101, 49 DCR 5306.)

Legislative history of Law 14-194. — Law 14-194, the “Omnibus Anti-Terrorism Act of 2002”, was introduced in Council and assigned Bill No. 14-373, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 9,

2002, and May 7, 2002, respectively. Signed by the Mayor on June 3, 2002, it was assigned Act No. 14-380 and transmitted to both Houses of Congress for its review. D.C. Law 14-194 became effective on October 17, 2002.

§ 22-3152. Definitions.

For the purposes of this chapter, the term:

(1) “Act of terrorism” means an act or acts that constitute a specified offense as defined in paragraph (8) of this section and that are intended to:

(A) Intimidate or coerce a significant portion of the civilian population of:

(i) The District of Columbia; or

(ii) The United States; or

(B) Influence the policy or conduct of a unit of government by intimidation or coercion.

(2) “Biological agent” means any microorganism, virus, infectious substance, or biological product that may be engineered as a result of biotechnology, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product, capable of causing:

(A) Death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(B) Deterioration of food, water, equipment, supplies, or material of any kind; or

(C) Deleterious alteration of the environment.

(3) “Hoax weapon of mass destruction” means any device or object that by its design, construction, content, or characteristics, appears to be or to contain, or is represented to be or to contain a weapon of mass destruction, even if it is, in fact, an inoperative facsimile or imitation of a weapon of mass destruction, or contains no weapon of mass destruction.

(4) “Material support or resources” means:

(A) Expert services or assistance;

(B) Currency, financial securities or other monetary instruments, financial services, lodging, training, false documentation or identification, equip-

ment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets; or

(C) A weapon of mass destruction.

(5) "Nuclear material" means material containing any:

(A) Plutonium;

(B) Uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;

(C) Enriched uranium, defined as uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or

(D) Uranium 233.

(6) "Provision of material support or resources for an act of terrorism" means the act of providing material support or resources to a person or an organization with the purpose or knowledge that the material support or resources will be used, in whole or in part, to plan, prepare, or carry out an act of terrorism, or to flee after committing an act of terrorism.

(7) "Solicitation of material support or resources to commit an act of terrorism" means the act of raising, soliciting, or collecting material support or resources with the purpose or knowledge that such material support or resources will be used, in whole or in part, to plan, prepare, or carry out an act of terrorism, or to flee after committing an act of terrorism.

(8) "Specified offense" means:

(A) Section 22-2101 (Murder in the first degree);

(B) Section 22-2102 (Murder in the first degree — placing obstructions upon or displacement of railroads);

(C) Section 22-2106 (Murder of law enforcement officer or public safety employee);

(D) Section 22-2103 (Murder in the second degree);

(E) Section 22-2105 (Manslaughter);

(F) Section 22-2001 (Kidnapping and conspiracy to kidnap);

(G) Section 22-401 (Assault with intent to kill only);

(H) Section 22-406 (Mayhem or maliciously disfiguring);

(I) Section 22-301 (Arson);

(J) Section 22-303 (Malicious burning, destruction, or injury of another's property, if the property is valued at \$500,000 or more); or

(K) An attempt or conspiracy to commit any of the offenses listed in subparagraphs (A) through (J) of this paragraph.

(9) "Toxic or poisonous chemical" means any chemical which, through its chemical action on life processes, can cause death, permanent incapacitation, or permanent harm to humans.

(10) "Toxin" means the toxic material of plants, animals, microorganisms, viruses, fungi, or infectious substances, or a recombinant molecule, whatever its origin or method of production, including:

(A) Any poisonous substance or biological product that may be engineered as a result of biotechnology produced by a living organism; or

(B) Any poisonous isomer or biological product, homolog, or derivative of such a substance;

(11) "Unit of government" means:

- (A) The office of the President of the United States;
- (B) The United States Congress;
- (C) Any federal executive department or agency;
- (D) The office of the Mayor of the District of Columbia;
- (E) Any executive department or agency of the District of Columbia, including any independent agency, board, or commission;
- (F) The Council of the District of Columbia;
- (G) The Superior Court of the District of Columbia;
- (H) The District of Columbia Court of Appeals;
- (I) The United States Court of Appeals for the District of Columbia;
- (J) The United States District Court for the District of Columbia; or
- (K) The Supreme Court of the United States.

(12) "Weapon of mass destruction" means:

(A) Any destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury, including:

(i) An explosive, incendiary, or poison gas:

- (I) Bomb;
- (II) Grenade;
- (III) Rocket;
- (IV) Missile;
- (V) Mine; or

(VI) Device similar to any of the devices described in the preceding clauses;

(ii) A mortar, cannon, or artillery piece; or

(iii) Any combination of parts either designed or intended for use in converting any device into a device described in sub-subparagraphs (i) through (iii) of this paragraph and from which such device may be readily assembled;

(B) An object similar to or used to achieve the same destructive effect of any of the devices described in subparagraph (A) of this paragraph;

(C) Any weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a toxic or poisonous chemical;

(D) Any weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a biological agent or toxin; or

(E) Any weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material.

(Oct. 17, 2002, D.C. Law 14-194, § 102, 49 DCR 5306; Apr. 7, 2006, D.C. Law 16-91, § 141, 52 DCR 10637.)

Effect of amendments. — D.C. Law 16-91, in subpar. (12)(A)(iii), substituted "any device" for "any device described".

Legislative history of Law 14-194. — For Law 14-194, see notes following § 22-3151.

Legislative history of Law 16-91. — Law

16-91, the "Technical Amendments Act of 2005", was introduced in Council and assigned Bill No. 16-477 which was referred to the Committee on the Whole. The Bill was adopted on first and second readings on November 1, 2005, and November 15, 2005, respectively. Signed by the

Mayor on November 30, 2005, it was assigned of Congress for its review. D.C. Law 16-91
Act No. 16-212 and transmitted to both Houses became effective on April 7, 2006.

§ 22-3153. Acts of terrorism; penalties.

(a) A person who commits first degree murder that constitutes an act of terrorism shall, upon conviction, be punished by imprisonment for life without the possibility of release.

(b) A person who commits murder of a law enforcement officer or public safety employee that constitutes an act of terrorism shall, upon conviction, be punished by imprisonment for life without the possibility of release.

(c) A person who commits murder in the second degree that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for life.

(d) A person who commits manslaughter that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for life.

(e) A person who commits kidnapping that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for life.

(f) A person who commits any assault with intent to kill that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 30 years.

(g) A person who commits mayhem or maliciously disfiguring another that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.

(h) A person who commits arson that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.

(i) A person who commits malicious burning, destruction, or injury of another's property, if such property is valued at \$500,000 or more, that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.

(j) A person who attempts or conspires to commit first degree murder, murder of a law enforcement officer or public safety employee, murder in the second degree, manslaughter, or kidnapping that constitutes an act of terrorism may be punished by imprisonment for not more than 30 years.

(k) A person who attempts or conspires to commit any assault with intent to kill that constitutes an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.

(l) A person who attempts or conspires to commit mayhem or maliciously disfiguring another, arson, or malicious burning, destruction, or injury of another's property, if such property is valued at \$500,000 or more, that constitutes an act of terrorism may, upon conviction, be punished by imprisonment of not more than 15 years.

(m) A person who provides material support or resources for an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.

(n) A person who solicits material support or resources to commit an act of terrorism may, upon conviction, be punished by imprisonment for not more than 20 years.

(Oct. 17, 2002, D.C. Law 14-194, § 103, 49 DCR 5306.)

Legislative history of Law 14-194. — For Law 14-194, see notes following § 22-3151.

§ 22-3154. Manufacture or possession of a weapon of mass destruction.

(a) A person who manufactures or possesses a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for life.

(b) A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.

(Oct. 17, 2002, D.C. Law 14-194, § 104, 49 DCR 5306.)

Legislative history of Law 14-194. — For Law 14-194, see notes following § 22-3151.

§ 22-3155. Use, dissemination, or detonation of a weapon of mass destruction.

(a) A person who uses, disseminates, or detonates a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for life.

(b) A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.

(Oct. 17, 2002, D.C. Law 14-194, § 105, 49 DCR 5306.)

Legislative history of Law 14-194. — For Law 14-194, see notes following § 22-3151.

§ 22-3156. Jurisdiction.

There is jurisdiction to prosecute any person who participates in the commission of any offense described in this chapter if any act in furtherance of the offense occurs in the District of Columbia or where the effect of any act in furtherance of the offense occurs in the District of Columbia.

(Oct. 17, 2002, D.C. Law 14-194, § 106, 49 DCR 5306.)

Legislative history of Law 14-194. — For Law 14-194, see notes following § 22-3151.

CHAPTER 32. THEFT; FRAUD; STOLEN PROPERTY; FORGERY; AND EXTORTION.

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- 22-3231. Trafficking in stolen property.
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- 22-3241. Forgery.
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- 22-3251. Extortion.
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*Subchapter I. General Provisions.***§ 22-3201. Definitions.**

For the purposes of this chapter, the term:

(1) “Appropriate” means to take or make use of without authority or right.

(2) “Deprive” means:

(A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or

(B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

(2A) “Person” means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.

(3) “Property” means anything of value. The term “property” includes, but is not limited to:

(A) Real property, including things growing on, affixed to, or found on land;

(B) Tangible or intangible personal property;

(C) Services;

(D) Credit;

(E) Debt; and

(F) A government-issued license, permit, or benefit.

(4) “Property of another” means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term “property of another” includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term “property of another” does not include any property in the possession of the accused as to which any other person has only a security interest.

(5) “Services” includes, but is not limited to:

(A) Labor, whether professional or nonprofessional;

(B) The use of vehicles or equipment;

(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;

(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;

(E) Admission to public exhibitions or places of entertainment; and

(F) Educational and hospital services, accommodations, and other related services.

(6) “Stolen property” includes any property that has been obtained by conduct previously known as embezzlement.

(7) “Value” with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible

property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.

(Dec. 1, 1982, D.C. Law 4-164, § 101, 29 DCR 3976; Dec. 10, 2009, D.C. Law 18-88, § 214(a), 56 DCR 7413.)

Cross references. — Exploitation, adult protective services, see § 7-1901.

Prior Codifications. — 1981 Ed., § 22-3801.

Effect of amendments. — D.C. Law 18-88, added par. (2A); in par. (3), deleted “and” from the end of subpar. (B), substituted a semicolon for a period at the end of subpar. (C), and added subpars. (D) to (F); and added par. (7).

Emergency legislation. — For temporary (90 day) amendment of section, see § 102(a) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 2009, 56 DCR 5495).

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CASE NOTES

ANALYSIS

Attorney discipline.

Misappropriation of property.

Ownership and possession or custody of property.

Presumptions and burden of proof.

Attorney discipline.

Substantial evidence supported finding of Board on Professional Responsibility that conduct which resulted in conviction of misdemeanor charge of taking property without right did not involve “moral turpitude” within meaning of disciplinary rule prohibiting illegal conduct involving moral turpitude that reflects adversely on one’s fitness to practice law. Code of Prof.Resp., DR1-102(A)(3); D.C. Code 1981, § 22-3801. In re Kent, 467 A.2d 982, 1983 D.C. App. LEXIS 503 (1983).

Substantial evidence supported finding of Board of Professional Responsibility that conduct which resulted in conviction for offense of taking property without right involved “dishonesty” within meaning of disciplinary rule which prohibits engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Code of Prof.Resp., DR1-102(A)(4); D.C. Code 1981, § 22-3801. In re Kent, 467 A.2d 982, 1983 D.C. App. LEXIS 503 (1983).

Misappropriation of property.

The suggestion that misappropriated electric current is not within the definition of property would surely fly in the face of an unambiguous legislative intention to interdict wrongful tak-

ings of anything of value. *United States v. Gray*, 115 WLR 265 (Super. Ct. 1987).

Ownership and possession or custody of property.

The unexplained possession of recently stolen property may provide the basis for a reasonable inference that the possessor actually stole the property. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Trial court’s finding that defendant did not “own” merchandise, so as to be guilty of shoplifting, was supported by testimony of security officer that other party had informed him that defendant had shoplifted gloves, that security officer had observed defendant set off security alarm as he exited from department store, and that merchandise recovered from defendant’s shoulder bag still bore store’s price tags. D.C. Code 1981, §§ 22-3801(4), 22-3813(a). *Alston v. United States*, 509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

Presumptions and burden of proof.

To establish defendant’s guilt for taking property without right, the Government must prove that defendant took and carried away property of another as defined in applicable statute without right to do so. D.C. Code 1981, §§ 22-3801, 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Government did not have to affirmatively prove, in accordance with District of Columbia statute defining “property of another,” that gloves which defendant took were merchandise in which department store had more than se-

curity interest in order to make out prima facie case of shoplifting. D.C. Code 1981, §§ 22-3801(4), 22-3813(a). *Alston v. United States*,

509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

§ 22-3202. Aggregation of amounts received to determine grade of offense.

Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.

(Dec. 1, 1982, D.C. Law 4-164, § 102, 29 DCR 3976; Aug. 2, 1983, D.C. Law 5-24, § 6, 30 DCR 3341; Apr. 20, 2012, D.C. Law 19-120, § 101(a), 58 DCR 11235.)

Prior Codifications. — 1981 Ed., § 22-3802.

Effect of amendments. — D.C. Law 19-120 rewrote the section, which formerly read:

“Amounts received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), or § 22-3223 (Credit Card Fraud) may be aggregated in determining the grade of the offense and the sentence for the offense, except that with respect to credit card fraud only amounts received within a consecutive 7-day period may be aggregated.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 101(a) of Receiving Stolen Property and Public Safety Amendments Emergency Amendment Act of 2011 (D.C. Act 19-261, December 21, 2011, 58 DCR 11232).

For temporary (90 day) amendment of section, see § 101(a) of Receiving Stolen Property

and Public Safety Amendments Congressional Review Emergency Amendment Act of 2012 (D.C. Act 19-326, March 19, 2012, 59 DCR 2384).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 5-24. — Law 5-24, the “Technical and Clarifying Amendments Act of 1983,” was introduced in Council and assigned Bill No. 5-169, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 10, 1983, and May 24, 1983, respectively. Signed by the Mayor on June 9, 1983, it was assigned Act No. 5-41 and transmitted to both Houses of Congress for its review.

Legislative history of Law 19-120. — For history of Law 19-120, see notes under § 22-2701.

§ 22-3203. Consecutive sentences.

(a) A person may be convicted of any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct; provided, that no person shall be consecutively sentenced for any such combination or combinations that arise from the same act or course of conduct.

(b) Convictions arising out of the same act or course of conduct shall be considered as one conviction for purposes of any application of repeat offender sentencing provisions.

(Dec. 1, 1982, D.C. Law 4-164, § 103, 29 DCR 3976; June 3, 1997, D.C. Law 11-275, § 12(a), 44 DCR 1408; Mar. 27, 2004, D.C. Law 15-106, § 2(b), 50 DCR 9809; Dec. 10, 2009, D.C. Law 18-88, § 214(b), 56 DCR 7413.)

Cross references. — Commercial piracy, see § 22-3214.

Fraud, see § 22-3221.

Theft, see § 22-3811.

Unauthorized use of motor vehicles, see § 22-3215.

Prior Codifications. — 1981 Ed., § 22-3803.

Effect of amendments. — D.C. Law 15-106 made nonsubstantive changes in pars. (2) and (3); and added pars. (4) and (5).

D.C. Law 18-88 rewrote the section.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(b) of Identity Theft Emergency Amendment Act of 2003 (D.C. Act 15-285, December 18, 2003, 51 DCR 204).

For temporary (90 day) amendment of section, see § 2(b) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

For temporary (90 day) amendment of section, see § 102(b) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) amendment of section, see § 214(b) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(b) of Omnibus Public Safety and

Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 11-275. — Law 11-275, the “Second Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-909, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-520 and transmitted to both Houses of Congress for its review. D.C. Law 11-275 became effective on June 3, 1997.

Legislative history of Law 15-106. — Law 15-106, the “Identity Theft Amendment Act of 2003”, was introduced in Council and assigned Bill No. 15-36, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on July 8, 2003, and October 7, 2003, respectively. Signed by the Mayor on October 24, 2003, it was assigned Act No. 15-196 and transmitted to both Houses of Congress for its review. D.C. Law 15-106 became effective on March 27, 2004.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CASE NOTES

In general.

Conviction for both fraud and theft offenses and imposition of concurrent sentences for both did not violate right of protection against double jeopardy even if offenses arose from same course of conduct, where Council of the District of Columbia had clearly expressed its intention to allow such convictions and punishments for combined acts of fraud and theft through enactment of sentencing statute. *Youssef v. United States*, 27 A.3d 1202, 2011 D.C. App. LEXIS 529 (2011).

Defendant can properly be convicted of both unauthorized use of vehicle (UUV) and receiving stolen property (RSP) arising out of same act or course of conduct, even though State is statutorily precluded from consecutively sentencing a defendant upon convictions for RSP and UUV arising out of same act or course of conduct. D.C. Code 1981, §§ 22-3803, 22-3815, 22-3832, 23-112; *U.S. Const. Amend. 5*. *Byrd v. United States*, 598 A.2d 386, 1991 D.C. App. LEXIS 283 (1991).

§ 22-3204. Case referral.

For the purposes of this chapter, in cases involving more than one jurisdiction, or in cases where more than one District of Columbia agency is responsible for investigating an alleged violation, the investigating agency to which the report was initially made may refer the matter to another investigating or law enforcement agency with proper jurisdiction.

(Dec. 1, 1982, D.C. Law 4-164, § 104, as added Dec. 10, 2009, D.C. Law 18-88, § 214(c), 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 102(c) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) addition, see § 214(c) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 214(c) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Subchapter II. Theft; Related Offenses.

§ 22-3211. Theft.

(a) For the purpose of this section, the term “wrongfully obtains or uses” means: (1) taking or exercising control over property; (2) making an unauthorized use, disposition, or transfer of an interest in or possession of property; or (3) obtaining property by trick, false pretense, false token, tampering, or deception. The term “wrongfully obtains or uses” includes conduct previously known as larceny, larceny by trick, larceny by trust, embezzlement, and false pretenses.

(b) A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent:

(1) To deprive the other of a right to the property or a benefit of the property; or

(2) To appropriate the property to his or her own use or to the use of a third person.

(c) In cases in which the theft of property is in the form of services, proof that a person obtained services that he or she knew or had reason to believe were available to him or her only for compensation and that he or she departed from the place where the services were obtained knowing or having reason to believe that no payment had been made for the services rendered in circumstances where payment is ordinarily made immediately upon the rendering of the services or prior to departure from the place where the services are obtained, shall be prima facie evidence that the person had committed the offense of theft.

(Dec. 1, 1982, D.C. Law 4-164, § 111, 29 DCR 3976.)

Cross references. — Consecutive sentences for theft and certain other crimes, availability, see § 22-3203.

Enhanced penalty for crimes committed against senior citizen victims, see § 22-3601.

Forgery, see § 22-3241.

Medicaid Provider Fraud Prevention Act, penalties for violation, see § 4-802.

Merchant's civil recovery for criminal conduct, fraud, theft and shoplifting defined, see § 27-101.

Receiving stolen property, see § 22-3232.

Trafficking in stolen property, see § 22-3231.

Section references. — This section is referred to in §§ 22-3202.

Prior Codifications. — 1981 Ed., § 22-3811.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

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Admissibility of evidence.

Testimony of police officer in prosecution for false pretenses was admissible where noncoercive questioning of defendant was carried on in course of a routine police investigation prior to arrest, or the establishment of probable cause for an arrest, and police had not moved from investigation into possible existence of a crime to purposeful investigation of defendant. D.C. Code 1961, § 22-1301. *Pennewell v. United States*, 353 F.2d 870, 1965 U.S. App. LEXIS 4024 (C.A.D.C. 1965).

Testimony of store proprietor that defendant charged with larceny of woman's wig from store had inquired on day prior to taking of wig as to possible purchase of wig for use in dance act was competent on issue of defendant's identification as well as his motive. D.C. Code 1961, § 22-2201. *Jackson v. United States*, 331 F.2d 816, 1964 U.S. App. LEXIS 5770 (C.A.D.C. 1964).

Where defendant obtained delivery of two television sets by misrepresenting indebtedness upon automobile given security of the purchase and converted such sets to his own use, defendant would not be heard to contend that seller, who had relied upon defendant's misrepresentation, could not show true situation if the fraud had culminated in a written instrument at variance with the facts. D.C. Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d

21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

In prosecution of one who presented a bad check as good and got hotel to cash it, for obtaining money by false pretenses, court properly admitted in evidence some 13 other bad checks which defendant had represented as good, and for which he got cash at about the same time, for purpose of showing fraudulent intent. D.C. Code 1940, § 22-1301. *Green v. U.S.*, 188 F.2d 48, 1951 U.S. App. LEXIS 2965 (C.A.D.C. 1951).

A trial court may admit a statement under the excited-utterance exception to the hearsay rule if a party presenting the statement establishes the existence of the three elements of (1) a startling event that causes a state of nervous excitement or physical shock in the declarant, (2) a declaration made within a sufficiently short period of time after the occurrence to ensure that the declarant did not reflect upon the event and possibly invent a statement, and (3) circumstances that in their totality suggest spontaneity and sincerity of the remark. *Teasley v. United States*, 899 A.2d 124, 2006 D.C. App. LEXIS 219 (2006).

Victim's statements during two telephone conversations after carjacking were admissible under exception to hearsay rule for excited utterances; victim placed both telephone calls, which were made to 911 and his children's grandmother, within one-half hour after incident, victim spoke in excited tone, mumbled to himself, and did not have wherewithal to provide vehicle's license plate number during 911 call, and during next call, according to grandmother, victim had excited tone of voice, spoke very fast, and uncharacteristically used profanity. *Teasley v. United States*, 899 A.2d 124, 2006 D.C. App. LEXIS 219 (2006).

Statement of department store loss prevention officer while observing a woman remove handbags on closed circuit television system, "that's Theresa Hallums," was not admissible under the excited utterance exception to the hearsay rule, in trial of defendant for second degree theft, as officer presumably was accustomed to watching shoplifters on the monitor and was not in the requisite state of nervous excitement or physical shock. *Hallums v. United States*, 841 A.2d 1270, 2004 D.C. App. LEXIS 48 (2004).

There are different methods of proving value in prosecutions for theft or destruction of property exceeding a threshold value, and no one method is preferred over others. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Even if police officer lacked probable cause to seize articles in shopping cart pushed by defendant on the street, defendant's confessions to burglary after his return to police station seeking to reclaim the seized articles were properly

not suppressed where there was nothing which compelled defendant to return and confess to the police after seizure of the contents of his shopping cart, there was no evidence that defendant was pressured, harassed or subjected to any form of duress before he made his confession, eight days passed between time of the seizure of the goods and defendant's confession, police officer's action in seizing the goods did not indicate an obvious purpose to coerce or intimidate defendant, and prosecution would have been impossible once all physical evidence and defendant's incriminating statements were suppressed. *U.S. Const. Amend. 4. Wilkerson v. United States*, 432 A.2d 730, 1981 D.C. App. LEXIS 316 (1981), writ of certiorari denied by 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628, 1981 U.S. LEXIS 4758, 50 U.S.L.W. 3447 (1981).

Where specific terms of check with which defendant purchased some \$79 worth of groceries at local supermarket while knowing he had no current account in bank upon which check was drawn were not material in prosecution for obtaining property under false pretenses, since false representation alleged was that defendant had an account at the bank and such representation was obviously implied and not part of instrument itself, best evidence rule was not applicable, and oral testimony concerning check lost by government prior to trial was properly considered in arriving at verdict. D.C. Code § 22-1301. *Henson v. United States*, 287 A.2d 106, 1972 D.C. App. LEXIS 341 (1972).

Arguments and conduct of counsel.

Inadvertent remark which was made in prosecutor's closing argument and which related to lack of surprise by witness' failure to identify defendant's signature in view of defendant's prior involvement in similar cases did impermissibly suggest that handwriting analyst could not tie the signatures to defendant because defendant was experienced in disguising his hand through prior involvement with similar cases. 18 U.S.C. § 1341; D.C. Code 1973, §§ 22-1301, 22-1401. *United States v. Coats*, 652 F.2d 1002, 1981 U.S. App. LEXIS 19259 (C.A.D.C. 1981).

No legitimate basis existed for government's comment on defendant's failure to call missing witness where, in prosecution involving false pretenses, it could not reasonably be supposed or inferred that missing witness would have supported defendant's account, even if true, since defendant's contention was that the fraud was committed by missing witness rather than by himself. D.C. Code 1961, § 22-1301. *Pennewell v. United States*, 353 F.2d 870, 1965 U.S. App. LEXIS 4024 (C.A.D.C. 1965).

In prosecution for false pretenses, trial court did not err when, prior to opening statement of Assistant United States Attorney, and at his

request, trial court instructed counsel of defendant to refrain from mentioning that facts of transaction involved in false pretenses trial had previously been presented to grand jury as a charge of forgery and that the grand jury had ignored the charge. D.C. Code 1951, § 22-1301. *Brommer v. U.S.*, 157 A.2d 292, 1960 D.C. App. LEXIS 158 (Cr.App. 1960).

Arrest.

Where police officer, on foot patrol, saw a bag of trash thrown into a public street from left front window of automobile standing at curb with motor running, and where the automobile's occupant, after being approached by the officer and questioned about the bag, alighted from the automobile, picked up the bag and put it back inside the car, it could not be said that the incident was over and that it was unlawful for the officer to ask the occupant to produce his operator's permit and the registration card for the automobile, which inquiries resulted in discovery that the occupant's permit had been revoked and, later, that the automobile had been stolen. D.C. Code §§ 22-2201, 22-2204, 40-102(a), 40-104(a)(1), (a)(1)(C), 40-301(c, d). *United States v. Weston*, 466 F.2d 435, 1972 U.S. App. LEXIS 8038 (C.A.D.C. 1972).

Probable cause for arrest existed when driver of automobile, who started to drive away without his lights on, was stopped by police and dome light showed articles in automobile which had just been reported stolen from another automobile in the area as driver got out to show officers his registration card, and such probable cause was sufficient to support search and seizure of reportedly stolen articles. D.C. Code 1951, §§ 22-2201, 22-2202; Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C. *Campbell v. U.S.*, 289 F.2d 775, 1961 U.S. App. LEXIS 4962 (C.A.D.C. 1961).

Police officers who saw parked automobile resting on its axles and three tires scattered nearby when they came upon scene at which two security officers from nearby apartment building had stopped defendant, observed by security officers walking away from vicinity of vehicle carrying jumper cables and a jack plate, for questioning during which neighbor called out from window to say that defendant was one of the men who had been "messing" with stripped vehicle had probable cause to arrest for petit larceny notwithstanding arresting officers did not actually see defendant remove or carry away tires from vehicle. D.C. Code §§ 22-2201, 22-2202, 23-306(c). *United States v. Bynum*, 283 A.2d 649, 1971 D.C. App. LEXIS 226 (1971).

Attorney disciplinary proceedings.

Disbarment of attorney was warranted, in attorney disciplinary case, where attorney pled guilty to five counts of theft, two counts of

fraud, and contempt of court in connection with attorney's conduct in swindling a series of landlords and prospective tenants, and attorney's offenses involved moral turpitude, thus warranting disbarment under statute. *In re Hallmark*, 998 A.2d 284, 2010 D.C. App. LEXIS 287 (2010).

Disbarment was proper sanction for attorney's theft of fraternal organization's funds and his dishonest and deceitful deposition testimony in lawsuit that he filed against the national chapter of the organization, where attorney reimbursed the funds only after he was caught, subsequent to his making false statements in the deposition to conceal his actions. *In re Slattery*, 767 A.2d 203, 2001 D.C. App. LEXIS 23 (2001).

For purposes of determining attorney discipline, conviction of crime of false pretenses constitutes conviction of crime involving moral turpitude. D.C. Code 1981, §§ 11-2503(a), 22-1301. *In re Anderson*, 474 A.2d 145, 1984 D.C. App. LEXIS 365 (1984).

Convictions, on plea of guilty, of three counts of false pretenses warrants disbarment. D.C. Code 1981, §§ 11-2503(a), 22-1301. *In re Anderson*, 474 A.2d 145, 1984 D.C. App. LEXIS 365 (1984).

Construction with other statutes.

Within context of statute punishing those who make unauthorized use of vehicle, as opposed to statutory scheme concerning titling and registration, there is not sufficient difference between moped and other vehicles known as motorcycles, to warrant disparate treatment for offenders and diminished legal protection for legal owners of such vehicles, and, therefore, moped is "motor vehicle" for purposes of unauthorized use of vehicle statute. D.C. Code §§ 22-2204, 22-2204(c). *United States v. Stancil*, 422 A.2d 1285, 1980 D.C. App. LEXIS 398 (1980).

Double jeopardy.

Where during investigation on charges of mail fraud and false pretenses defendant's premises were searched and marijuana as well as items defendant had reported stolen were discovered, the offenses were separate, and double jeopardy clause did not preclude subsequent prosecution for mail fraud and false pretenses concerning allegedly false claims made to insurance company, following prosecution for marijuana possession. U.S. Const. Amend. 5; 18 U.S.C. § 1341; D.C. Code 1981, §§ 22-1301, 33-502. *United States v. Turner*, 573 F. Supp. 1104, 1983 U.S. Dist. LEXIS 11866 (1983).

In prosecution for grand larceny and unauthorized use of a motor vehicle, defendant waived any potential double jeopardy claim where he failed to raise the issue either in trial

court or on his brief on appeal, and since no grave injustice was likely to result where defendant was sentenced to concurrent sentences for the two convictions. D.C. Code 1973, §§ 22-2201, 22-2204; U.S. Const. Amend. 5. *Wesley v. United States*, 449 A.2d 282, 1982 D.C. App. LEXIS 399 (1982).

Examination of witnesses.

Rule authorizes use of conviction for crime involving dishonesty or false statement to attack credibility of witness regardless of possible prejudice to defendant. Fed. Rules Evid. Rule 609(a)(2), 18 U.S.C. *United States v. Coats*, 652 F.2d 1002, 1981 U.S. App. LEXIS 19259 (C.A.D.C. 1981).

Examination of record failed to disclose any abuse of discretion with respect to limitations placed on cross-examination of prosecution witnesses by defense counsel who claimed that he was prevented from testing the explanation given by the witnesses of general lending procedures by eliciting from them procedure followed with respect to the 17 transactions listed in indictment charging false pretenses in view of fact that nothing in record showed that defense was intimidated from further inquiry into the specific loan transactions. 18 U.S.C. § 371; D.C. Code §§ 22-1301, 22-1401. *United States v. Stamp*, 458 F.2d 759, 1971 U.S. App. LEXIS 6547 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2424, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2406 (1972), writ of certiorari denied by 409 U.S. 842, 93 S. Ct. 104, 34 L. Ed. 2d 81, 1972 U.S. LEXIS 1258 (1972).

Where defendant's prior convictions of unauthorized use of vehicle and petit larceny were introduced in evidence on his own direct examination in effort to support contention that he was framed with respect to grand larceny charge by one of government's witnesses, he could not successfully complain of alleged error in permitting him to be impeached by prior convictions, notwithstanding decisions stating that the offense of taking property without right does not bear on credibility. D.C. Code §§ 22-1201, 22-1801(b), 22-2201. *United States v. Lucas*, 426 F.2d 663, 1970 U.S. App. LEXIS 9918 (C.A.D.C. 1970).

Harmless or prejudicial error.

Failure of court to clearly charge jury that false pretenses and conspiracy statutes provided more severe penalty when value of property involved exceeded \$100 was not prejudicial error where all defendants were charged with getting or conspiring to get property worth more than \$100 and were sentenced on that basis, where government's proof of value was adequate and not contested and where there was no real issue as to value and no request for more specific instruction. D.C. Code 1961, § 22-1301; 18 U.S.C. § 371. *Cupo v. United States*,

359 F.2d 990, 1966 U.S. App. LEXIS 6807 (C.A.D.C. 1966), writ of certiorari denied by 385 U.S. 1013, 87 S. Ct. 723, 17 L. Ed. 2d 549, 1967 U.S. LEXIS 2672 (1967).

Where indictment charged embezzlement, false pretense, and larceny after trust, any confusion which might have existed as a result of the prosecution being allowed to put in its case before making an election was dispelled by election at end of Government's case and by instructions to jury. D.C. Code 1940, §§ 22-1202, 22-1301, 22-2203. *Dobbins v. U.S.*, 157 F.2d 257, 1946 U.S. App. LEXIS 2691 (1946).

Any error in admission of statement of department store loss prevention officer while observing a woman remove handbags on closed circuit television system, "that's Theresa Hallums," was harmless in trial for second degree theft; store loss prevention manager also identified defendant after looking at videotape. *Hallums v. United States*, 841 A.2d 1270, 2004 D.C. App. LEXIS 48 (2004).

Defendant in second-degree burglary prosecution could not have been prejudiced by court's response to jury's question that aiding and abetting instruction applied to second-degree burglary, in that it was unnecessary for jury to agree on whether he was inside shoe store; one who aids and abets principal in committing crime is charged as principal. D.C. Code 1981, §§ 22-105, 22-1801(b). *Tyler v. United States*, 495 A.2d 1180, 1985 D.C. App. LEXIS 444 (1985).

Where information charging defendant with false pretenses described clearly date of act alleged, named victim and cited appropriate statutes, defendant could, by motion, have had charge reworded at any time before verdict, nothing in record indicated that defendant's defense suffered through any misunderstanding of the information, and all of elements necessary to show violation of false pretenses statute were proven to satisfaction of jury, error in information describing as nonnegotiable check that actually was negotiable, in the absence of an objection prior to appeal, was not so prejudicial an error as to require reversal. D.C. Code § 22-1301; D.C. Code SCR, Criminal Rule 7(e). *Clemons v. United States*, 400 A.2d 1048, 1979 D.C. App. LEXIS 344 (1979).

Indictment or information.

False pretenses counts, which did not refer to specific allegations of misrepresentation contained in wire fraud count, which did not say anything about defendant's representations concerning qualifications of his corporations to do home improvement work, and which only alleged that defendant falsely represented his intention through such corporations to perform home improvement work contracted for, failed to state an offense. D.C. Code § 22-1301. *United States v. Fulcher*, 626 F.2d 985, 1980

U.S. App. LEXIS 19661 (C.A.D.C. 1980), writ of certiorari denied by 449 U.S. 839, 101 S. Ct. 116, 66 L. Ed. 2d 46, 1980 U.S. LEXIS 2840, 49 U.S.L.W. 3247 (1980).

Absent any allegation whatsoever in indictment, which charged the obtaining of something of value by false pretenses with intent to defraud, as to what the false pretenses were, the indictment was fatally defective and should have been dismissed upon timely objection; the United States Attorney was not vested with authority to insert allegations as to the particular false pretenses used through response to bill of particulars. Fed.Rules Crim.Proc. rules 7(f), 12(b)(2), 18 U.S.C.; D.C. Code § 22-1301(a). *United States v. Nance*, 533 F.2d 699, 1976 U.S. App. LEXIS 12339 (C.A.D.C. 1976).

In prosecution for grand larceny, government had to introduce probative evidence of each and every element of crime charged, including value of property which was taken and failure to offer such proof would be fatal to government's case. D.C. Code § 22-2201. *United States v. Thweatt*, 433 F.2d 1226, 1970 U.S. App. LEXIS 8425 (C.A.D.C. 1970).

When there is a possibility of convicting the defendant of either grand or petit larceny, offenses which carry significantly different penalties and which are distinguished solely by value of property taken, it is essential that government introduce evidence of that value in order to give jury a firm basis upon which it can render a verdict. D.C. Code § 22-2201. *United States v. Thweatt*, 433 F.2d 1226, 1970 U.S. App. LEXIS 8425 (C.A.D.C. 1970).

Court's failure to order severance was not abuse of discretion as to defendants who did not raise joinder issue in that defendants were not seriously prejudiced. Fed.Rules Crim.Proc. rules 8(a, b), 12(b)(2), 14, 52(b), 18 U.S.C.; D.C. Code 1961, § 22-1301; 18 U.S.C. § 371. *Cupo v. United States*, 359 F.2d 990, 1966 U.S. App. LEXIS 6807 (C.A.D.C. 1966), writ of certiorari denied by 385 U.S. 1013, 87 S. Ct. 723, 17 L. Ed. 2d 549, 1967 U.S. LEXIS 2672 (1967).

Under larceny indictment under District of Columbia statute, charging that defendant had taken union property which had been entrusted to victim, it was not necessary to show that money was received from union, but rather that money was that of union and that it had been entrusted to victim. D.C. Code 1961, § 22-2201. *Levin v. United States*, 338 F.2d 265, 1964 U.S. App. LEXIS 4853 (C.A.D.C. 1964), writ of certiorari denied by 379 U.S. 999, 85 S. Ct. 719, 13 L. Ed. 2d 701, 1965 U.S. LEXIS 1914 (1965).

Where indictment charged embezzlement, false pretense, and larceny after trust, defendant's motion that Government be required to elect to place its case on one of the three crimes charged before putting in evidence was addressed to discretion of trial court and its denial of motion was not an abuse of discretion. D.C.

Code 1940, §§ 22-1202, 22-1301, 22-2203. *Dobbins v. U.S.*, 157 F.2d 257, 1946 U.S. App. LEXIS 2691 (1946).

An indictment charging defendant in one count with forgery and in second count with uttering same forged letter was not demurrable on ground that it was "repugnant". D.C. Code 1940, §§ 22-1301, 22-1401. *U.S. v. Briggs*, 54 F.Supp. 731, 1944 U.S. Dist. LEXIS 2485 (D.D.C.1944).

Guilty plea to first-degree theft, rather than first-degree burglary, with respect to one charged incident did not amount to a constructive amendment of indictment, but rather an amendment of government's plea offer, where charge to which defendant was allowed to plead guilty was already contained in indictment. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Joinder of counts concerning second-degree burglary, grand larceny, and attempted burglary, was not improper. D.C. Code §§ 22-103, 22-1801(b), 22-2201; D.C. Code SCR, Criminal Rule 8(a). *Coleman v. United States*, 298 A.2d 40, 1972 D.C. App. LEXIS 303 (1972), writ of certiorari denied by 413 U.S. 921, 93 S. Ct. 3070, 37 L. Ed. 2d 1043, 1973 U.S. LEXIS 1990 (1973).

In larceny cases, Government must prove each and every element of crime charged, including value of property taken. D.C. Code § 22-2201. *Boone v. United States*, 296 A.2d 449, 1972 D.C. App. LEXIS 274 (1972).

Instructions.

Defendant's requested instructions on his "good faith" defense to charges of wire fraud and false pretenses, crimes that required proof of intent to defraud, were sufficiently covered by trial court's instructions emphasizing government's burden of proving element of specific intent beyond reasonable doubt. 18 U.S.C. § 1343; D.C. Code 1973, § 22-1301. *United States v. Gambler*, 662 F.2d 834, 1981 U.S. App. LEXIS 18562 (C.A.D.C. 1981).

Defendant's requested instructions on his "good faith" defense to charges of wire fraud and false pretenses, crimes that required proof of intent to defraud, were sufficiently covered by trial court's instructions emphasizing government's burden of proving element of specific intent beyond reasonable doubt. 18 U.S.C. § 1343; D.C. Code 1973, § 22-1301. *United States v. Gambler*, 662 F.2d 834, 1981 U.S. App. LEXIS 18562 (C.A.D.C. 1981).

In grand larceny prosecution in which it appeared that defendant was found in possession of certain contents of recently stolen travel bag, instruction on rule that guilt of theft may be inferred from possession of recently stolen

property, otherwise accurate, was not rendered insufficient by failure to explicitly inform jury that theft of entire bag and its contents by defendant could be inferred only if it were proved beyond reasonable doubt that all were stolen at the same time, where it was absolutely clear that all the items were taken by a single act, while owner's attention was only momentarily diverted. D.C. Code § 22-2201. *United States v. Coggins*, 433 F.2d 1357, 1970 U.S. App. LEXIS 7455 (C.A.D.C. 1970).

Refusal to charge, in prosecution for false pretenses, on lesser included offense of passing bad check was not error where defense testimony disclosed something had been obtained for value and that defrauded party had placed reliance on defendant's check. D.C. Code 1961, §§ 22-1301, 22-1410. *Ciullo v. United States*, 325 F.2d 227, 1963 U.S. App. LEXIS 3861 (C.A.D.C. 1963).

In prosecution for obtaining goods by false pretenses, court was not bound to adopt defendant's theory of the case. D.C. Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

In prosecution for obtaining goods by false pretenses, instruction, which enumerated elements of the crime, which were to be proven beyond a reasonable doubt, was, under District of Columbia law, correct and adequate for jury's guidance. D.C. Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

In prosecution for grand larceny, defendant's general request, made prior to rendition of charge, that court charge that if prosecuting witness gave defendant money intending that he be able to pass title to it, there was no larceny, was an incorrect statement of law. D.C. Code 1940, § 22-2201. *Graham v. U.S.*, 187 F.2d 87, 1950 U.S. App. LEXIS 2345 (C.A.D.C. 1950).

Trial court properly refused to instruct jury on larceny as lesser included offense of robbery, where defendant's conduct would have constituted robbery even under his version of facts in which he only decided to take victim's property after fatally stabbing him. D.C. Code 1981, § 22-2901. *Ulmer v. United States*, 649 A.2d 295, 1994 D.C. App. LEXIS 197 (1994).

In prosecution for petit larceny, trial court did not abuse its discretion in denying defendant's request for additional instruction which he urged would help jury delineate subject matter of instant larceny from other property mentioned in course of trial. D.C. Code 1973, § 22-2202. *McEachin v. United States*, 432 A.2d 1212, 1981 D.C. App. LEXIS 312 (1981).

In prosecution for obtaining money from complaining witness by falsely representing to him that certain repairs had been made and certain parts replaced in his automobile, instruction that jury could find that defendants had guilty

knowledge if they found that they made false representations as to repairs recklessly and not caring whether the representations were true or false, was improper, in view of fact subjective knowledge is necessary for criminal responsibility for a false representation, rather than a mere reckless disregard of the facts. D.C. Code 1951, § 22-1301. *Avant v. U.S.*, 154 A.2d 354, 1959 D.C. App. LEXIS 295 (Cr.App. 1959).

Insurance coverage.

Where insured entered into agreement to sell insured automobile to third person for certain sum, and insured accepted a check, and third person departed with possession and title to automobile, and thereafter insured discovered that check was fraudulent, taking of automobile by third person was by "false pretenses" and not by "theft" within meaning of policy insuring against "theft" of automobile. D.C. Code 1951, § 22-1301. *Great Am. Indem. Co. v. Yoder*, 131 A.2d 401, 1957 D.C. App. LEXIS 224 (Cr.App. 1957).

Joint or separate trial of charges.

Federal rule of criminal procedure allowed joinder of one count charging larceny after trust and four other counts, including two counts of larceny after trust, one count of wire fraud and one count of false pretenses, and district court did not abuse its discretion in denying motion for severance, where evidence would have been mutually admissible in separate trials. 18 U.S.C. § 1343; D.C. Code 1973, §§ 22-1301, 22-2203; Fed.R.Cr.Proc. Rules 8(a), 14, 18 U.S.C. *United States v. Gambler*, 662 F.2d 834, 1981 U.S. App. LEXIS 18562 (C.A.D.C. 1981).

Offense of carrying dangerous weapon could be tried with burglary and robbery charges, where proof of the robberies and burglaries included substantially all of the proof of the weapons charge; although crimes were not similar, they were sufficiently connected to warrant joinder. Criminal Rules 8, 8(a); D.C. Code 1981, §§ 22-1801(a, b), 22-2101, 22-2901, 22-3209, 22-3811, 22-3812(a), 22-3901. *Coleman v. United States*, 619 A.2d 40, 1993 D.C. App. LEXIS 6 (1993).

Jurisdiction.

Where District of Columbia police officer was charged with obstruction of justice under federal statute and with tampering with evidence and theft in violation of the District of Columbia Code, and the federal charge was dismissed, it would not be appropriate for United States District Court for the District of Columbia to retain jurisdiction over the local offenses, even if it had discretion to do so, in that no matters of legitimate federal concern remained. 18 U.S.C. § 1503; D.C. Code 1981, §§ 22-723, 22-3811, 22-3812. *United States v. Smith*, 729 F. Supp. 1380, 1990 U.S. Dist. LEXIS 1092 (1990).

Defendant's use of Maryland victim's motor vehicle occurred in District of Columbia, within meaning of statutes governing theft and unauthorized use of motor vehicle, as required for superior court to have subject matter jurisdiction to prosecute offense; although defendant took possession of victim's car in Maryland, police officers stopped and arrested defendant while he was using victim's car without her permission within District of Columbia. *Dobyns v. United States*, 30 A.3d 155, 2011 D.C. App. LEXIS 614 (2011).

Criminal provisions of District of Columbia Code apply to all property owned by United States in District unless such property is expressly exempt from coverage by Congress. U.S. Const. Art. 1, § 8, cl. 17; D.C. Code 1973, § 4-120. *McEachin v. United States*, 432 A.2d 1212, 1981 D.C. App. LEXIS 312 (1981).

District of Columbia Superior Court had jurisdiction over violations of District criminal statutes committed on Air Force base located within District, even though Air Force base was federally owned and defendant could have been prosecuted for violations of federal statutes. U.S. Const. Art. 1, § 8, cl. 17; D.C. Code 1973, § 11-923(b)(1). *McEachin v. United States*, 432 A.2d 1212, 1981 D.C. App. LEXIS 312 (1981).

Lesser included offenses.

Larceny is a necessarily included offense of robbery. D.C. Code §§ 22-2201, 22-2901. *Walker v. United States*, 418 F.2d 1116, 1969 U.S. App. LEXIS 12640 (C.A.D.C. 1969).

Defendant could not be convicted of both theft and receipt of stolen goods with respect to the same property; thus, conviction for second-degree theft required acquittal on charge of receiving stolen property. *Cannon v. United States*, 838 A.2d 293, 2003 D.C. App. LEXIS 712 (2003).

Taking property without right is a lesser included offense of robbery inasmuch as larceny is a lesser included offense of robbery and taking property without right is a lesser included offense of larceny. D.C. Code 1981, §§ 22-2901, 22-3811, 22-3812, 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Because receiving stolen property is lesser included offense of theft, defendant cannot be convicted of both theft and receipt of stolen goods with respect to same property. D.C. Code 1981, §§ 22-3811, 22-3812(a, b), 22-3832(a), (c)(2). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

Limitation of actions.

Statute of limitations did not run during absence from the District of Columbia of defendant charged with obtaining money by false pretenses in the District of Columbia even if he did not leave the District of Columbia to avoid

prosecution. D.C. Code 1940, § 22-1301. *Green v. U.S.*, 188 F.2d 48, 1951 U.S. App. LEXIS 2965 (C.A.D.C. 1951).

Merger of offenses.

Defendant's conviction of uttering did not merge with his conviction of attempted second-degree theft, where each offense required proof of element not required by the other; uttering required proof that defendant "issue[d], authenticate[d], transfer[red], publish[ed], s[old], deliver[ed], transmit[ted], present[ed], display[ed], use[d], or certifi[ed] [a forged written instrument,]" while attempted second-degree theft required proof that defendant acted with intent "[t]o deprive [victim] of a right to the property or a benefit of the property" or "[t]o appropriate the property to his own use or to the use of a third person." *Boyd v. United States*, 870 A.2d 70, 2005 D.C. App. LEXIS 40 (2005).

Defendant's conviction for unauthorized use of motor vehicle did not merge with his robbery conviction, and his theft conviction did not merge with burglary conviction, where each conviction required a different element of proof. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b), 22-3815. *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

Since offense of attempted false pretenses is identical to offense of unemployment compensation fraud, the doctrine of merger was applicable on conviction of false pretenses and unemployment compensation fraud and, hence, conviction of unemployment compensation fraud was required to be vacated. D.C. Code §§ 22-103, 22-1301(a), 46-319(a). *Lewis v. United States*, 389 A.2d 306, 1978 D.C. App. LEXIS 486 (1978).

Nature and elements of theft offenses.

Nature and elements of theft by false pretenses—In general.

Five elements of crime of false pretenses are: false representation, knowledge of falsity, intent to defraud, reliance by the defrauded party, and obtaining something of value. D.C. Code 1961, § 22-1301. *Ciullo v. United States*, 325 F.2d 227, 1963 U.S. App. LEXIS 3861 (C.A.D.C. 1963).

District of Columbia false pretenses statute protects against an individual's obtaining any service or anything of value through false or fraudulent means. D.C. Code 1981, § 22-1301. *United States v. Turner*, 573 F. Supp. 1104, 1983 U.S. Dist. LEXIS 11866 (1983).

Elements of false pretenses are false representation, knowledge of falsity, specific intent to defraud, reliance by victim, and obtaining of valuable property. D.C. Code § 22-1301. *Clemmons v. United States*, 400 A.2d 1048, 1979 D.C. App. LEXIS 344 (1979).

Elements of crime of false pretenses are a false representation, knowledge of its falsity, an intent to defraud, reliance on the misrepresentation by defrauded party, and the obtaining of something of value. D.C. Code §§ 22-103, 22-1301. *Marganella v. United States*, 268 A.2d 803, 1970 D.C. App. LEXIS 331 (App. 1970).

Elements of false pretenses are false representation, knowledge of falsity, intent to defraud, reliance by defrauded party, and obtaining something of value. D.C. Code 1961, § 22-1301. *Willgoos v. United States*, 228 A.2d 635, 1967 D.C. App. LEXIS 150 (App. 1967).

— **Acts constituting other offense, nature and elements of theft by false pretenses.**

Environmental group failed to establish that it suffered any harm as result of alleged violations of federal wire fraud statute by chemical company, public relations firm, and member of private security firm in connection with their alleged infiltration of another organization to defraud it of confidential information, and thus alleged wire fraud could not serve as predicate acts in group's action against company and firms under Racketeer Influenced and Corrupt Organizations Act (RICO), even though defrauded organization worked with group in campaign against company, where group did not claim that its own confidential information or communications were stolen. *Greenpeace, Inc. v. Dow Chem. Co.*, 808 F.Supp.2d 262, 2011 U.S. Dist. LEXIS 101428 (2011).

Where one gives up possession of chattel to another who converts it to his own use, wrongdoer commits a trespass, and taking is by "larceny", but where one, though induced by fraud or trick, actually intends that title shall pass to wrongdoer, crime is that of "false pretenses". D.C. Code 1951, § 22-1301. *Great Am. Indem. Co. v. Yoder*, 131 A.2d 401, 1957 D.C. App. LEXIS 224 (Cr.App. 1957).

— **Degrees of offense, nature and elements of theft offenses.**

Although the proof requirement for theft in the first degree that the value of the property obtained was \$250 or more appears in a penalty statute, and not in the definition of theft, the issue of value distinguishing first degree or felony theft from second degree or misdemeanor theft implicates an element of the offense and must be submitted to the trier of fact. *Foreman v. United States*, 988 A.2d 505, 2010 D.C. App. LEXIS 31 (2010).

Main difference between former offense of grand larceny, and offense of first-degree theft which superseded it by enactment of the Theft and White Collar Crimes Act of 1982, is that grand larceny was defined as felonious taking of property of the amount or value of \$100 or upward, whereas first-degree theft is theft of

property of value of \$250 or more; definition of theft also includes conduct previously characterized as embezzlement, false pretenses, and larceny after trust. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

In first-degree theft cases, "value" means fair market value of property. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

— **Different offenses in same transaction, nature and elements of theft offenses.**

Defendant was properly subject to three separate convictions for second-degree burglary where he made three separate entries into home following initial entry in order to remove and sell items, even though he had obtained complete control over the home by murdering its occupants. D.C. Code 1981, § 22-1801(b). *Byrd v. United States*, 618 A.2d 596, 1992 D.C. App. LEXIS 353 (1992).

Where same act constitutes both federal offense and state offense under police power, state may prosecute; mere existence of similar federal statute does not prevent prosecution under local law for same offense. *McEachin v. United States*, 432 A.2d 1212, 1981 D.C. App. LEXIS 312 (1981).

— **False pretenses as to particular subject-matters, nature and elements of theft by false pretenses.**

Statute prescribing fine of not more than \$100 or imprisonment not more than 60 days or both for making a false statement or representation to obtain an increase in a benefit or payment provided in Unemployment Compensation Act is not the exclusive criminal sanction for unemployment compensation fraud; prosecution may also be had under general false pretenses statute. D.C. Code §§ 22-1301, 46-319(a). *Lewis v. United States*, 389 A.2d 306, 1978 D.C. App. LEXIS 486 (1978).

— **False token, nature and elements of theft by false pretenses.**

Uniform Commercial Code definitions of negotiable instructions and of holders in due course were irrelevant to issue of defendant's criminal liability for false pretenses based upon defendant's negotiation of check, payment of which had been stopped. D.C. Code §§ 22-1301, 28-3-104. *Clemons v. United States*, 400 A.2d 1048, 1979 D.C. App. LEXIS 344 (1979).

— **Falsity of pretense and knowledge thereof, nature and elements of theft by false pretenses.**

Knowledge of falsity of statements is essential element of offense of defrauding by false pretenses. D.C. Code 1951, § 22-1301. *U.S. v.*

Avant, 275 F.2d 650, 1960 U.S. App. LEXIS 4934 (C.A.D.C. 1960).

— **In general.**

While “larceny” remains an offense against possession, “robbery” is basically a crime against the person. D.C. Code §§ 22-2201, 22-2901. *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

Under theft statute, the fact that the possession was brief or that the goods never left the store is immaterial. *Price v. United States*, 985 A.2d 434, 2009 D.C. App. LEXIS 641 (2009).

Defendant’s admission at guilty plea hearing that he took more than \$1,000 from victim’s bank account with her ATM card, without her permission, and with the intent to deprive her permanently of the money, satisfied all elements of first-degree theft. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

The theft statute, by its plain language, proscribes in the alternative that a person commits a theft by either wrongfully obtaining or wrongfully using the property of another with the intent to deprive that person of the benefit. *In re D.D.*, 775 A.2d 1096, 2001 D.C. App. LEXIS 136 (2001).

— **Injury from fraud, nature and elements of theft by false pretenses.**

Defendant could be convicted of violating District of Columbia false pretenses statute and federal mail and wire fraud statutes for participating in scheme to have adverse information deleted from and fictitious favorable information added to computerized credit files of individuals who had difficulty obtaining credit, enabling those persons to obtain loans to purchase automobiles or other items, even if applicants intended to repay loans and even if security interest was retained in goods sold. 18 U.S.C. §§ 1341, 1343; D.C. Code § 22-1301. *United States v. Alston*, 609 F.2d 531, 1979 U.S. App. LEXIS 11025 (C.A.D.C. 1979), writ of certiorari denied by 445 U.S. 918, 100 S. Ct. 1281, 63 L. Ed. 2d 603, 1980 U.S. LEXIS 1064 (1980).

Although hotels cashing checks for defendant who had insufficient funds did not suffer eventual loss because they were reimbursed by issuer of credit card presented by defendant, defendant was still guilty of crime of obtaining money by false pretenses in cashing checks which issuer had no reason to suppose would be honored, since offense was not purged by subsequent restoration or repayment. D.C. Code 1951, § 22-1301. *Gilmore v. U.S.*, 273 F.2d 79, 1959 U.S. App. LEXIS 2917 (C.A.D.C. 1959).

Under District of Columbia law in determining whether defendant was guilty of having

obtained goods by false pretenses, fact that automobile, which defendant had given in security for purchase of two television sets, and which defendant represented as being paid for except for one \$55 payment then not due, had equity of roughly five times value of the television sets was immaterial. D.C. Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

Fact that party who cashed check upon which payment had been stopped, as holder in due course, with ultimate recovery rights through legal action, suffered no pecuniary loss by relying upon defendant was no defense to defendant’s criminal liability for false pretenses. D.C. Code § 22-1301. *Clemons v. United States*, 400 A.2d 1048, 1979 D.C. App. LEXIS 344 (1979).

— **Intent, nature and elements of theft offenses.**

Because the offense of theft requires a showing of specific intent, the government must also prove that the aider and abettor himself had the requisite intent. *Price v. United States*, 985 A.2d 434, 2009 D.C. App. LEXIS 641 (2009).

In order to support conviction of burglary, intent to commit any criminal offense must be present at time of entry. (*Per Ferren, J.*, with one Judge concurring in the result and one Judge dissenting.) D.C. Code 1973, § 22-1801(b). *Parker v. United States*, 449 A.2d 1076, 1982 D.C. App. LEXIS 414 (1982).

Defendant, who towed bus with valid tags without authorization to remove vehicle from housing authority parking lot, who used forged authority from housing authority to sell vehicle to used car dealer, and who, after rightful owner learned of such sale and contacted used car dealer, repurchased vehicle and took it to shredder at junkyard, had necessary felonious intent to sustain his conviction for grand larceny. D.C. Code § 22-2201. *Fogle v. United States*, 336 A.2d 833, 1975 D.C. App. LEXIS 369 (1975).

— **Intent, nature and elements of theft by false pretenses.**

No one can be permitted to say, in regard to his own statements upon a material fact, that he did not expect to be believed, and if such statements are knowingly false and wilfully made, fact that they are material is proof of an attempted fraud, since materiality, in eye of law, consists in their tendency to influence conduct of party who has interest in them and to whom they are addressed. D.C. Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

Wrongful acts, which are knowingly or intentionally committed, cannot be justified or excused on ground of innocent intent, since color of act determines complexion of intent. D.C.

Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

— **Nature of pretense, nature and elements of theft by false pretenses.**

A false representation of present intention to perform in the future is not enough to support conviction of false pretenses because it does not relate to present or past existing fact. D.C. Code § 22-1301. *United States v. Fulcher*, 626 F.2d 985, 1980 U.S. App. LEXIS 19661 (C.A.D.C. 1980), writ of certiorari denied by 449 U.S. 839, 101 S. Ct. 116, 66 L. Ed. 2d 46, 1980 U.S. LEXIS 2840, 49 U.S.L.W. 3247 (1980).

Embassy employee who, with intent to steal, represented to superiors that money was needed for embassy's cash account and thus procured their signatures to checks, the proceeds of which he kept for himself, falsifying entries in cash journal to cloak transaction, was guilty of false pretenses and grand larceny, under District of Columbia law. D.C. Code 1951, §§ 22-1301, 22-2201. *Skantze v. U.S.*, 288 F.2d 416, 1961 U.S. App. LEXIS 5256 (C.A.D.C. 1961).

A false pretense, under statute punishing one who obtains money by false pretenses, must relate to a past event or existing fact, and any representation with regard to a future transaction is excluded. D.C. Code 1940, § 22-1301. *Chaplin v. U.S.*, 157 F.2d 697, 1946 U.S. App. LEXIS 3820 (1946).

A liquor dealer who borrowed money on representations that he would use it to purchase liquor tax stamps, and that he would repay the money, but who used only a small portion to purchase stamps and failed to return the money so advanced, was not guilty under statute of obtaining money by "false pretenses," since the representations did not relate to a present or past existing fact. D.C. Code 1940, § 22-1301. *Chaplin v. U.S.*, 157 F.2d 697, 1946 U.S. App. LEXIS 3820 (1946).

When theft charge is based on deception rather than false pretenses, statutory term "deception" may include misrepresentation as to the future, as well as misrepresentation as to a past or existing fact. D.C. Code 1981, § 22-3811(a, b). *Cash v. United States*, 700 A.2d 1208, 1997 D.C. App. LEXIS 225 (1997).

Presentation of pay check for cash by defendant, who had already cashed replacement check representing pay due for same period, was an implied representation of check's validity and of defendant's ability to assign right to present it for payment. D.C. Code § 22-1301. *Clemons v. United States*, 400 A.2d 1048, 1979 D.C. App. LEXIS 344 (1979).

Unauthorized use of a credit card may be a violation of false pretenses statute providing all elements of false pretenses are proven. D.C. Code § 22-1301. *Hymes v. United States*, 260

A.2d 679, 1970 D.C. App. LEXIS 192 (App. 1970).

— **Nature of property, right, or benefit obtained, nature and elements of theft by false pretenses.**

In determining whether, under District of Columbia law, defendants had committed an offense by violating code provision that whoever by any false pretense, with intent to defraud, obtains from any person, anything of value is guilty, fact, if true, that chattel mortgage to two television sets, which were purchased after defendant made misrepresentation as to indebtedness on automobile given as security for the purchase, would have to be construed as conditional sales contract, which would preclude defendant from having received title to them, was irrelevant. D.C. Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

— **Obtaining money or property by trick or device or confidence game, nature and elements of theft b.**

Since the "three-card monte" statute deals with gambling, it is not a proper vehicle for prosecuting other forms of fraud or deceit. D.C. Code §§ 22-1301, 22-1506, 22-2201 to 22-2203. *United States v. Brown*, 309 A.2d 256, 1973 D.C. App. LEXIS 345 (1973).

— **Persons who may rely on representations, nature and elements of theft by false pretenses.**

Defendant could be convicted of false pretenses based on statements which he made to a third party other than the victim; where automobile dealership sales manager told a person in the District of Columbia Department of Consumer Protection that the automobile which the buyer wished to return could not be sold as new and that it had depreciated \$500 and that he thus would require \$500 to take automobile back and where the sales manager knew and intended that those statements would be conveyed to the buyer and where he intended that they would induce buyer to pay him \$500 to take the automobile back, and where the automobile could be, and in fact was, resold as a new automobile, sales manager could be convicted of false pretenses. D.C. Code § 22-1301. *Bolet v. United States*, 417 A.2d 386, 1980 D.C. App. LEXIS 319 (1980).

— **Property subject of larceny, nature and elements of theft offenses.**

Under District of Columbia statute, gist of larceny is felonious taking and carrying away of anything of value, and ownership of property does not matter. D.C. Code 1961, § 22-2201. *Levin v. United States*, 338 F.2d 265, 1964 U.S. App. LEXIS 4853 (C.A.D.C. 1964), writ of cer-

tiorari denied by 379 U.S. 999, 85 S. Ct. 719, 13 L. Ed. 2d 701, 1965 U.S. LEXIS 1914 (1965).

"Personalty," in context of charge of first-degree theft to which defendant entered guilty plea, included money taken from bank account by unlawful use of victim's ATM card. *Johnson v. United States*, 812 A.2d 234, 2002 D.C. App. LEXIS 721 (2002), writ of certiorari denied by 538 U.S. 1045, 123 S. Ct. 2098, 155 L. Ed. 2d 1082, 2003 U.S. LEXIS 3888, 71 U.S.L.W. 3722 (2003).

Because bank owned money in individual depositors' accounts, defendant was properly charged with theft from bank instead of theft from individual customers. D.C. Code 1981, §§ 22-3811, 22-3812(a, b). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

— **Reliance on pretense and inducement to act, nature and elements of theft by false pretenses.**

Under false pretenses statute, it must be shown that alleged fraud would not have been accomplished but for misrepresentations made. D.C. Code 1961, § 22-1301. *Ciullo v. United States*, 325 F.2d 227, 1963 U.S. App. LEXIS 3861 (C.A.D.C. 1963).

In order to sustain a conviction for obtaining money by false pretenses in cashing checks which issuer had no reason to suppose would be honored, law merely demands that the belief that checks were good be a contributing influence sufficient to turn the scale, or that the alleged fraud would not have been accomplished except for misrepresentations made. D.C. Code 1951, § 22-1301. *Gilmore v. U.S.*, 273 F.2d 79, 1959 U.S. App. LEXIS 2917 (C.A.D.C. 1959).

Where a false pretense charge stems from unauthorized use of a credit card, it is not necessarily significant that the card was presented immediately after rather than just prior to receipt of goods in what is virtually a simultaneous change. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

An initial implicit false promise of lawful payment coupled with presentation of stolen credit card, which occurred in a single and continuous transaction, can support a conviction for false pretenses or attempted false pretenses provided that together they induce or would have induced victim to surrender title to the property. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

— **Taking, nature and elements of theft offenses.**

One element of crime of "larceny" is that accused took the property and carried it away, not that he was at some time in the vicinity of

the property. D.C. Code 1961, § 22-2201. *Hiet v. United States*, 365 F.2d 504, 1966 U.S. App. LEXIS 5742 (C.A.D.C. 1966).

One who obtains money from another upon representation that he will perform certain service therewith for the latter, intending at the time to convert the money, and actually converting it, to his own use, is guilty of larceny. D.C. Code 1951, § 22-2201. *Skantz v. U.S.*, 288 F.2d 416, 1961 U.S. App. LEXIS 5256 (C.A.D.C. 1961).

Where the victim was induced by artifice to part with possession of property but clearly did not intend to pass title, subsequent conversion by the swindlers completed the crime of larceny by trick. D.C. Code 1951, § 22-2201. *Ballard v. U.S.*, 237 F.2d 582, 1956 U.S. App. LEXIS 2940 (C.A.D.C. 1956).

Under the statute making it a crime to feloniously take and carry away anything of the value of \$50 or upwards, one who obtains money from another upon representation that he will perform certain services therewith for the latter intending at the time to convert the money and actually converting it to his own use is guilty of larceny. D.C. Code 1940, § 22-2201. *Graham v. U.S.*, 187 F.2d 87, 1950 U.S. App. LEXIS 2345 (C.A.D.C. 1950).

Police officer wrongfully obtained arrestee's cellular telephone and committed second-degree theft, when he took it from arrestee's car after parking it in front of arrestee's house; even if the officer had a right to conduct an inventory search, he initiated the search with the wrongful purpose of stealing the arrestee's property. *Cannon v. United States*, 838 A.2d 293, 2003 D.C. App. LEXIS 712 (2003).

One who obtains property or money of value of \$100 or more from another upon representation that he will perform certain services for the latter, intending at the time to convert money or property, and actually converting it to his own use, is guilty of larceny. D.C. Code § 22-2201. *Fowler v. United States*, 374 A.2d 856, 1977 D.C. App. LEXIS 451 (1977).

Persons liable.

Defendant who aided and abetted the taking of an automobile and other property within the District of Columbia was liable as a principal. D.C. Code 1951, §§ 22-105, 22-2201, 22-2204; 18 U.S.C. § 2. *Williams v. U.S.*, 215 F.2d 35, 1954 U.S. App. LEXIS 2807 (C.A.D.C. 1954).

Evidence was sufficient to support conviction for theft of polyurethane even though product never left the home improvement store; evidence showed that defendant, while working in concert with another individual, removed the product from the shelf, placed product in a shopping cart, and handed the cart off to another individual who proceeded to customer service area and attempted to return the product in exchange for store credit. *Price v. United*

States, 985 A.2d 434, 2009 D.C. App. LEXIS 641 (2009).

Pleas.

Defendant intentionally and voluntarily waived right to trial, prior to guilty pleas on charges of first-degree theft and destruction of property, where trial judge carefully and repeatedly advised defendant of his rights to trial by jury, to confront witnesses, to testify or not to testify, and his appeal rights if convicted, and record was devoid of any hint that defendant wanted any trial at all, let alone a jury trial. D.C. Code 1981, §§ 22-403, 22-3811, 22-3812(a). Terrell v. United States, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

Presumptions and burden of proof.

— False pretenses, presumptions and burden of proof.

Conviction under District of Columbia false pretenses statute requires proof of false representation, knowledge of falsity, intent to defraud, reliance by defrauded party, and obtaining something of value as result of false representation. D.C. Code § 22-1301. United States v. Alston, 609 F.2d 531, 1979 U.S. App. LEXIS 11025 (C.A.D.C. 1979), writ of certiorari denied by 445 U.S. 918, 100 S. Ct. 1281, 63 L. Ed. 2d 603, 1980 U.S. LEXIS 1064 (1980).

Intention to injure or defraud is presumed when unlawful act, which results in loss or injury is proved to have been knowingly committed because intent is presumed and inferred from the result of such act. D.C. Code 1951, § 22-1301. Nelson v. U.S., 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

Where defendants misrepresented indebtedness on automobile given in security for purchase of television sets, requisite intent to defraud was presumed and did not have to be proved in absence of countervailing evidence. D.C. Code 1951, § 22-1301. Nelson v. U.S., 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

To convict for crime of false pretenses, government must prove that defendant made a false representation with knowledge of its falsity and an intent to defraud, that defrauded party relied on the misrepresentation, and that defendant obtained title to something of value as result of the misrepresentation. D.C. Code 1981, §§ 22-103, 22-1301. Blackledge v. United States, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

— In general.

Trial court did not impermissibly shift burden of proof onto defendant by discrediting defense witness's testimony, in prosecution for theft; specifically, in finding that the evidence proved defendant's guilt beyond a reasonable doubt, the trial judge did not rely on negative

inferences drawn from witness's plausible testimony to supply a necessary element of the offense of theft, and the burden of proof remained with the government at all times. Price v. United States, 985 A.2d 434, 2009 D.C. App. LEXIS 641 (2009).

To convict a defendant of second-degree theft, the government needs to prove: (1) that he wrongfully obtained the property of another, (2) that at the time he obtained it, he specifically intended either to deprive the other of a right to the property or a benefit of the property or to take or make use of the property for himself without authority or right, and (3) that the property had some value. Van Buren Peery v. United States, 849 A.2d 999, 2004 D.C. App. LEXIS 229 (2004).

Conviction for second-degree theft requires proof that (1) defendant wrongfully obtained the property of another, (2) he specifically intended, at the time he obtained it, either to deprive the owner of a right to the property or a benefit of the property or to take or make use of the property for himself without authority or right, and (3) the property had some value. Cannon v. United States, 838 A.2d 293, 2003 D.C. App. LEXIS 712 (2003).

In cases in which the value of stolen property is in issue, the government must present evidence of an item's value at the time of the theft sufficient to eliminate the possibility of the jury's verdict being based on surmise or conjecture. Williams v. United States, 805 A.2d 919, 2002 D.C. App. LEXIS 489 (2002).

To convict defendant of second-degree theft for cashing an allegedly stolen or forged check that was payable to defendant, the government was required to prove that: (1) defendant wrongfully obtained property of paying bank; (2) that at time he obtained it, he specifically intended either to deprive paying bank of right to property or of benefit of the property or to take or make use of the property for himself without authority or right; and (3) that the property had some value. Nowlin v. United States, 782 A.2d 288, 2001 D.C. App. LEXIS 208 (2001).

In prosecution for grand larceny, Government must present evidence of item's value at time of theft sufficient to eliminate the possibility of jury's verdict being based on surmise or conjecture; departure from such rule of proof is countenanced only when stolen property had been recently purchased at price well in excess of \$100, was in mint condition at time of theft and was not subject to prompt depreciation or obsolescence. D.C. Code § 22-2201. Wilson v. United States, 358 A.2d 324, 1976 D.C. App. LEXIS 277 (1976).

Questions of law and fact.

Evidence in prosecution for obtaining property by false pretenses was sufficient for jury to

infer that lending company relied on veracity of documents presented to it in connection with mortgage loan applications despite claim of defendants that there was insufficient evidence to prove the element of reliance on documents which actually reflected false sales of property. D.C. Code §§ 22-1301, 22-1401. *United States v. Stamp*, 458 F.2d 759, 1971 U.S. App. LEXIS 6547 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2424, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2406 (1972), writ of certiorari denied by 409 U.S. 842, 93 S. Ct. 104, 34 L. Ed. 2d 81, 1972 U.S. LEXIS 1258 (1972).

In prosecution for housebreaking and larceny, evidence regarding identification of defendant made a case for the jury. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202. *Williams v. U.S.*, 282 F.2d 867, 1960 U.S. App. LEXIS 4117 (C.A.D.C. 1960).

In prosecution for defrauding by false pretenses, the question of knowledge of falsity of the statements is a question of fact for the jury, and since knowledge is subjective so that it is always difficult and sometimes impossible to establish by direct evidence the mental processes or state of mind of the accused, the law permits a jury to find knowledge of the falsity based on reasonable inferences from concrete facts in evidence, and such facts include the conduct of the parties to the transaction, their utterances and the position occupied by the accused. D.C. Code 1951, § 22-1301. *U.S. v. Avant*, 275 F.2d 650, 1960 U.S. App. LEXIS 4934 (C.A.D.C. 1960).

In prosecution for defrauding by false pretenses, a showing of recklessness in making the statement without caring whether it is true or false, standing alone, does not establish knowledge as a matter of law; however, the jury is permitted to impute knowledge of the falsity of the statements to the accused as a consequence of inferences reasonably drawn from the facts shown. D.C. Code 1951, § 22-1301. *U.S. v. Avant*, 275 F.2d 650, 1960 U.S. App. LEXIS 4934 (C.A.D.C. 1960).

Evidence, in prosecution for theft and unauthorized use of motor vehicle, that appellant and another defendant took truck with paint spray pump, both of which appellant knew were not owned by fellow defendant, and that they had traveled 175 miles on way to another state, and had arranged to sell or pledge the pump in exchange for gasoline, oil and whiskey, was sufficient, in absence of any explanation, to raise issue for jury on question of defendant's guilty knowledge and intent. D.C. Code 1951, §§ 22-2201, 22-2204. *Gilbert v. U.S.*, 215 F.2d 334, 1954 U.S. App. LEXIS 2835 (C.A.D.C. 1954).

In grand larceny prosecution, court properly refused to direct verdict for defendant. D.C. Code 1940, § 22-2201. *Graham v. U.S.*, 187

F.2d 87, 1950 U.S. App. LEXIS 2345 (C.A.D.C. 1950).

Evidence, in prosecution for forging or uttering a forged document, that credit card taken from robbery victim was used to procure gasoline and services from filling stations, that automobile license recorded on sales slips coincided with registration of defendant's car and that it was highly probable that handwriting on the slips was that of defendant made submissible case. D.C. Code §§ 22-1301, 22-1401. *Long v. United States*, 298 A.2d 213, 1972 D.C. App. LEXIS 307 (1972).

In prosecution for attempting by false pretenses to obtain money from an insurance company on a fraudulent claim for stolen furs evidence of defendants' guilt was sufficient for the jury. D.C. Code 1951, §§ 11-776(b), 22-103, 22-1301. *Cooper v. U.S.*, 123 A.2d 918, 1956 D.C. App. LEXIS 207 (Cr.App. 1956).

Review and disposition.

Because it was impossible to determine from the record whether defendant's convictions for theft of personal property and receiving stolen property were duplicative, remand was necessary for clarification, and resentencing, if necessary. D.C. Code 1981, §§ 22-3811, 22-3812(a, b), 22-3832(a), (c)(2). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

Where, absent improper convictions for forgery and uttering, sentencing judge might have imposed lesser period of probation, reviewing court vacated convictions of forgery and uttering, affirmed conviction of attempted false pretenses and remanded case for resentencing. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

Right to jury trial.

The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Searches and seizures.

Examination of record in prosecution for conspiracy, obtaining property by false pretenses, and forgery showed that information obtained by Internal Revenue agents, who were conducting valid civil tax audits of the principals, prior to those persons being advised of the rights of criminal suspects was obtained properly with respect to the defendants who were persons well versed in finance, taxation and the law. 18 U.S.C. § 371; 26 U.S.C. (I.R.C.1954) § 7602; U.S. Const. Amend. 4; D.C. Code §§ 22-1301, 22-1401. *United States v. Stamp*, 458 F.2d 759, 1971 U.S. App. LEXIS 6547 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2424, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2406 (1972), writ of certiorari denied by 409

U.S. 842, 93 S. Ct. 104, 34 L. Ed. 2d 81, 1972 U.S. LEXIS 1258 (1972).

Where officers had right and duty to confront and interrogate suspect in investigation of murder, and suspect on alighting from automobile dropped handkerchief containing jewelry into street, action of officers in taking jewelry was not "seizure" in legal sense and same was competent evidence in larceny prosecution and trial court properly refused to suppress it as evidence. D.C. Code 1951, § 22-2201. *Lee v. U.S.*, 221 F.2d 29, 1954 U.S. App. LEXIS 3315 (C.A.D.C. 1954).

Validity.

Council had authority to pass the Theft and White Collar Crimes Act of 1982 because the unconstitutional one-house veto provision of the Home Rule Act, found in § 1-233(c)(2), is severable from the rest of the act; and therefore, a defendant was properly convicted under this section. *United States v. Davis*, 112 WLR 2249 (Super. Ct. 1984).

Verdict.

Where court instructed jury that if it should find defendant guilty of embezzlement as to either transaction, it would have to return a verdict of not guilty as to the companion larceny count, but jury found defendant guilty of both embezzlement and larceny as to the same transaction, District Court had right to direct verdict of acquittal on larceny count, and defendant was not prejudiced by any alleged "choice of verdicts" since penalty for embezzlement was less than that for larceny. Fed. Rules Crim. Proc. rule 29(a, b), 18 U.S.C.; D.C. Code 1951, §§ 22-1202, 22-2201. *U.S. v. Daigle*, 149 F.Supp. 409, 1957 U.S. Dist. LEXIS 3874 (D.D.C.1957).

Weight and sufficiency of evidence.

— Effect of possession accompanied by other evidence, weight and sufficiency of evidence.

Evidence was sufficient to support adjudication of juvenile for theft of bicycle tire; juvenile offered to buy the bicycle tire from victim, juvenile followed victim to where he left his bicycle, after victim discovered his bicycle was missing juvenile ran from the police, and when juvenile was caught he possessed victim's tire. In re D.D., 775 A.2d 1096, 2001 D.C. App. LEXIS 136 (2001).

Convictions for second-degree burglary, first-degree theft, second-degree theft, and destruction of property valued at \$200 or more, on aiding and abetting theory, were supported by evidence that police officers had seen defendant standing in front of burglarized premises near time of burglary holding stolen bird bath. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-3811, 22-

3812(a, b). *Wright v. United States*, 508 A.2d 915, 1986 D.C. App. LEXIS 321 (1986).

— Effect of possession of property stolen, weight and sufficiency of evidence.

Where evidence demonstrated that travel bag containing personal property of value in excess of \$100 was stolen when owner's attention was only momentarily diverted therefrom and that defendant, three days thereafter, was found in possession of certain items, of value of less than \$100, which had been in the stolen bag, and where defendant did not explain possession but denied possession, jury was entitled to infer that defendant had stolen the bag, with all its contents, so as to be guilty of grand larceny. D.C. Code § 22-2201. *United States v. Coggins*, 433 F.2d 1357, 1970 U.S. App. LEXIS 7455 (C.A.D.C. 1970).

Evidence, in prosecution for grand larceny of automobile, unauthorized use of such automobile, and for grand larceny of engine from another automobile, warranted finding that character of possession of stolen property, united with other evidence in case, would authorize inference attributing guilt to defendant. D.C. Code §§ 22-2201, 22-2204. *United States v. Coggins*, 433 F.2d 1357, 1970 U.S. App. LEXIS 7455 (C.A.D.C. 1970).

The unexplained exclusive possession of stolen property, shortly after the commission of larceny, does not raise presumption of law that defendant committed larceny, but it may satisfy jury and warrant verdict of guilty. D.C. Code 1940, §§ 22-1801, 22-2201. *Wright v. U.S.*, 189 F.2d 699, 1951 U.S. App. LEXIS 3219 (C.A.D.C. 1951).

The unexplained possession of recently stolen property may provide the basis for a reasonable inference that the possessor actually stole the property. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Recent possession of stolen goods permits the reasonable inference that the person possessing it stole it. In re D.D., 775 A.2d 1096, 2001 D.C. App. LEXIS 136 (2001).

Defendant's unexplained, or unsatisfactorily explained, possession of recently stolen property (RSP) may support conviction of larceny, or RSP. D.C. Code 1981, §§ 22-2201, 22-3832. *Byrd v. United States*, 598 A.2d 386, 1991 D.C. App. LEXIS 283 (1991).

Defendant's unexplained, or unsatisfactorily explained, possession of recently stolen property (RSP) may support conviction of larceny, or RSP. D.C. Code 1981, §§ 22-2201, 22-3832. *Byrd v. United States*, 598 A.2d 386, 1991 D.C. App. LEXIS 283 (1991).

Unexplained or unsatisfactorily explained possession of property recently stolen permits inference that possessor is person who stole it. D.C. Code § 22-2201. *White v. United States*,

300 A.2d 716, 1973 D.C. App. LEXIS 233 (1973).

Where prosecution established corpus delicti of grand larceny, it was proper for jury to infer that defendant found in possession of stolen goods was guilty of the larceny. D.C. Code § 22-2201. *White v. United States*, 300 A.2d 716, 1973 D.C. App. LEXIS 233 (1973).

Evidence sustained larceny conviction of defendant who had been observed entering alleyway without certain goods in automobile and who was observed some time thereafter leaving alley with goods taken from business in automobile. D.C. Code § 22-2201. *White v. United States*, 300 A.2d 716, 1973 D.C. App. LEXIS 233 (1973).

— False pretenses, weight and sufficiency of evidence.

In prosecution for obtaining money by false pretenses in cashing checks which issuer had no reason to suppose would be honored, where defendant claimed that hotels cashing checks for defendant were induced to part with their money not on belief that checks were good but in reliance on fact that issuer of credit card would make good whatever loss hotel might suffer, evidence sustained jury's finding that hotels cashed checks in belief that checks were good. D.C. Code 1951, § 22-1301. *Gilmore v. U.S.*, 273 F.2d 79, 1959 U.S. App. LEXIS 2917 (C.A.D.C. 1959).

Evidence was sufficient to sustain conviction for obtaining goods by false pretenses. D.C. Code 1951, § 22-1301. *Nelson v. U.S.*, 227 F.2d 21, 1955 U.S. App. LEXIS 3148 (C.A.D.C. 1955).

Evidence was sufficient to establish that defendant obtained victim's money by deception and that he specifically intended, at that time, to deprive her of such money and keep it for himself, as required to support conviction of second-degree theft by deception; defendant represented to victim that he was licensed contractor, entered into contract for improvements on victim's home, accepted payments from her, never performed improvements, and added handwritten notation to contract, after it was signed, stating that starting and completion dates were subject to change. D.C. Code 1981, § 22-3811. *Cash v. United States*, 700 A.2d 1208, 1997 D.C. App. LEXIS 225 (1997).

Evidence was sufficient to convict defendants of first degree theft, where there was evidence that gold bracelet and two gold chains were taken from defendants at time of their arrest, that gold bracelet and gold chains came from shop owner's shop, that shop owner identified defendants at show-up identification as men who purchased jewelry and toiletries, that credit card owner had never given defendants permission to use his credit cards, and that purchases had value in excess of \$250. D.C.

Code 1981, § 22-3811(b)(1, 2). *Zanders v. United States*, 678 A.2d 556, 1996 D.C. App. LEXIS 122 (1996).

In prosecution for false pretenses and receiving stolen property arising from defendant's attempted use of stolen credit card, there was sufficient proof to permit jury to infer defendant's guilty knowledge that the card was stolen as well as his fraudulent intent to use the card. D.C. Code 1981, §§ 22-103, 22-1301, 22-2205. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

In prosecution for false pretenses and receiving stolen property arising from defendant's attempted use of stolen credit card, there was sufficient proof to permit jury to infer defendant's guilty knowledge that the card was stolen as well as his fraudulent intent to use the card. D.C. Code 1981, §§ 22-103, 22-1301, 22-2205. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Necessity of producing motel desk clerk, in prosecution for attempted false pretenses involving misuse of credit card in connection with motel registration was obviated by introduction of motel's records. D.C. Code, 1967, §§ 22-103, 22-1301. *Marganella v. United States*, 268 A.2d 803, 1970 D.C. App. LEXIS 331 (App. 1970).

Evidence sustained conviction for attempted false pretenses involving misuse of a credit card. D.C. Code §§ 22-103, 22-1301. *Marganella v. United States*, 268 A.2d 803, 1970 D.C. App. LEXIS 331 (App. 1970).

Direct evidence by a victim is not necessary to prove obtaining and reliance as requisite elements of offense of obtaining anything of specified value by false pretenses. D.C. Code § 22-1301. *Hymes v. United States*, 260 A.2d 679, 1970 D.C. App. LEXIS 192 (App. 1970).

Seven purchase receipts evidencing gasoline sales would support inference that gasoline was provided with reliance on validity of credit card and authorized use thereof and thus would support conviction of obtaining anything of specified value by false pretenses, notwithstanding that no direct testimony of underlying transactions was introduced. D.C. Code § 22-1301. *Hymes v. United States*, 260 A.2d 679, 1970 D.C. App. LEXIS 192 (App. 1970).

Evidence did not sustain conviction of obtaining hotel lodging under false pretenses, notwithstanding defendant's failure to pay within one week after checking out, in view of showing of defendant's efforts to pay. D.C. Code 1961, § 22-1301. *Willgoos v. United States*, 228 A.2d 635, 1967 D.C. App. LEXIS 150 (App. 1967).

Finding of knowledge of falsity may be based on reasonable inferences from concrete facts in evidence, including conduct of parties to transaction, their utterances, the position occupied by accused, and all circumstances surrounding the transaction. D.C. Code 1961, § 22-1301.

Willgoos v. United States, 228 A.2d 635, 1967 D.C. App. LEXIS 150 (App. 1967).

Evidence, which showed that defendants knowingly obtained from complaining witness a check for \$150 drawn against insufficient funds, that defendants falsely represented that check had been cashed with warning that witness would be prosecuted if check was not honored and store manager had later said police would be notified if check were not immediately covered, and that witness therefore cashed certain bonds and turned \$150 over to defendants, showed that the representations related to past events and supported convictions of false pretenses. D.C. Code 1961, § 22-1301. *Williamson v. United States*, 224 A.2d 309, 1966 D.C. App. LEXIS 244 (App. 1966).

— **Fraud, weight and sufficiency of evidence.**

Evidence permitted jury to find that defendant by presenting duplicate public assistance check for payment impliedly represented its validity and his ability to assign right to present it for payment and impliedly represented that he was entitled to receive proceeds and that, because he had already entered into a reimbursement agreement and had already cashed original check, such representations were false. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

— **Grade or degree of offense, weight and sufficiency of evidence.**

First-degree theft conviction was sufficiently supported by evidence, including evidence that defendant had cashed union checks without authorization and in violation of union policy and resisted union efforts to obtain financial records in his possession when union became concerned about his financial activities. D.C. Code 1981, §§ 22-3811, 22-3812(a). *Johnson v. United States*, 613 A.2d 1381, 1992 D.C. App. LEXIS 223 (1992).

Evidence was insufficient to sustain defendant's conviction of one count of petit larceny for aiding and abetting accomplice in commission of the theft of ten dollars since evidence showed that defendant came onto the scene well after the theft and when accomplice was seen with the bill. D.C. Code 1981, § 22-2202. *Mackey v. United States*, 451 A.2d 887, 1982 D.C. App. LEXIS 462 (1982).

Evidence of defendant's involvement with his accomplice was sufficient to sustain conviction of petit larceny for aiding and abetting in theft of a pocketbook. D.C. Code 1981, § 22-2202. *Mackey v. United States*, 451 A.2d 887, 1982 D.C. App. LEXIS 462 (1982).

— **Identity of defendant, weight and sufficiency of evidence.**

Evidence in larceny prosecution was insufficient to sustain conviction where only evidence

against defendant was fingerprint taken from automobile window, which was identified as his, he was not placed in vicinity of automobile on evening in question or in immediate neighborhood at any other time, he was not shown to have been in possession of any of the stolen property at any time, none of the stolen property was ever recovered, and there was no testimony as to probable age of the fingerprint. D.C. Code 1961, § 22-2201. *Hiet v. United States*, 365 F.2d 504, 1966 U.S. App. LEXIS 5742 (C.A.D.C. 1966).

Burglary, destruction of property, and theft convictions were supported by evidence of defendant's unauthorized presence in building where crimes occurred shortly after police responded to burglary alarm, footprints, burglary tools, damage done, and evasive actions of defendant upon seeing police. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-3811, 22-3812(b). *Wright v. United States*, 637 A.2d 95, 1994 D.C. App. LEXIS 11 (1994).

Even if witness' showup identification of defendant had been flawed, dismissal of theft and burglary charges was not required, where there was other sufficient evidence pointing to defendant as person who had been climbing on witness' window; officer saw defendant in alley behind witness' house wearing clothing that matched witness' description 15 minutes after witness had called police, officer followed distinctive footprints left in snow by defendant's boots to site of two televisions stolen from witness' house, and red stain on defendant's jacket matched color on surface of witness' house. *Turner v. United States*, 622 A.2d 667, 1993 D.C. App. LEXIS 69 (1993).

In-court identification by supermarket employees of defendant as individual who purchased some \$79 worth of groceries by drawing check subsequently dishonored was not inherently incredible because their testimony was not consistent regarding number of times each had observed defendant prior to date of alleged obtaining of property under false pretenses. D.C. Code § 22-1301. *Henson v. United States*, 287 A.2d 106, 1972 D.C. App. LEXIS 341 (1972).

— **In general.**

In prosecution of accused under indictment charging him with housebreaking and larceny, evidence bearing on larceny count was insufficient to sustain a conviction for larceny. D.C. Code 1951, §§ 22-1801, 22-2201, 22-2202. *Nelms v. U.S.*, 215 F.2d 678, 1954 U.S. App. LEXIS 2875 (C.A.D.C. 1954).

Evidence justified larceny conviction of an accused whose alleged confederate removed carton of spark plugs from store and placed carton in their automobile while accused was in store notwithstanding no property was marked for or offered in evidence at trial. D.C. Code

1951, § 22-2201. *Foster v. U.S.*, 212 F.2d 249, 1954 U.S. App. LEXIS 3356 (C.A.D.C. 1954).

In case in which discipline was sought for attorney's committing theft, substantial evidence supported Board on Professional Responsibility's finding that attorney made an unauthorized use of money from a fraternal organization's bank account; other than attorney's unsworn representations, there was no evidence that he owned the funds, that he withdrew the funds for the benefit of the organization, that he ever made a contribution to the account, or that his father, a prior account signatory, ever asserted a claim to any portion of the funds, and bank statements addressed to attorney's home showing the name and tax identification number of the account provided attorney notice that ownership of the funds belonged to someone other than himself. In re *Slaterry*, 767 A.2d 203, 2001 D.C. App. LEXIS 23 (2001).

Substantial evidence supported Board on Professional Responsibility's finding, as grounds for discipline, that attorney was dishonest and deceitful based on his theft of fraternal organization's funds and the sworn testimony that he gave in a deposition following the lawsuit he filed against the national chapter of the organization; attorney had no instructions or authorization from the fraternal organization to withdraw the funds and place them in his account for personal use, and attorney's deposition answers regarding the status of the account were not merely equivocal, but misleading, false, and deceitful. In re *Slaterry*, 767 A.2d 203, 2001 D.C. App. LEXIS 23 (2001).

Evidence establishing defendant's proximity to scene of crime and stolen television set, his flight and attempt to hide from police, and when discovered, his statement to officer that he did not go in house but was with friend who did, supported conviction, as aider and abettor, of first-degree burglary, second-degree theft, and misdemeanor destruction of property. D.C. Code 1981, §§ 22-403, 22-1801(a), 22-3811, 22-3812. *Garrett v. United States*, 642 A.2d 1312, 1994 D.C. App. LEXIS 88 (1994).

Conviction of theft through unauthorized withdrawals from automated teller machines was supported by sufficient evidence, including missing cards found in briefcase in defendant's possession, summary of bank computer records indicating that alleged ATM withdrawals took place, testimony of individual bank customers that withdrawals were unauthorized and photographs of defendant taken by security camera inside ATM machine at time one of the alleged unauthorized withdrawals was made. D.C. Code 1981, §§ 22-3811, 28-3812. *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

Evidence that, as defendant sat on hood of police car, he waved to companion, who reached

into open window and removed police radio from front seat, and that approximately 25 minutes later defendant and companion were observed standing across the street, warranted defendant's conviction, as aider and abettor, of grand larceny. D.C. Code 1981, § 22-2201[Repealed]. *Patterson v. United States*, 479 A.2d 335, 1984 D.C. App. LEXIS 464 (1984).

In prosecution for larceny, undisputed evidence of manager of Air Force exchange service store that service was quasi-governmental agency and that items taken by defendant belonged to service was sufficient to sustain conviction. D.C. Code 1973, § 22-2202. *McEachin v. United States*, 432 A.2d 1212, 1981 D.C. App. LEXIS 312 (1981).

Evidence consisting of minor's admissions that he went to store with other "fellows" and that he was in store just before it closed and his flight from general vicinity of store was insufficient to support adjudication that minor was guilty as an aider and abettor in burglary and larceny of store. D.C. Code §§ 22-105, 22-1801(b), 22-2201. *Matter of R. A. B.*, 399 A.2d 81, 1979 D.C. App. LEXIS 312 (1979).

— Intent, weight and sufficiency of evidence.

Defendant's admission to his employer that he had inadvertently charged personal expenses to firm credit card and would reimburse firm, without more, was insufficient to show that subsequent charges for personal expenses were committed with knowledge that he was unauthorized to do so, as required to support conviction for theft. *Van Buren Peery v. United States*, 849 A.2d 999, 2004 D.C. App. LEXIS 229 (2004).

Evidence in prosecution for second-degree theft supported conclusion that police officer specifically intended to deprive arrestee of the right to his cellular telephone when officer took it from arrestee's car after parking it in front of arrestee's house; the officer could have handed the property for safekeeping to arrestee's housemates, never logged the phone or other items into the police property book, began using the phone only a few hours after taking it, and attempted to trade it in for a rebate on a new cell phone. *Cannon v. United States*, 838 A.2d 293, 2003 D.C. App. LEXIS 712 (2003).

Evidence that defendant removed his roommate's property from the apartment and stashed it at his girlfriend's and mother's homes after the roommate's death established an intent to deprive the owner of the property and supported theft conviction, even though the defendant presented evidence explaining reason for removing the property. *Hebron v. United States*, 804 A.2d 270, 2002 D.C. App. LEXIS 384 (2002).

Testimony of one of two co-owners of automobile body shop that he did not write out check

payable to defendant and that he did not know defendant, and evidence that “auto repair” was written in on the memo line of the check, did not establish the requisite knowledge and intent of defendant to deprive paying bank of its property, in prosecution of defendant for second-degree theft for cashing an allegedly stolen or forged check that was payable to defendant. *Nowlin v. United States*, 782 A.2d 288, 2001 D.C. App. LEXIS 208 (2001).

Evidence that defendant had formed plan before going into house to take things therein and barter them for cocaine was sufficient to show that defendant entered apartment with intent to steal, for purposes of conviction for first-degree burglary. D.C. Code 1981, § 22-1801(a). *Byrd v. United States*, 618 A.2d 596, 1992 D.C. App. LEXIS 353 (1992).

— **Motor vehicle offenses, weight and sufficiency of evidence.**

Evidence in delinquency proceeding was insufficient to show that juvenile knew that car was stolen so as to support his convictions for unauthorized use of a motor vehicle, receiving stolen property, and theft; juvenile was a back seat passenger in car, and there was no evidence that the punched ignition was visible to a person in juvenile’s position in the car, nor did the government introduce evidence that, in addition to having a punched ignition, the car was so badly damaged as to warrant inference that juvenile knew that it was being used without the owner’s consent, and there was no basis for attributing juvenile’s flight to consciousness of guilt than to a purpose consistent with innocence. *In re D.P.*, 996 A.2d 1286, 2010 D.C. App. LEXIS 278 (2010).

Police officer’s testimony that he witnessed defendant exit driver’s door of vehicle immediately after chasing and following the vehicle into an alley, and that the vehicle had been reported stolen the previous day, established that defendant stole the vehicle. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Evidence supported convictions for unauthorized use of murder victim’s car, robbery of items from murder victim and burglary and theft of items from victim’s apartment; defendant joined two others in victim’s car, helped murder victim and took property from him and went to victim’s home and removed two plastic bags of personal property belonging to victim. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b). *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

— **Value of property, weight and sufficiency of evidence.**

Evidence was insufficient to show that portable music device stolen from victim had fair

market value of \$250 or more, as required to support conviction for first-degree theft; testimony of victim’s mother that she had paid “about \$250” for device, plus shipping and taxes, coupled with victim’s testimony that he believed that his mother had paid \$300 for it, that he downloaded movies and “about 400 or more songs” onto device, and that although he had to pay for some of songs, some of them were free, called for determination of value based on surmise or conjecture, and there was no evidence that device did not depreciate in value over time, or how much victim paid for songs and movies. *Foreman v. United States*, 988 A.2d 505, 2010 D.C. App. LEXIS 31 (2010).

In cases in which the value of stolen property is in issue, the market value of a chattel may be established by the testimony of its non-expert owner. *Williams v. United States*, 805 A.2d 919, 2002 D.C. App. LEXIS 489 (2002).

Evidence was sufficient to prove that fair market value of stolen property was \$250 or more, thus supporting conviction for first-degree theft; victim testified that total value of numerous items of stolen jewelry was well over \$250, victims paid out a deductible of \$250 to receive compensation under home insurance policy for stolen jewelry and electrical goods, and victims received \$1755 from their insurer over and above the deductible amount. *Williams v. United States*, 805 A.2d 919, 2002 D.C. App. LEXIS 489 (2002).

The market value of a chattel may be established by the testimony of its non-expert owner, but the government is still required to introduce evidence sufficient to eliminate the possibility that the jury’s verdict was based on surmise or conjecture about the value of the property. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Testimony of stolen vehicle’s rightful owner that the vehicle was operable when stolen and that his insurance company “totaled” the vehicle and reimbursed him \$2,800 for the loss of the vehicle established that the vehicle’s value exceeded the \$250 threshold for first-degree theft of property valued at or greater than \$250. *Phillips v. United States*, 778 A.2d 281, 2001 D.C. App. LEXIS 160 (2001).

Victim’s testimony about \$21,000 price she paid for five-year-old minivan when new, “good working” condition of minivan when stolen, \$1700 repair estimate revealing items of value in minivan, and new purchaser’s ability to drive minivan away was sufficient to prove that minivan’s value was at least \$250 at time of offense, so as to support convictions for first-degree theft, receiving stolen property, and destruction of property. D.C. Code 1981, §§ 22-403, 22-3811, 22-3812(a), 22-3832(a), (c)(1). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

For first-degree theft cases, proof requirements on issue of value established in series of grand larceny cases under prior law, are applicable, since value of stolen property is essential element of crime to be proved under both old

statute and new one. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

§ 22-3212. Penalties for theft.

(a) *Theft in the first degree.* — Any person convicted of theft in the first degree shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is \$1,000 or more.

(b) *Theft in the second degree.* — Any person convicted of theft in the second degree shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.

(c) A person convicted of theft in the first or second degree who has 2 or more prior convictions for theft, not committed on the same occasion, shall be fined not more than \$5,000 or imprisoned for not more than 10 years and for a mandatory-minimum term of not less than one year, or both. A person sentenced under this subsection shall not be released from prison, granted probation, or granted suspension of sentence, prior to serving the mandatory-minimum.

(d) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for theft if he or she has been convicted on at least 2 occasions of violations of:

(1) Section 22-3211;

(2) A statute in one or more jurisdictions prohibiting theft or larceny; or

(3) Conduct that would constitute a violation of section 22-3211 if committed in the District of Columbia.

(Dec. 1, 1982, D.C. Law 4-164, § 112, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(a), 41 DCR 2608; June 3, 1997, D.C. Law 11-275, § 12(b), 44 DCR 1408; Dec. 10, 2009, D.C. Law 18-88, § 214(d), 56 DCR 7413.)

Prior Codifications. — 1981 Ed., § 22-3812.

Effect of amendments. — D.C. Law 18-88, in subsec. (a), substituted “\$1,000” for “\$250”; in subsec. (b), substituted “if the property obtained or used has some value” for “if the value of the property obtained or used is less than \$250”; and added subsecs. (c) and (d).

Emergency legislation. — For temporary amendment of section, see § 113(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 214(d) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(d) of Omnibus Public Safety and Justice Congressional Review Emergency

Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 11-275. — For legislative history of D.C. Law 11-275, see Historical and Statutory Notes following § 22-3203.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

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ANALYSIS

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Admissibility of evidence.

Admission, without objection, of hearsay evidence to prove value in grand larceny prosecution, was error which reviewing court could notice, but which would not be noticed where, had objection been made, prosecution would have had opportunity to introduce direct evidence of value. Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C.; D.C. Code 1961, § 22-2201. *Chew v. U.S.*, 298 F.2d 334, 1962 U.S. App. LEXIS 6107 (C.A.D.C. 1962).

Where memorandum on value of stolen items was merely written record of what managers of departments from which merchandise had been stolen had told security manager, it was not admissible as security manager's past recollection recorded to establish value of stolen items in prosecution for first-degree theft. D.C. Code 1981, § 22-3812(a). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

There was ample evidence in juvenile delinquency proceedings involving charges of burglary and first-degree theft to support trial court's finding that juvenile signed a waiver of his rights before any conversation with police detective and without any coercion or compulsion, and thus, the Court of Appeals was bound to accept it; furthermore, inherent in such finding was a finding that conversation about which juvenile testified, concerning difference between burglary and receiving stolen property, and whether he would have to be incarcerated, never took place, and thus there was no factual support for juvenile's legal argument that his statement was inadmissible and

should have been suppressed. D.C. Code 1981, §§ 17-305(a), 22-1801(b), 22-3812(a). In re D.L., 486 A.2d 1180, 1985 D.C. App. LEXIS 317 (1985).

Trial court properly accepted rulings of motions judge as law of the case on juvenile's motion to suppress statement he made to police in delinquency proceedings involving charges of second-degree burglary and first-degree theft. D.C. Code 1981, §§ 22-1801(b), 22-3812(a). In re D.L., 486 A.2d 1180, 1985 D.C. App. LEXIS 317 (1985).

For purposes of determining whether chattel which was subject to larceny had value of \$100 or more, market value may be established by testimony of its nonexpert owner. D.C. Code § 22-2201. *Saunders v. United States*, 317 A.2d 867, 1974 D.C. App. LEXIS 398 (1974).

Attorney misconduct.

Disbarment of attorney was warranted, in attorney disciplinary case, where attorney pled guilty to five counts of theft, two counts of fraud, and contempt of court in connection with attorney's conduct in swindling a series of landlords and prospective tenants, and attorney's offenses involved moral turpitude, thus warranting disbarment under statute. In re Hallmark, 998 A.2d 284, 2010 D.C. App. LEXIS 287 (2010).

Evidence to establish value.

Television showroom manager was properly qualified as an expert as to value of television set which was stolen and manager's testimony was sufficient to prove value in excess of \$100 as required for conviction for grand larceny. D.C. Code 1961, § 22-2201. *Owens v. United States*, 318 F.2d 204, 1963 U.S. App. LEXIS 5820 (C.A.D.C. 1963).

Jury should not be precluded from drawing reasonable inferences from item's purchase date and price when determining, on totality of facts and circumstances, whether government has met its burden of proving under theft statute value of stolen property. *Hebron v. United States*, 837 A.2d 910, 2003 D.C. App. LEXIS 703 (2003), writ of certiorari denied by 540 U.S. 1228, 124 S. Ct. 1529, 158 L. Ed. 2d 170, 2004 U.S. LEXIS 1793, 72 U.S.L.W. 3552 (2004).

Courts consider the following factors in evaluating purchase price testimony from owners in a prosecution for first-degree theft: whether the purchase was very recent, whether the chattel was in mint condition, and whether the chattel was subject to prompt depreciation or

obsolescence. *Hebron v. United States*, 804 A.2d 270, 2002 D.C. App. LEXIS 384 (2002).

Regardless of whether the owner testifies or some other method is used to prove value, the government in a prosecution for first-degree theft must introduce evidence of value sufficient to eliminate the possibility that the jury's verdict was based on surmise or conjecture about the value of the property. *Hebron v. United States*, 804 A.2d 270, 2002 D.C. App. LEXIS 384 (2002).

Market value of stolen chattel may be established by the testimony of its non-expert owner, in prosecution for first-degree theft. D.C. Code 1981, § 22-3812(a). *Chappelle v. United States*, 736 A.2d 212, 1999 D.C. App. LEXIS 171 (1999).

Where managers of two departments from which merchandise had been stolen did not testify, and memorandum on value of stolen items was based on figures from such managers, memorandum was not admissible as past recollection recorded of such managers to show value of stolen items in prosecution for first-degree theft. D.C. Code 1981, § 22-3812(a). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

Admission of memorandum on value of stolen items in prosecution for first-degree theft did not rise to level of plain error, where prices of stolen items could have been quickly checked against universally available catalogue, common sense would establish that stolen items would almost certainly be worth a lot more than \$250, and department managers could have testified to what was in memorandum. D.C. Code 1981, § 22-3812(a). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

Security manager's direct testimony on issue of value of stolen items, based on his own daily observations of price tags, was incompetent to prove value of merchandise to which such tags were attached. D.C. Code 1981, § 22-3812(a). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

In determining whether value of article which was subject of larceny was \$100 or more, testimony of management employee as to value of chattel is generally acceptable. D.C. Code § 22-2201. *Saunders v. United States*, 317 A.2d 867, 1974 D.C. App. LEXIS 398 (1974).

For purposes of determining whether value of article which was subject to larceny was \$100 or more, the relevant market value is usually the retail value. D.C. Code § 22-2201. *Saunders v. United States*, 317 A.2d 867, 1974 D.C. App. LEXIS 398 (1974).

Instructions.

In grand larceny prosecution, instruction on petit larceny was unnecessary where there was nothing in evidence to indicate value of less

than \$100. D.C. Code 1961, § 22-2201. *Chew v. U.S.*, 298 F.2d 334, 1962 U.S. App. LEXIS 6107 (C.A.D.C. 1962).

Trial judge properly denied defendant's request for instruction on petit larceny as lesser included offense of grand larceny where evidence presented by Government did not support reasonable inference that stolen automobile was worth less than \$100, defendant neither presented evidence nor conducted cross-examination addressing value issue, and trial judge instructed jury that grand larceny conviction required finding beyond a reasonable doubt that property was worth \$100 or more. D.C. Code 1981, § 22-2201(repealed). *Parker v. United States*, 476 A.2d 173, 1984 D.C. App. LEXIS 401 (1984).

Larceny victim's testimony that his aunt purchased color television approximately 14 to 15 months prior to crime for \$300 to \$400, and that when stolen it was in "almost mint" condition and worked well, was insufficient to establish Government's burden as to value required for submission of grand larceny charge to jury. D.C. Code § 22-2201. *Moore v. United States*, 388 A.2d 889, 1978 D.C. App. LEXIS 484 (1978).

Jurisdiction.

Where District of Columbia police officer was charged with obstruction of justice under federal statute and with tampering with evidence and theft in violation of the District of Columbia Code, and the federal charge was dismissed, it would not be appropriate for United States District Court for the District of Columbia to retain jurisdiction over the local offenses, even if it had discretion to do so, in that no matters of legitimate federal concern remained. 18 U.S.C. § 1503; D.C. Code 1981, §§ 22-723, 22-3811, 22-3812. *United States v. Smith*, 729 F. Supp. 1380, 1990 U.S. Dist. LEXIS 1092 (1990).

Juvenile offenders.

Sentences imposed for theft and unauthorized use of vehicle of not less than six years on each count were invalid where court failed to set maximum term of confinement as required by Federal Youth Corrections Act, and six-year sentence on unauthorized use of vehicle count exceeded five-year penalty authorized by unauthorized use statute and hence it also exceeded maximum allowed under Federal Youth Corrections Act. D.C. Code 1981, §§ 22-3812(a), 22-3815(b); 18 U.S.C. § 5010(c). *Byrd v. United States*, 487 A.2d 616, 1985 D.C. App. LEXIS 296 (1985).

Where trial judge intended to incarcerate defendant pursuant to guilty plea to unauthorized use of a motor vehicle and false pretenses and did not intend to grant probation, trial judge did not err in amending judgment and commitment orders which originally provided

for commitment under section of Federal Youth Corrections Act providing for probation so as to conform written orders to sentence of incarceration which was pronounced in open court. D.C. Code §§ 22-1301, 22-2204; 18 U.S.C. § 5010(a, b); D.C. Code SCR, Criminal Rule 36. *Rich v. United States*, 357 A.2d 421, 1976 D.C. App. LEXIS 539 (1976).

Lesser included offenses.

Taking property without right is a lesser included offense of robbery inasmuch as larceny is a lesser included offense of robbery and taking property without right is a lesser included offense of larceny. D.C. Code 1981, §§ 22-2901, 22-3811, 22-3812, 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Because receiving stolen property is lesser included offense of theft, defendant cannot be convicted of both theft and receipt of stolen goods with respect to same property. D.C. Code 1981, §§ 22-3811, 22-3812(a, b), 22-3832(a), (c)(2). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

Merger of offenses.

Defendant's conviction for unauthorized use of motor vehicle did not merge with his robbery conviction, and his theft conviction did not merge with burglary conviction, where each conviction required a different element of proof. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b), 22-3815. *Matthews v. United States*, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

Defendant's conviction for unauthorized use of motor vehicle merged with more serious offense of grand larceny while armed, where there was nothing in defendant's unlawful use of vehicle conviction that was not also used as proof of grand larceny while armed; thus, resulting 18 to 54 months consecutive imprisonment meted out by trial court for unlawful use of motor vehicle violated Fifth Amendment guaranty against double jeopardy. U.S. Const. Amend. 5; D.C. Code 1981, §§ 22-3202, 22-3812, 22-3815. *Kirk v. United States*, 510 A.2d 499, 1986 D.C. App. LEXIS 345 (1986).

Nature and elements of offenses.

If evidence in armed robbery prosecution did not warrant findings that the \$500 involved was taken from victim's person or immediate actual possession, then jury could only have properly found defendants guilty of the lesser included offense of grand larceny. D.C. Code §§ 22-2201, 22-2901. *United States v. Dixon*, 469 F.2d 940, 1972 U.S. App. LEXIS 7038 (C.A.D.C. 1972).

Although the proof requirement for theft in the first degree that the value of the property obtained was \$250 or more appears in a penalty statute, and not in the definition of theft, the

issue of value distinguishing first degree or felony theft from second degree or misdemeanor theft implicates an element of the offense and must be submitted to the trier of fact. *Foreman v. United States*, 988 A.2d 505, 2010 D.C. App. LEXIS 31 (2010).

"Value" within the meaning of statute requiring a value of \$250 or more for first-degree theft refers to the fair market value of the property. *Hebron v. United States*, 804 A.2d 270, 2002 D.C. App. LEXIS 384 (2002).

Cost of service contract purchased with subsequently stolen telephone could not be considered in making threshold determination of whether value of stolen telephone made theft first-degree offense, where obligations encompassed in service contract were not exclusive to stolen telephone. D.C. Code 1981, § 22-3812(a, b). *Chappelle v. United States*, 736 A.2d 212, 1999 D.C. App. LEXIS 171 (1999).

Even if checking account lacked sufficient funds to cover check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, check would still have had "value," within meaning of statute making it crime to take property without right; defendant could have endorsed check and passed it to third party in exchange for cash, goods, or services, or, if check was dishonored, defendant could have sued drawer for the face amount of the check. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Fact that defendant never received cash equivalent for check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, because of stop-payment order did not affect conclusion that check had "value," within meaning of statute making it crime to take property without right; value of property is determined at time crime through which it is acquired occurs, and defendant committed crime of taking property without right at instant he tricked drawer into delivering check to him. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Because bank owned money in individual depositors' accounts, defendant was properly charged with theft from bank instead of theft from individual customers. D.C. Code 1981, §§ 22-3811, 22-3812(a, b). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

Main difference between former offense of grand larceny, and offense of first-degree theft which superseded it by enactment of the Theft and White Collar Crimes Act of 1982, is that grand larceny was defined as felonious taking of property of the amount or value of \$100 or upward, whereas first-degree theft is theft of

property of value of \$250 or more; definition of theft also includes conduct previously characterized as embezzlement, false pretenses, and larceny after trust. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

In first-degree theft cases, "value" means fair market value of property. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

Grand larceny of motor vehicle requires proof of asportation of vehicle with specific intent to steal and proof of value of vehicle, neither of which are required to be proved for conviction of unauthorized use of motor vehicle. D.C. Code 1981, §§ 22-2201, 22-2204. *Arnold v. United States*, 467 A.2d 136, 1983 D.C. App. LEXIS 513 (1983).

Essential element of grand larceny, in fact the only distinction between felony of grand larceny and misdemeanor of petit larceny, is market value for purloined property of at least \$100, and consequently it is essential that Government introduce evidence of that value in order to give jury a firm basis upon which it can find grand larceny. D.C. Code § 22-2201. *Moore v. United States*, 388 A.2d 889, 1978 D.C. App. LEXIS 484 (1978).

Relevant value in determining whether an item is worth in excess of \$100 for purposes of grand larceny statute is fair market value. D.C. Code § 22-2201. *Williams v. United States*, 376 A.2d 442, 1977 D.C. App. LEXIS 358 (1977).

Grand larceny, as defined by statute, does not require intent to appropriate property permanently, but proof must merely manifest intent to appropriate property to use inconsistent with owner's rights. D.C. Code § 22-2201. *Fredericks v. United States*, 306 A.2d 268, 1973 D.C. App. LEXIS 309 (1973).

Pleas.

Defendant intentionally and voluntarily waived right to trial, prior to guilty pleas on charges of first-degree theft and destruction of property, where trial judge carefully and repeatedly advised defendant of his rights to trial by jury, to confront witnesses, to testify or not to testify, and his appeal rights if convicted, and record was devoid of any hint that defendant wanted any trial at all, let alone a jury trial. D.C. Code 1981, §§ 22-403, 22-3811, 22-3812(a). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

Presumptions and burden of proof.

In a prosecution for first-degree theft, the prosecutor needs to prove that the stolen property's value exceeds the statutory minimum of \$250. *Hebron v. United States*, 804 A.2d 270, 2002 D.C. App. LEXIS 384 (2002).

Government must prove the fair market value of the property stolen in prosecution for first-degree theft. D.C. Code 1981, § 22-3812(a). *Chappelle v. United States*, 736 A.2d 212, 1999 D.C. App. LEXIS 171 (1999).

In trials where illegal taking or possession of piece of property is an issue, to establish "value," the Government need not prove item's specific monetary worth; rather, it only need show that item had some value—any value at all, although less than the smallest coin. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Grand larceny of motor vehicle requires proof of asportation of vehicle with specific intent to steal and proof of value of vehicle, neither of which are required to be proved for conviction of unauthorized use of motor vehicle. D.C. Code 1981, §§ 22-2201, 22-2204. *Arnold v. United States*, 467 A.2d 136, 1983 D.C. App. LEXIS 513 (1983).

Review.

Where there was a question as to adequacy of proof of grand larceny that property taken had a value of \$100 or more, principle that appellate court may reverse a judgment as to one of sentences, if its validity is beset by substantial doubt, where there is neither injustice done defendant nor a need of government overridden would be applied to reverse concurrent sentence for grand larceny, while remanding case to trial court for entry of concurrent sentence on petit larceny. D.C. Code §§ 22-1801(b), 22-2201. *United States v. Henderson*, 439 F.2d 531, 1970 U.S. App. LEXIS 6365 (C.A.D.C. 1970).

In absence of specific evidence as to value of items taken, defendant's conviction for grand larceny would be reversed, but where district judge gave lesser included offense charge as to petit larceny and there was sufficient evidence on which jury could find defendant guilty thereof, case would be remanded for resentencing. D.C. Code §§ 22-1801(b), 22-2201. *United States v. Thweatt*, 433 F.2d 1226, 1970 U.S. App. LEXIS 8425 (C.A.D.C. 1970).

Conviction for grand larceny could not stand where value of articles involved was less than \$100. D.C. Code 1961, § 22-2201. *Ransom v. United States*, 337 F.2d 550, 1964 U.S. App. LEXIS 4290 (C.A.D.C. 1964).

Because it was impossible to determine from the record whether defendant's convictions for theft of personal property and receiving stolen property were duplicative, remand was necessary for clarification, and resentencing, if necessary. D.C. Code 1981, §§ 22-3811, 22-3812(a), 22-3832(a), (c)(2). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

In prosecution for grand larceny, evidence that original cost of stolen coat was \$150 and

exhibition of such coat was insufficient to establish minimum value required for grand larceny, and cause would be remanded for entry of judgment of conviction to charge of petty larceny. D.C. Code §§ 22-2201, 22-2202. *Wilson v. United States*, 358 A.2d 324, 1976 D.C. App. LEXIS 277 (1976).

Where defendant was sentenced to two concurrent ten-year terms of imprisonment for crimes exclusively applicable to District of Columbia, subsequent amendment by trial court of defendant's sentence to one of indeterminate term was error, and case would be remanded for resentencing. D.C. Code §§ 22-1801(b), 22-2201, 22-2202, 22-2204; 18 U.S.C. §§ 4208, 4208(a)(2). *Fredericks v. United States*, 306 A.2d 268, 1973 D.C. App. LEXIS 309 (1973).

Where evidence of value of stolen items was insufficient to sustain conviction of grand larceny but was sufficient to prove petit larceny, conviction of grand larceny would be reversed and case would be remanded with instructions to enter verdict of guilty of petit larceny and to resentence accordingly. D.C. Code § 22-2201. *Boone v. United States*, 296 A.2d 449, 1972 D.C. App. LEXIS 274 (1972).

Right to jury trial.

The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Weight and sufficiency of evidence.

— Grade or degree of offense, weight and sufficiency of evidence.

Evidence sustained conviction for grand larceny. D.C. Code 1961, § 22-2201. *Jackson v. United States*, 331 F.2d 816, 1964 U.S. App. LEXIS 5770 (C.A.D.C. 1964).

When the owner of stolen chattel testifies as to purchase price to establish value in prosecution for first-degree theft, factors to be considered are whether the purchase was very recent, whether the chattel was in mint condition, and whether the chattel was subject to prompt depreciation or obsolescence. D.C. Code 1981, § 22-3812(a). *Chappelle v. United States*, 736 A.2d 212, 1999 D.C. App. LEXIS 171 (1999).

Victim's testimony about \$21,000 price she paid for five-year-old minivan when new, "good working" condition of minivan when stolen, \$1700 repair estimate revealing items of value in minivan, and new purchaser's ability to drive minivan away was sufficient to prove that minivan's value was at least \$250 at time of offense, so as to support convictions for first-degree theft, receiving stolen property, and destruction of property. D.C. Code 1981, §§ 22-403, 22-3811, 22-3812(a), 22-3832(a), (c)(1). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

First-degree theft conviction was sufficiently supported by evidence, including evidence that defendant had cashed union checks without authorization and in violation of union policy and resisted union efforts to obtain financial records in his possession when union became concerned about his financial activities. D.C. Code 1981, §§ 22-3811, 22-3812(a). *Johnson v. United States*, 613 A.2d 1381, 1992 D.C. App. LEXIS 223 (1992).

Convictions for second-degree burglary, first-degree theft, second-degree theft, and destruction of property valued at \$200 or more, on aiding and abetting theory, were supported by evidence that police officers had seen defendant standing in front of burglarized premises near time of burglary holding stolen bird bath. D.C. Code 1981, §§ 22-403, 22-1801(b), 22-3811, 22-3812(a, b). *Wright v. United States*, 508 A.2d 915, 1986 D.C. App. LEXIS 321 (1986).

While evidence was not sufficient to support grand larceny conviction, it was sufficient to support conviction for the lesser included offense of petit larceny. D.C. Code 1981, § 22-2201. *Barkley v. United States*, 455 A.2d 412, 1983 D.C. App. LEXIS 289 (1983).

Evidence that defendant stole television, leather coat and watch which complaining witness had purchased for a total of \$755, that there was nothing wrong with the television when it was taken, but the watch needed fixing, and that shortly after the theft one of defendant's friends sold the television set for \$50 or \$60 and defendant paid \$100 to buy it back after complaining witness told defendant she would not press charges if he returned the set was insufficient to support finding that the stolen articles had a value of \$100 or more, for purposes of grand larceny conviction, in absence of any testimony as to fair market value; since defendant was not a "willing" buyer, the price he paid to repurchase set was without probative value. D.C. Code § 22-2201. *Williams v. United States*, 376 A.2d 442, 1977 D.C. App. LEXIS 358 (1977).

Evidence was sufficient to establish value of stolen property so as to support a conviction for grand larceny and so as to make an instruction on petit larceny unnecessary. D.C. Code § 22-2201. *Roldan v. United States*, 353 A.2d 292, 1976 D.C. App. LEXIS 484 (1976).

Evidence that value of items stolen by defendant and accomplices was based on estimate of current market value and not original cost was sufficient to support defendant's conviction for grand larceny. D.C. Code §§ 22-1801(b), 22-2201. *In re R.D.J.*, 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

Evidence as to value of stolen articles was sufficient to support conviction of grand larceny, especially in view of testimony of buyer that articles stolen and recovered had a retail value of \$248 and a wholesale value of \$124.

D.C. Code § 22-2201. *Saunders v. United States*, 317 A.2d 867, 1974 D.C. App. LEXIS 398 (1974).

Evidence that defendant drove off in car owned by another, which was parked in parking lot with keys in ignition, without permission of owner, supported conviction of defendant of grand larceny and unauthorized use of vehicle. D.C. Code §§ 22-2201, 22-2204. *Fredricks v. United States*, 306 A.2d 268, 1973 D.C. App. LEXIS 309 (1973).

Testimony of owner of two sets of stolen golf clubs that one set had cost \$211, that other set had cost \$101 and that clubs could have been sold for at least \$50 and physical presence of equipment in trial court constituted insufficient evidence of value to support conviction of grand larceny. D.C. Code § 22-2201. *Boone v. United States*, 296 A.2d 449, 1972 D.C. App. LEXIS 274 (1972).

— **In general.**

Evidence establishing defendant's proximity to scene of crime and stolen television set, his flight and attempt to hide from police, and when discovered, his statement to officer that he did not go in house but was with friend who did, supported conviction, as aider and abettor, of first-degree burglary, second-degree theft, and misdemeanor destruction of property. D.C. Code 1981, §§ 22-403, 22-1801(a), 22-3811, 22-3812. *Garrett v. United States*, 642 A.2d 1312, 1994 D.C. App. LEXIS 88 (1994).

Defendant's conviction for grand larceny could not be sustained, where basis for conviction could have been the theft of articles for which there was no proof of value. D.C. Code 1981, § 22-2201. *Barkley v. United States*, 455 A.2d 412, 1983 D.C. App. LEXIS 289 (1983).

— **Value of property, weight and sufficiency of evidence.**

Evidence of value of articles involved in charge of grand larceny was inadequate to sustain finding of jury that they were of value of \$100 or upward. D.C. Code 1961, § 22-2201. *Ransom v. United States*, 337 F.2d 550, 1964 U.S. App. LEXIS 4290 (C.A.D.C. 1964).

Evidence was insufficient to show that portable music device stolen from victim had fair market value of \$250 or more, as required to support conviction for first-degree theft; testimony of victim's mother that she had paid "about \$250" for device, plus shipping and taxes, coupled with victim's testimony that he believed that his mother had paid \$300 for it, that he downloaded movies and "about 400 or more songs" onto device, and that although he had to pay for some of songs, some of them were free, called for determination of value based on surmise or conjecture, and there was no evidence that device did not depreciate in value over time, or how much victim paid for songs

and movies. *Foreman v. United States*, 988 A.2d 505, 2010 D.C. App. LEXIS 31 (2010).

Evidence was sufficient to support finding that stolen property had value of \$250 or more, as required to establish first degree theft; testimony was presented that stolen 18 month old stereo was purchased for \$189 and that stolen furniture was at most four months old and had total purchase price that exceeded \$600. *Hebron v. United States*, 837 A.2d 910, 2003 D.C. App. LEXIS 703 (2003), writ of certiorari denied by 540 U.S. 1228, 124 S. Ct. 1529, 158 L. Ed. 2d 170, 2004 U.S. LEXIS 1793, 72 U.S.L.W. 3552 (2004).

In prosecution for first degree theft and like offenses, government need not prove value of stolen property with any strictness or precision greater than any other element of offense, which is subject to sufficiency of evidence standard of proof, and question of sufficiency will be reviewed under same uniform standard that applies across board in criminal cases. *Hebron v. United States*, 837 A.2d 910, 2003 D.C. App. LEXIS 703 (2003), writ of certiorari denied by 540 U.S. 1228, 124 S. Ct. 1529, 158 L. Ed. 2d 170, 2004 U.S. LEXIS 1793, 72 U.S.L.W. 3552 (2004).

Evidence was sufficient to prove that fair market value of stolen property was \$250 or more, thus supporting conviction for first-degree theft; victim testified that total value of numerous items of stolen jewelry was well over \$250, victims paid out a deductible of \$250 to receive compensation under home insurance policy for stolen jewelry and electrical goods, and victims received \$1755 from their insurer over and above the deductible amount. *Williams v. United States*, 805 A.2d 919, 2002 D.C. App. LEXIS 489 (2002).

Evidence of purchase price of \$606 for furniture, i.e., a glass table, chairs, a futon, mattress, coffee table, two end tables, and a lamp, bought within four months before theft and of \$189 for stereo bought eighteen months before theft did not establish value of at least \$250 and did not support conviction for first-degree theft; nothing indicated the condition of the items, and the jury could only speculate as to the depreciation rate of the furniture. *Hebron v. United States*, 804 A.2d 270, 2002 D.C. App. LEXIS 384 (2002).

Finding that value of television, microwave, and compact discs which were stolen by defendant from victim was \$250 or more was not supported by evidence, for purposes of first-degree theft conviction, where pawnbroker paid \$130 for all stolen items, defendant bought television for \$640 almost two years before theft, defendant bought microwave for \$99 almost three years before theft, defendant bought 40 compact discs for approximately \$15 each in year before robbery, even though property was in good condition at time of theft. D.C. Code

1981, § 22-3812(a). *Zellers v. United States*, 682 A.2d 1118, 1996 D.C. App. LEXIS 163 (1996).

Direct evidence showing balance in checking account at time check was drawn was not required to establish that check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, had "value," within meaning of statute making it crime to take property without right; when defendant received check, its useful functional purpose was to enable defendant to acquire amount for which it was drawn. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Testimony by store manager as to retail value of items stolen from store provided sufficient evidence of value to support defendant's conviction for grand larceny. D.C. Code 1981, § 22-2201 (repealed). *Ross v. United States*, 520 A.2d 1064, 1987 D.C. App. LEXIS 285 (1987).

For first-degree theft cases, proof requirements on issue of value established in series of grand larceny cases under prior law, are applicable, since value of stolen property is essential element of crime to be proved under both old statute and new one. D.C. Code 1981, §§ 22-403, 22-3811(a), 22-3812(a); § 22-2201 (repealed). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

Unless it could be shown that price tag was properly marked, security guards' testimony about tag was only speculative evidence of value of stolen merchandise, in that merchandise could have been mismarked and guards would not have known. D.C. Code 1981, § 22-3812(a). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

Testimony by retail store department managers as to value of stolen items would have been sufficient to prove value in prosecution for first-

degree theft. D.C. Code 1981, § 22-3812(a). *Eldridge v. United States*, 492 A.2d 879, 1985 D.C. App. LEXIS 392 (1985).

Government's failure to physically produce stolen police radio was not fatal to showing of value, in grand larceny prosecution, in view of expert testimony as to value. D.C. Code 1981, § 22-2201[Repealed]. *Patterson v. United States*, 479 A.2d 335, 1984 D.C. App. LEXIS 464 (1984).

Evidence that stolen automobile was worth \$6,000 when purchased, was 32 months old when stolen, never required any major repairs, and at time of theft was running well and was without any body damage was sufficient for jury to reasonably conclude that automobile was worth at least \$100 at time of theft in prosecution for grand larceny under statute requiring that stolen property have value of at least \$100 at time of theft. D.C. Code 1981, § 22-2201(repealed). *Parker v. United States*, 476 A.2d 173, 1984 D.C. App. LEXIS 401 (1984).

Evidence that television set was purchased for \$160 and radio for approximately \$40 or \$50, and that both items were at least one to two years old and in good working condition, was insufficient to establish value in excess of \$100 at time of theft. D.C. Code § 22-2201. *Terrell v. United States*, 361 A.2d 207, 1976 D.C. App. LEXIS 348 (1976), writ of certiorari denied by 429 U.S. 984, 97 S. Ct. 501, 50 L. Ed. 2d 594, 1976 U.S. LEXIS 3743 (1976).

Expert testimony is not required to establish market value of items stolen. D.C. Code §§ 22-1801(b), 22-2201. In re R.D.J., 348 A.2d 301, 1975 D.C. App. LEXIS 283 (1975).

In a grand larceny case, jury cannot be allowed to speculate as to value of stolen property merely from appearance of property. D.C. Code § 22-2201. *Boone v. United States*, 296 A.2d 449, 1972 D.C. App. LEXIS 274 (1972).

§ 22-3213. Shoplifting.

(a) A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person:

- (1) Knowingly conceals or takes possession of any such property;
- (2) Knowingly removes or alters the price tag, serial number, or other identification mark that is imprinted on or attached to such property; or
- (3) Knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.

(b) Any person convicted of shoplifting shall be fined not more than \$300 or imprisoned for not more than 90 days, or both.

(c) It is not an offense to attempt to commit the offense described in this section.

(d) A person who offers tangible personal property for sale to the public, or an employee or agent of such a person, who detains or causes the arrest of a person in a place where the property is offered for sale shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest, in any proceeding arising out of such detention or arrest, if:

(1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section;

(2) The manner of the detention or arrest was reasonable;

(3) Law enforcement authorities were notified within a reasonable time; and

(4) The person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time.

(Dec. 1, 1982, D.C. Law 4-164, § 113, 29 DCR 3976.)

Cross references. — Merchant's Civil Recovery for Criminal Conduct, see § 27-101 et seq.

Prior Codifications. — 1981 Ed., § 22-3813.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

CASE NOTES

ANALYSIS

Nature and elements of offense.

New trial.

Presumptions and burden of proof.

Search and seizure.

Weight and sufficiency of evidence.

Nature and elements of offense.

Merchandise in storeroom off customer sales area was "offered for sale" within meaning of shoplifting statute applicable to personal property offered for sale; merchandise was in reasonably close proximity to customer area and was intended for prompt availability to customer when and as needed. D.C. Code 1981, § 22-3813. *Harris v. United States*, 602 A.2d 1140, 1992 D.C. App. LEXIS 45 (1992).

Person can be guilty of completed offense of shoplifting without leaving the store. D.C. Code 1981, § 22-3813(a, c). *Singletary v. United States*, 519 A.2d 701, 1987 D.C. App. LEXIS 269 (1987).

New trial.

Defendant did not exercise due diligence in procuring newly discovered evidence and, thus, was not entitled to new shoplifting trial based on attorney's reinspection of department store leading to conclusions that exhibits were factually erroneous and that security guard could not have seen what he purported to have seen and based on assertion of counsel's surprise at

testimony that security guard was not the one encountered in the shoplifting incident. D.C. Code 1981, § 22-3813; Criminal Rule 33. *Harris v. United States*, 602 A.2d 1140, 1992 D.C. App. LEXIS 45 (1992).

Presumptions and burden of proof.

Government did not have to affirmatively prove, in accordance with District of Columbia statute defining "property of another," that gloves which defendant took were merchandise in which department store had more than security interest in order to make out prima facie case of shoplifting. D.C. Code 1981, §§ 22-3801(4), 22-3813(a). *Alston v. United States*, 509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

Government's failure to prove exact ownership of sweaters was not fatal to shoplifting prosecution under D.C. Code 1985 Supp. § 22-3813, where there was proof that owner of sweaters allegedly taken from store was someone other than defendant. *Carmon v. United States*, 498 A.2d 580, 1985 D.C. App. LEXIS 511 (1985).

Search and seizure.

Department store security officer's search of customer's bag for possible shoplifting was subject to Fourth Amendment, as incident involved arrest of a suspect and actions related thereto, the broad "Special Police Officer" power distinguishing SPO from private citizen, where there

was testimony that one SPO carried customer's bag from place of arrest back to store, and there was no indication that security officer searched bag solely under own initiative, but did so in presence of at least three SPO's, including her supervisor. U.S. Const.Amend. 4. *Alston v. United States*, 518 A.2d 439, 1986 D.C. App. LEXIS 486 (1986).

Search of customer's open tote bag by department store's security officer was valid as directly related to cause of customer's arrest for possible shoplifting, even though tote bag was not searched immediately upon apprehension of customer in park, where customer was moved from public park to privacy of security office across street for further processing, and search took place without any indication of undue delay. U.S. Const.Amend. 4. *Alston v. United States*, 518 A.2d 439, 1986 D.C. App. LEXIS 486 (1986).

Weight and sufficiency of evidence.

Finding that shoplifting defendant "took property of another" was sufficiently supported by evidence defendant carried rolled up dresses with price tags on them under his coat, left that area of the store, passed available cash registers on his way to stairway exit, then returned to area and put dresses under others on floor and left store. D.C. Code 1981, § 22-3813(c). *Baldwin v. United States*, 521 A.2d 650, 1987 D.C. App. LEXIS 294 (1987).

Conviction of shoplifting was supported by sufficient evidence, including testimony of private security guard showing that defendant took possession of bottle of lotion, that lotion

was store's property and that it was offered for sale. D.C. Code 1981, § 22-3813(a). *Singletary v. United States*, 519 A.2d 701, 1987 D.C. App. LEXIS 269 (1987).

Trial court's finding that defendant did not "own" merchandise, so as to be guilty of shoplifting, was supported by testimony of security officer that other party had informed him that defendant had shoplifted gloves, that security officer had observed defendant set off security alarm as he exited from department store, and that merchandise recovered from defendant's shoulder bag still bore store's price tags. D.C. Code 1981, §§ 22-3801(4), 22-3813(a). *Alston v. United States*, 509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

Evidence that defendant concealed sweaters under his coat and walked out of store without paying for them was sufficient to support finding, under shoplifting statute, D.C. Code 1985 Supp. § 22-3813, of specific intent "to appropriate [the sweaters] without complete payment." *Carmon v. United States*, 498 A.2d 580, 1985 D.C. App. LEXIS 511 (1985).

Evidence that defendant emerged from store with sweaters under his coat and was in public area of shopping mall, about three or four feet outside entrance to store, when he saw officer approaching, turned and reentered store, dropping sweaters on floor, established offense of shoplifting under statute, D.C. Code 1985 Supp. § 22-3813, not merely attempted shoplifting, which is not a crime. *Carmon v. United States*, 498 A.2d 580, 1985 D.C. App. LEXIS 511 (1985).

§ 22-3214. Commercial piracy.

(a) For the purpose of this section, the term:

(1) "Owner", with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.

(2) "Proprietary information" means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.

(3) "Phonorecords" means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

(b) A person commits the offense of commercial piracy if, with the intent to

sell, to derive commercial gain or advantage, or to allow another person to derive commercial gain or advantage, that person reproduces or otherwise copies, possesses, buys, or otherwise obtains phonorecords of a sound recording, live performance, or copies of proprietary information, knowing or having reason to believe that the phonorecord or copies were made without the consent of the owner. A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance.

(c) Nothing in this section shall be construed to prohibit:

(1) Copying or other reproduction that is in the manner specifically permitted by Title 17 of the United States Code; or

(2) Copying or other reproduction of a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use.

(d) Any person convicted of commercial piracy shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

(e) This section does not apply to any sound recording initially fixed on or after February 15, 1972.

(Dec. 1, 1982, D.C. Law 4-164, § 114, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(b), 41 DCR 2608; Oct. 31, 1995, D.C. Law 11-73, § 2(a), 42 DCR 3277.)

Cross references. — Consecutive sentences for theft and certain other crimes, availability, see § 22-3203.

Prior Codifications. — 1981 Ed., § 22-3814.

Emergency legislation. — For temporary amendment of section, see § 113(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary amendment of section, see § 2 of the Commercial Piracy Protection Emergency Amendment Act of 1994 (D.C. Act 10-363, December 15, 1994, 41 DCR 8059).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-3212.

Legislative history of Law 10-252. — Law 10-252, the “Commercial Piracy Protection Temporary Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-846. The Bill was adopted on first and second readings on December 6, 1994, and January 3, 1995, respectively. Signed by the Mayor on January 27, 1995, it was assigned Act No. 10-399 and transmitted to both Houses of Congress for its review. D.C. Law 10-252 became effective on March 23, 1995.

Legislative history of Law 11-73. — For legislative history of D.C. Law 11-73, see Historical and Statutory Notes following § 22-3214.01.

§ 22-3214.01. Deceptive labeling.

(a) For the purposes of this section, the term:

(1) “Audiovisual works” means material objects upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

(2) “Manufacturer” means the person who authorizes or causes the

copying, fixation, or transfer of sounds or images to sound recordings or audiovisual works subject to this section.

(3) “Sound recordings” means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

(b) A person commits the offense of deceptive labeling if, for commercial advantage or private financial gain, that person knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes, or transports, or possesses for such purposes, a sound recording or audiovisual work, the label, cover, or jacket of which does not clearly and conspicuously disclose the true name and address of the manufacturer thereof.

(c) Nothing in this section shall be construed to prohibit:

(1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; or

(2) Any person who, in his own home, for his own personal use, and without deriving any commercial advantage or private financial gain, transfers any sounds or images recorded on a sound recording or audiovisual work.

(d)(1) Any person convicted of deceptive labeling involving less than 1,000 sound recordings or less than 100 audiovisual works during any 180-day period shall be fined not more than \$10,000 or imprisoned for not more than 1 year, or both.

(2) Any person convicted of deceptive labeling involving 1,000 or more sound recordings or 100 or more audiovisual works during a 180-day period shall be fined not more than \$50,000 or imprisoned for not more than 5 years, or both.

(e) Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.

(Dec. 1, 1982, D.C. Law 4-164, § 114a, as added Oct. 31, 1995, D.C. Law 11-73, § 2(b), 42 DCR 3277.)

Prior Codifications. — 1981 Ed., § 22-3814.1.

Legislative history of Law 11-73. — Law 11-73, the “Commercial Piracy Protection and Deceptive Labeling Amendment Act of 1995,” was introduced in Council and assigned Bill No. 11-125, which was referred to the Commit-

tee on the Judiciary. The Bill was adopted on first and second readings on May 2, 1995, and June 6, 1995, respectively. Signed by the Mayor on June 19, 1995, it was assigned Act No. 11-74 and transmitted to both Houses of Congress for its review. D.C. Law 11-73 became effective on October 31, 1995.

CASE NOTES

Admissibility of evidence.

Thirty DVDs and 39 CDs allegedly seized from defendant at time of his arrest were admissible in prosecution for deceptive labeling of

sound and audiovisual recordings, despite chain-of-custody concerns such as failure of police to mark each DVD and CD for identification, record titles of discs, or seal the evidence

bag containing the discs, combined with dearth of testimony at trial about evidence-handling procedures of the evidence control branch; there was no evidence that police failed to maintain continuous custody over the discs seized from defendant, nor any evidence of tampering or other mishandling. *Plummer v. United States*, 43 A.3d 260, 2012 D.C. App. LEXIS 155 (2012).

Probative value was not substantially outweighed by danger of unfair prejudice as to admission, in prosecution for attempted deceptive labeling of sound recording, relating to sale of counterfeit music compact discs (CDs) manufactured without authorization of copyright owner, of other crimes evidence that five weeks before defendant's arrest for current charge, he had been warned, in connection with his prior arrest at same location for selling CDs without a license, that he was selling counterfeit CDs;

such evidence was relevant to showing defendant's knowledge, for purposes of currently charged offense, that he was selling counterfeit CDs, and current trial was a bench trial. *Jackson v. United States*, 856 A.2d 1111, 2004 D.C. App. LEXIS 413 (2004).

Other crimes evidence, that five weeks before his arrest for current charge of attempted deceptive labeling of sound recording, relating to sale of counterfeit music compact discs (CDs) manufactured without authorization of copyright owner, defendant had been warned, in connection with his prior arrest at same location for selling CDs without a license, that he was selling counterfeit CDs, was admissible in current prosecution to show defendant's knowledge that the CDs he was selling were counterfeit. *Jackson v. United States*, 856 A.2d 1111, 2004 D.C. App. LEXIS 413 (2004).

§ 22-3214.02. Unlawful operation of a recording device in a motion picture theater.

(a) For the purposes of this section, the term:

(1) "Motion picture theater" means a theater or other auditorium in which a motion picture is exhibited.

(2) "Recording device" means a photographic or video camera, audio or video recorder, or any other device not existing, or later developed, which may be used for recording sounds or images.

(b) A person commits the offense of unlawfully operating a recording device in a motion picture theater if, without authority or permission from the owner of a motion picture theater, or his or her agent, that person operates a recording device within the premises of a motion picture theater.

(c) Any person convicted of unlawfully operating a recording device in a motion picture theater shall be fined not more than \$300 or imprisoned for not more than 90 days, or both.

(d) A theater owner, or an employee or agent of a theater owner, who detains or causes the arrest of a person in, or immediately adjacent to, a motion picture theater shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest in any proceeding arising out of such detention or arrest, if:

(1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed, or attempted to commit, in that person's presence, an offense described in this section;

(2) The manner of the detention or arrest was reasonable;

(3) Law enforcement authorities were notified within a reasonable time; and

(4) The person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time.

(Dec. 1, 1982, D.C. Law 4-164, § 114b, as added Oct. 31, 1995, D.C. Law 11-73, § 2(b), 42 DCR 3277.)

Prior Codifications. — 1981 Ed., § 22-3814.2.

legislative history of D.C. Law 11-73, see Historical and Statutory Notes following § 22-3214.01.

Legislative history of Law 11-73. — For

§ 22-3215. Unauthorized use of motor vehicles.

(a) For the purposes of this section, the term “motor vehicle” means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.

(b) A person commits the offense of unauthorized use of a motor vehicle under this subsection if, without the consent of the owner, the person takes, uses, or operates a motor vehicle, or causes a motor vehicle to be taken, used, or operated, for his or her own profit, use, or purpose.

(c)(1) A person commits the offense of unauthorized use of a motor vehicle under this subsection if, after renting, leasing, or using a motor vehicle under a written agreement which provides for the return of the motor vehicle to a particular place at a specified time, that person knowingly fails to return the motor vehicle to that place (or to any authorized agent of the party from whom the motor vehicle was obtained under the agreement) within 18 days after written demand is made for its return, if the conditions set forth in paragraph (2) of this subsection are met.

(2) The conditions referred to in paragraph (1) of this subsection are as follows:

(A) The written agreement under which the motor vehicle is obtained contains the following statement: “WARNING — Failure to return this vehicle in accordance with the terms of this rental agreement may result in a criminal penalty of up to 3 years in jail”. This statement shall be printed clearly and conspicuously in a contrasting color, set off in a box, and signed by the person obtaining the motor vehicle in a space specially provided;

(B) There is displayed clearly and conspicuously on the dashboard of the motor vehicle the following notice: “NOTICE — Failure to return this vehicle on time may result in serious criminal penalties”; and

(C) The party from whom the motor vehicle was obtained under the agreement makes a written demand for the return of the motor vehicle, either by actual delivery to the person who obtained the motor vehicle, or by deposit in the United States mail of a postpaid registered or certified letter, return receipt requested, addressed to the person at each address set forth in the written agreement or otherwise provided by the person. The written demand shall state clearly that failure to return the motor vehicle may result in prosecution for violation of the criminal law of the District of Columbia punishable by up to 3 years in jail. The written demand shall not be made prior to the date specified in the agreement for the return of the motor vehicle, except that, if the parties or their authorized agents have mutually agreed to some other date for the return of the motor vehicle, then the written demand shall not be made prior to the other date.

(3) This subsection shall not apply in the case of a motor vehicle obtained under a retail installation contract as defined in § 50-601(9).

(4) It shall be a defense in any criminal proceeding brought under this subsection that a person failed to return a motor vehicle for causes beyond his or her control. The burden of raising and going forward with the evidence with respect to such a defense shall be on the person asserting it. In any case in which such a defense is raised, evidence that the person obtained the motor vehicle by reason of any false statement or representation of material fact, including a false statement or representation regarding his or her name, residence, employment, or operator's license, shall be admissible to determine whether the failure to return the motor vehicle was for causes beyond his or her control.

(d)(1) Except as provided in paragraphs (2) and (3) of this subsection, a person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than \$1,000, imprisoned for not more than 5 years, or both.

(2)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:

(i) Fined not more than \$10,000, imprisoned for not more than 10 years, or both, consecutive to the penalty imposed for the crime of violence; and

(ii) If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.

(B) For the purposes of this paragraph, the term "crime of violence" shall have the same meaning as provided in § 23-1331(4).

(3)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who has 2 or more prior convictions for unauthorized use of a motor vehicle or theft in the first degree, not committed on the same occasion, shall be fined not less than \$5,000 nor more than \$15,000, or imprisoned for not less than 30 months nor more than 15 years, or both.

(B) For the purposes of this paragraph, a person shall be considered as having 2 prior convictions for unauthorized use of a motor vehicle or theft in the first degree if the person has been twice before convicted on separate occasions of:

(i) A prior violation of subsection (b) of this section or theft in the first degree;

(ii) A statute in one or more other jurisdictions prohibiting unauthorized use of a motor vehicle or theft in the first degree;

(iii) Conduct that would constitute a violation of subsection (b) of this section or a violation of theft in the first degree if committed in the District of Columbia; or

(iv) Conduct that is substantially similar to that prosecuted as a violation of subsection (b) of this section or theft in the first degree.

(4) A person convicted of unauthorized use of a motor vehicle under subsection (c) of this section shall be fined not more than \$1,000, imprisoned for not more than 3 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 115, 29 DCR 3976; Mar. 10, 1983, D.C. Law 4-199, § 2, 30 DCR 119; Dec. 10, 2009, D.C. Law 18-88, § 214(e), 56 DCR 7413.)

Cross references. — Consecutive sentences for theft and certain other crimes, availability, see § 22-3203.

No-Fault Motor Vehicle Insurance Act, penalties and adjudications, see § 35-2113.

Prior Codifications. — 1981 Ed., § 22-3815.

Effect of amendments. — D.C. Law 18-88 rewrote subsecs. (b) and (d).

Emergency legislation. — For temporary (90 day) amendment of section, see § 102(d) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) amendment of section, see § 214(e) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(e) of Omnibus Public Safety and Justice Congressional Review Emergency

Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 4-199. — Law 4-199, the “Christmas Tree Act of 1982,” was introduced in Council and assigned Bill No. 4-427, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on November 16, 1982, and December 14, 1982, respectively. Signed by the Mayor on December 28, 1982, it was assigned Act No. 4-283 and transmitted to both Houses of Congress for its review.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Mayor's Orders. — District of Columbia Vehicle Theft Prevention Council, see Mayor's Order 2002-34, March 1, 2002 (49 DCR 1876).

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Adequacy of representation by counsel.

Counsel's continued refusal to participate in first day of trial on charges of unauthorized use of vehicle and receiving stolen property after request for continuance was denied warranted presumption that juvenile was deprived of due process and statutory right to counsel that was not rebutted by trial court's attempts on second day of trial to remedy situation; counsel's refusal to participate resulted in admission of evidence and of juvenile's statement to police without objection and no cross-examination of State's witnesses, trooper who identified juve-

nile as one of passengers in vehicle was not recalled, and there was no explanation as to why counsel did not recall him. In re R.K.S., 905 A.2d 201, 2006 D.C. App. LEXIS 443 (2006).

In prosecution for receiving stolen property and unauthorized use of motor vehicle, prosecution did not wrongfully characterize asserted relationship between defendant and individual whom defendant claimed was in original possession of vehicle as substantial, where defendant estimated that he saw that person at playground twice a week from June to December, during which they played basketball and cards, and drank beer. *Alston v. United States*, 552 A.2d 526, 1989 D.C. App. LEXIS 4 (1989).

In prosecution for receiving stolen property and unauthorized use of motor vehicle, trial court properly allowed prosecutor to argue that person whom defendant claimed was in original possession of vehicle never existed, where prosecution did not argue that witness, had he been produced, would have testified unfavorably, and did not argue that witness was conspicuously absent, and where theory that witness never existed could reasonably be inferred from evidence adduced at trial. *Alston v. United States*, 552 A.2d 526, 1989 D.C. App. LEXIS 4 (1989).

In prosecution for grand larceny and unauthorized use of a motor vehicle, defendant was not denied effective assistance of counsel on basis either of contention that his alibi defense

was blotted out by trial counsel's failure to produce alibi witness or of argument that his misidentification defense was mismanaged by defense counsel. U.S. Const.Amend. 6. *Wesley v. United States*, 449 A.2d 282, 1982 D.C. App. LEXIS 399 (1982).

Admissibility of evidence.

In prosecution for grand larceny and for unauthorized use of a vehicle, wherein defense was interposed that defendant was repossessing automobile on request of man engaged in automobile business, testimony and argument of Government to effect that repossession of automobiles must be accomplished by a United States marshal and that repossession by an individual was illegal, which testimony and argument led jury to believe that defendant was engaged in an illegal enterprise in repossessing automobile, was prejudicial error, where jury was not instructed to disregard testimony or argument on this point, notwithstanding that jury was instructed that Government had to prove every element of crime, including intent, beyond reasonable doubt. D.C. Code 1951, §§ 22-2201, 22-2204. *Evans v. U.S.*, 232 F.2d 379, 1956 U.S. App. LEXIS 3043 (C.A.D.C. 1956).

Defendant failed to establish that witness's testimony during trial for receiving stolen property and unauthorized use of a vehicle, specifically that her father was the registered owner of the stolen car, constituted inadmissible hearsay; defendant's hearsay challenge was based entirely on speculation and conjecture. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

Arrest.

Police officer had reasonable basis to initiate investigatory stop of automobile as officer's observation of smashed rear vent window, taken together with officer's experience with other unauthorized use of motor vehicle (UUV) arrests, was sufficient to support reasonable suspicion in officer's mind that vehicle was stolen. U.S. Const.Amend. 4; D.C. Code 1981, § 22-3815(b). In re C.A.P., 633 A.2d 787, 1993 D.C. App. LEXIS 278 (1993).

Fresh pursuit statute, which gives police officer from another state same authority as District police officer to arrest individual suspected of committing felony, did not apply in prosecution for unauthorized use of motor vehicle (UUV) since pursuit and arrest involved Capitol Police officer inside district, rather than pursuit into District by officer from state. D.C. Code 1981, §§ 22-3815(b), 23-901, 23-903. In re C.A.P., 633 A.2d 787, 1993 D.C. App. LEXIS 278 (1993).

Delinquency adjudications.

Evidence that juvenile was riding in vehicle that was recovered few hours after it had been

stolen, that steering column had been broken open and roughly bound with duct tape, and that rear vent window was smashed was sufficient to support delinquency adjudication of offense of unauthorized use of motor vehicle. D.C. Code 1981, § 22-3815(b). In re C.A.P., 633 A.2d 787, 1993 D.C. App. LEXIS 278 (1993).

Adjudication of delinquency, upon finding juvenile guilty of unauthorized use of motor vehicle, was sufficiently supported by testimony of single eyewitness, a police officer, where officer had adequate opportunity to observe driver of stolen vehicle, identified him as wearing light colored T-shirt, which was highly distinctive characteristic in middle of February, and positively identified juvenile at showup; there was no substantial difference between officer's description of driver and juvenile who was stopped by other officers, and officer identified juvenile in court. D.C. Code 1981, § 22-3815(b). In re B.E.W., 537 A.2d 206, 1988 D.C. App. LEXIS 38 (1988).

Discovery.

Defendant was not entitled to mistrial in trial on charges of unauthorized use of motor vehicle and possession of unregistered firearm and ammunition due to government's failure to disclose before trial entirety of oral statement made by defendant to arresting officers, including defendant's alleged statement that his destination was East Side Club instead of east side, where the government did not act in bad faith and trial judge imposed sanction against government by excluding from jury's consideration defendant's alleged statement that he was going to East Side Club so that defendant did not suffer any substantial prejudice. Criminal Rule 16(a)(1)(A). *Allen v. United States*, 649 A.2d 548, 1994 D.C. App. LEXIS 199 (1994).

Government's failure to preserve and produce vehicle key and yellow inventory tag in trial of defendant on charges of unauthorized use of motor vehicle and possession of unregistered firearm found in vehicle being operated by defendant during pretrial discovery did not warrant sanctions, where there was no indication that government acted in bad faith in returning key and yellow tag to owner of car, preservation of key and yellow tag would not have led reasonable juror to conclude that defendant had no knowledge that car was not stolen property, and defendant could cross-examine seller of car, arresting officer, and any other officer associated with processing of car about key and yellow inventory tag. Criminal Rule 16(a)(1)(C). *Allen v. United States*, 649 A.2d 548, 1994 D.C. App. LEXIS 199 (1994).

Double jeopardy.

Convictions for unauthorized use of a vehicle (UUV) and receiving stolen property (RSP),

which arose from the taking of victim's vehicle, did not merge under double jeopardy prohibition against multiple punishments for the same offense; each offense contained an element that the other did not. *Sutton v. United States*, 988 A.2d 478, 2010 D.C. App. LEXIS 28 (2010).

Conviction and imposition of sentence for both unauthorized use of vehicle and grand larceny of same vehicle violated double jeopardy clause as unauthorized use of vehicle conviction was merged into grand larceny conviction. U.S. Const. Amend. 5. *Garris v. United States*, 491 A.2d 511, 1985 D.C. App. LEXIS 375 (1985).

Conviction of unauthorized use of motor vehicle violated double jeopardy clause of Fifth Amendment where defendant was also convicted in same trial of grand larceny for stealing same vehicle four days earlier, as conviction for unauthorized use required no proof beyond that necessary for conviction of grand larceny. D.C. Code 1981, §§ 22-2201, 22-2204 (repealed); U.S. Const. Amend. 5. *Parker v. United States*, 476 A.2d 173, 1984 D.C. App. LEXIS 401 (1984).

Fact that defendant received concurrent rather than consecutive sentences for convictions of grand larceny and unauthorized use of a motor vehicle did not alter the fact that conviction of both offenses violated double jeopardy clause of Fifth Amendment. D.C. Code 1981, §§ 22-2201, 22-2204 (repealed); U.S. Const. Amend. 5. *Parker v. United States*, 476 A.2d 173, 1984 D.C. App. LEXIS 401 (1984).

In prosecution for grand larceny and unauthorized use of a motor vehicle, defendant waived any potential double jeopardy claim where he failed to raise the issue either in trial court or on his brief on appeal, and since no grave injustice was likely to result where defendant was sentenced to concurrent sentences for the two convictions. D.C. Code 1973, §§ 22-2201, 22-2204; U.S. Const. Amend. 5. *Wesley v. United States*, 449 A.2d 282, 1982 D.C. App. LEXIS 399 (1982).

Each of defendant's and codefendant's convictions for destroying property, armed carjacking, and unauthorized use of a vehicle did not merge into one crime for double jeopardy purposes; despite fact that crime spree engaged in by defendant and codefendant extended over several hours, many of their crimes occurred after significant breaks in time, changes of location, and opportunities to reformulate criminal intent. *Bryant v. United States*, 859 A.2d 1093, 2004 D.C. App. LEXIS 526 (2004).

Indictment and information.

Defendant, who was convicted of receiving stolen property and unauthorized use of a vehicle, failed to establish that he was prejudiced by variance between indictment and evidence at trial regarding owner of the stolen vehicle;

defendant's defense that he did not know the car was stolen was unaffected by the variance. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

Evidence at trial for receiving stolen property and unauthorized use of a vehicle, showing that the owner of the stolen car was someone other than the person named in the indictment, was merely a variance, and not a constructive amendment; government's evidence did not prove a "complex of facts" that was "distinctly different" from the facts alleged by the grand jury. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

Offenses of robbery, armed robbery, and unauthorized use of motor vehicle could be joined for trial on basis that they were "connected together" in light of evidence that proceeds of robbery were found in trunk of vehicle stolen several days earlier. Criminal Rule 8(a); D.C. Code 1981, §§ 22-2901, 22-3202, 22-3815. *Gooch v. United States*, 609 A.2d 259, 1992 D.C. App. LEXIS 128 (1992).

Offenses of unauthorized use of a motor vehicle, robbery, and armed robbery were of same or similar character and thus could be joined for trial; crimes were against owner's right of possession, and additional elements distinguishing robbery offenses from unauthorized use of motor vehicle did not undercut degree of similarity. Criminal Rule 8(a); D.C. Code 1981, §§ 22-2901, 22-3202, 22-3815. *Gooch v. United States*, 609 A.2d 259, 1992 D.C. App. LEXIS 128 (1992).

Statute penalizing person who, without consent of owner, shall take, use, operate or remove, etc., motor vehicle does not require notice of precise point from which vehicle is removed nor of precise point to which vehicle is removed, and, at least in absence of motion for bill of particulars, indictment charging that defendant at specified time used, operated and drove automobile of named owner, without his consent and for defendant's own profit, use and purpose is sufficient. D.C. Code §§ 22-403, 22-2201, 22-2204, 22-2205; D.C. Code SCR, Criminal Rule 7(f). *Allen v. United States*, 377 A.2d 65, 1977 D.C. App. LEXIS 372 (1977), writ of certiorari denied by 434 U.S. 1000, 98 S. Ct. 645, 54 L. Ed. 2d 497, 1977 U.S. LEXIS 4353 (1977).

Instructions.

Fact that jury was instructed, in prosecution for grand larceny of automobile and of automobile engine and for unauthorized use of motor vehicle, that if prerequisite to inference of guilt for possession of recently stolen property exists beyond reasonable doubt it could be inferred that defendant was guilty of one or both of such offenses, but was not instructed that inference permissible was that defendant was person who committed such offense if government

proved all of their essential elements beyond reasonable doubt did not warrant reversal of conviction where, in other portions of charge, instruction was given on presumption of innocence and government's burden of proof beyond reasonable doubt. D.C. Code §§ 22-2201, 22-2204; Fed.Rules Crim.Proc. rule 30, 18 U.S.C. United States v. Johnson, 433 F.2d 1160, 1970 U.S. App. LEXIS 7454 (C.A.D.C. 1970).

Refusal to give requested instruction to determine whether allegedly unauthorized use of motor vehicle was without consent of owner or some other person empowered to consent in owner's behalf required reversal, even though driver argued that he lacked the knowledge if he genuinely thought that unlicensed juvenile had authority to use car and let driver use it temporarily; deliberating jury asked whether the relevant authorization was from owner or the juvenile. D.C. Code 1981, §§ 11-721(e), 22-3815. Jackson v. United States, 600 A.2d 90, 1991 D.C. App. LEXIS 327 (1991).

In prosecution for receiving stolen property and unauthorized use of motor vehicle, trial court properly denied prosecution's request to give missing witness instruction regarding person whom defendant claimed was originally in possession of vehicle, where that person would have been "unavailable" as his testimony would have been privileged under Fifth Amendment if he had appeared at trial. U.S. Const.Amend. 5. Alston v. United States, 552 A.2d 526, 1989 D.C. App. LEXIS 4 (1989).

Jurisdiction and venue.

In prosecution for the unauthorized use of a vehicle and larceny of other property in District of Columbia, evidence on issue of whether defendant had aided and abetted those who took the property and whether the planning and the taking were within the District sustained conviction, even though it was not shown that defendant was present at the taking or had used the automobile in the District. D.C. Code 1951, §§ 22-105, 22-2201, 22-2204; 18 U.S.C. § 2. Williams v. U.S., 215 F.2d 35, 1954 U.S. App. LEXIS 2807 (C.A.D.C. 1954).

Merger of offenses.

Single taking of automobile can constitute both offense of grand larceny of automobile and offense of unauthorized use of automobile, and can authorize separate though concurrent sentences under each. D.C. Code §§ 22-2201, 22-2204. United States v. Johnson, 433 F.2d 1160, 1970 U.S. App. LEXIS 7454 (C.A.D.C. 1970).

Defendant's conviction for unauthorized use of motor vehicle (UUV) did not merge with his conviction for carjacking for sentencing purposes; carjacking could have been accomplished without implicating three of five statutory elements of UUV. D.C. Code 1981, §§ 22-2903,

22-3815. Allen v. United States, 697 A.2d 1, 1997 D.C. App. LEXIS 124 (1997).

Defendant's conviction for unauthorized use of motor vehicle did not merge with his robbery conviction, and his theft conviction did not merge with burglary conviction, where each conviction required a different element of proof. D.C. Code 1981, §§ 22-1801(b), 22-2901, 22-3811, 22-3812(b), 22-3815. Matthews v. United States, 629 A.2d 1185, 1993 D.C. App. LEXIS 179 (1993).

Defendant can properly be convicted of both unauthorized use of vehicle (UUV) and receiving stolen property (RSP) arising out of same act or course of conduct, even though State is statutorily precluded from consecutively sentencing a defendant upon convictions for RSP and UUV arising out of same act or course of conduct. D.C. Code 1981, §§ 22-3803, 22-3815, 22-3832, 23-112; U.S. Const.Amend. 5. Byrd v. United States, 598 A.2d 386, 1991 D.C. App. LEXIS 283 (1991).

Defendant could not be convicted of both receiving stolen property and unauthorized use of motor vehicle, as unauthorized use merged with offense of receiving stolen property. D.C. Code 1981, §§ 22-3832(a), (c)(1), 22-3851. Alston v. United States, 552 A.2d 526, 1989 D.C. App. LEXIS 4 (1989).

Defendant's conviction for unauthorized use of motor vehicle merged with more serious offense of grand larceny while armed, where there was nothing in defendant's unlawful use of vehicle conviction that was not also used as proof of grand larceny while armed; thus, resulting 18 to 54 months consecutive imprisonment meted out by trial court for unlawful use of motor vehicle violated Fifth Amendment guaranty against double jeopardy. U.S. Const.Amend. 5; D.C. Code 1981, §§ 22-3202, 22-3812, 22-3815. Kirk v. United States, 510 A.2d 499, 1986 D.C. App. LEXIS 345 (1986).

Trial court erred in permitting jury to convict defendant on two counts of unauthorized use of a motor vehicle when jury had already returned guilty verdicts on grand larceny charges relating to the same vehicles. D.C. Code 1981, §§ 22-2201, 22-2204, 22-2205 (repealed). Holt v. United States, 486 A.2d 705, 1985 D.C. App. LEXIS 306 (1985).

Conviction for unauthorized use of motor vehicle merged into grand larceny conviction, and thus where jury convicted defendant of grand larceny and unauthorized use of motor vehicle, judgment of conviction for grand larceny was affirmed and case was remanded to trial court to vacate conviction of unauthorized use. D.C. Code 1981, §§ 22-2201, 22-2204 (repealed). Jones v. United States, 479 A.2d 332, 1984 D.C. App. LEXIS 466 (1984).

Motor Vehicles defined.

An all-terrain vehicle (ATV) is a "motor vehicle" for purposes of statute setting forth offense

of unauthorized use of a motor vehicle (UUV), as an ATV is a vehicle propelled by a motor. *Gordon v. United States*, 906 A.2d 882, 2006 D.C. App. LEXIS 507 (2006).

Nature and element of offenses.

When Congress amended unauthorized use of vehicle statute by including term “motorcycle,” but failing to include “motorbike,” Congress presumed that word “motorcycle” as used in statute, would continue to mean what it does in everyday speech; motor-powered vehicle having two, in some cases three, wheels. D.C. Code §§ 22-2204, 22-2204(c). *United States v. Stancil*, 422 A.2d 1285, 1980 D.C. App. LEXIS 398 (1980).

Within context of statute punishing those who make unauthorized use of vehicle, as opposed to statutory scheme concerning titling and registration, there is not sufficient difference between moped and other vehicles known as motorcycles, to warrant disparate treatment for offenders and diminished legal protection for legal owners of such vehicles, and, therefore, moped is “motor vehicle” for purposes of unauthorized use of vehicle statute. D.C. Code §§ 22-2204, 22-2204(c). *United States v. Stancil*, 422 A.2d 1285, 1980 D.C. App. LEXIS 398 (1980).

Statute penalizing any person who, without consent of owner, shall take, use, operate or remove, etc., motor vehicle was intended to punish “joy riding.” D.C. Code §§ 22-403, 22-2201, 22-2204, 22-2205. *Allen v. United States*, 377 A.2d 65, 1977 D.C. App. LEXIS 372 (1977), writ of certiorari denied by 434 U.S. 1000, 98 S. Ct. 645, 54 L. Ed. 2d 497, 1977 U.S. LEXIS 4353 (1977).

Presumptions and burden of proof.

In both unauthorized use of a vehicle and receiving stolen property cases, there is no requirement that the government prove the actual name of the owner, because that is not an essential element of the offense. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

In an unauthorized use of a vehicle case, the government must prove that the defendant took a vehicle without the consent of the owner or some other person empowered to consent on the owner’s behalf. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

In order to establish unauthorized use of a vehicle, the government must prove beyond a reasonable doubt that: (1) defendant took a motor vehicle, used, operated, or removed it from any place, or caused it to be taken, used, operated, or removed from any place; (2) she operated it, or drove it, or caused it to be operated or driven for her own profit, use or purpose; (3) she did so without the consent of the owner or some other person empowered to

consent on the owner’s behalf; and (4) at the time, she did so without the consent of the owner or some other authorized person. *Agnew v. United States*, 813 A.2d 192, 2002 D.C. App. LEXIS 737 (2002).

To convict defendant of unauthorized use of a motor vehicle, the government had to prove beyond a reasonable doubt that: (1) defendant took a motor vehicle, or used, operated, or removed a motor vehicle from any place; (2) defendant operated it, drove it, or caused it to be operated or driven for his own profit, use or purpose; (3) defendant did so without the consent of the owner; and (4) at the time defendant took, used, operated or removed the vehicle he knew that he did so without the consent of the owner. *Moore v. United States*, 757 A.2d 78, 2000 D.C. App. LEXIS 188 (2000).

To prove unauthorized use of motor vehicle (UUV), prosecution must show that defendant: took, used, operated or removed; vehicle; from any one of a number of specified locations; without consent of owner; and for offender’s own profit, use, or purpose. D.C. Code 1981, § 22-3815. *Allen v. United States*, 697 A.2d 1, 1997 D.C. App. LEXIS 124 (1997).

In order to convict passenger of unauthorized use of motor vehicle (UUV), government must show, beyond reasonable doubt, that passenger was present in vehicle with knowledge that vehicle was being operated without owner’s consent. D.C. Code 1981, § 22-3815(b). In re C.A.P., 633 A.2d 787, 1993 D.C. App. LEXIS 278 (1993).

Grand larceny of motor vehicle requires proof of asportation of vehicle with specific intent to steal and proof of value of vehicle, neither of which are required to be proved for conviction of unauthorized use of motor vehicle. D.C. Code 1981, §§ 22-2201, 22-2204. *Arnold v. United States*, 467 A.2d 136, 1983 D.C. App. LEXIS 513 (1983).

Questions for the court.

Apprendi, which held that, other than fact of prior conviction, any fact that increased penalty for crime beyond prescribed statutory maximum had to be submitted to jury and proved beyond a reasonable doubt, did not require submission to jury of question of whether legislature meant the term “motor vehicle” to include an all-terrain vehicle (ATV), in prosecution for unauthorized use of a motor vehicle (UUV), as this question was one of law to be decided by trial court employing statutory interpretation. *Gordon v. United States*, 906 A.2d 882, 2006 D.C. App. LEXIS 507 (2006).

Question of whether defendant’s all-terrain vehicle (ATV) was a “motor vehicle” under statute setting forth offense of unauthorized use of a motor vehicle (UUV) was question of law for trial court to decide, rather than question of fact for the jury; jury was not the determiner of

statutory meaning. *Gordon v. United States*, 906 A.2d 882, 2006 D.C. App. LEXIS 507 (2006).

Search and seizure.

Where at time of stop arresting officer had no reason to believe his action in stopping defendant's vehicle because it bore rental tags was illegal, but before suppression hearing decision of Supreme Court made the stop invalid, trial court was required to apply recent decision to suppress concededly illegally seized evidence. *United States v. Nicks*, 427 A.2d 444, 1981 D.C. App. LEXIS 233 (1981).

Sentence and punishment.

Sentences imposed for theft and unauthorized use of vehicle of not less than six years on each count were invalid where court failed to set maximum term of confinement as required by Federal Youth Corrections Act, and six-year sentence on unauthorized use of vehicle count exceeded five-year penalty authorized by unauthorized use statute and hence it also exceeded maximum allowed under Federal Youth Corrections Act. D.C. Code 1981, §§ 22-3812(a), 22-3815(b); 18 U.S.C. § 5010(c). *Byrd v. United States*, 487 A.2d 616, 1985 D.C. App. LEXIS 296 (1985).

Verdict.

Verdict whereby defendant was convicted of and codefendant was acquitted of grand larceny of automobile, unauthorized use of such automobile, and grand larceny of engine from another automobile, was not inconsistent where jury, rather than determining that codefendant lacked possession of stolen property, could have derived doubt as to whether codefendant collaborated in commission of charged offenses. D.C. Code §§ 22-2201, 22-2204. *United States v. Johnson*, 433 F.2d 1160, 1970 U.S. App. LEXIS 7454 (C.A.D.C. 1970).

Evidence can be sufficient for a reasonable jury to infer that a defendant knew he had possession of a motor vehicle under circumstances which indicated that he had not acquired possession with the consent of the true owner, and support a conviction for unauthorized use of a motor vehicle; yet based on the same evidence, it may be impermissible speculation or conjecture on the part of a jury to infer the defendant had the specific intent to deprive the owner permanently of his property, to sustain his conviction for receiving stolen property. *United States v. Brown*, 120 WLR 697 (Super. Ct. 1992).

Weight and sufficiency of evidence.

Conviction of either grand larceny of automobile or unauthorized use of automobile entails evidence having enough probative power to convince jury beyond reasonable doubt of every essential element, and also on identity of ac-

cused as participant. D.C. Code §§ 22-2201, 22-2204. *United States v. Johnson*, 433 F.2d 1160, 1970 U.S. App. LEXIS 7454 (C.A.D.C. 1970).

Evidence in delinquency proceeding was insufficient to show that juvenile knew that car was stolen so as to support his convictions for unauthorized use of a motor vehicle, receiving stolen property, and theft; juvenile was a back seat passenger in car, and there was no evidence that the punched ignition was visible to a person in juvenile's position in the car, nor did the government introduce evidence that, in addition to having a punched ignition, the car was so badly damaged as to warrant inference that juvenile knew that it was being used without the owner's consent, and there was no basis for attributing juvenile's flight to consciousness of guilt than to a purpose consistent with innocence. *In re D.P.*, 996 A.2d 1286, 2010 D.C. App. LEXIS 278 (2010).

Evidence was sufficient to show that juvenile was aware that vehicle in which he was passenger was stolen, as required to support adjudication of delinquency for unauthorized use of motor vehicle; state trooper who engaged in police pursuit with stolen vehicle saw juvenile turning around and looking back toward his vehicle, juvenile fled on foot after vehicle crashed, indicating consciousness of guilt, and trooper made positive in- and out-of-court identifications of juvenile. *In re R.K.S.*, 905 A.2d 201, 2006 D.C. App. LEXIS 443 (2006).

Evidence failed to establish that driver knowingly used the vehicle without the consent of the owner or other authorized person and committed unauthorized use of a vehicle (UUV); although witness testified about theft of her car six months earlier, no evidence established that driver was using the stolen car, a discrepancy in the vehicle identification numbers (VINs) on the car and the registration and a missing window covered in plastic did not establish a lack of authorization, nothing indicated that police activated siren or red lights during pursuit, and the driver professed no knowledge about ownership. *Agnew v. United States*, 813 A.2d 192, 2002 D.C. App. LEXIS 737 (2002).

Evidence was sufficient to find that defendant took victim's car without her consent and that defendant knew the vehicle was being operated without such consent, as required for conviction of unauthorized use of a motor vehicle, where victim testified that she retained the car key after she parked it and that the key was not left in the car before it was stolen, and police officer testified that the key used by defendant to start the car was bent and required extra force to fit it in the ignition, and victim testified that the key defendant used to start the car was not the key to her car. *Moore v. United States*, 757 A.2d 78, 2000 D.C. App. LEXIS 188 (2000).

Despite absence of vehicle owner's testimony in prosecution of juvenile for unauthorized use of vehicle, trial court could properly infer that juvenile was driving car without owner's consent, based on officer's testimony that steering column had been "punched out," and where

juvenile was fourteen years of age, he had no driver's license, he could not produce registration papers, and he attempted to escape from police. D.C. Code 1981, § 22-3815(b). In re Q.D.G., 706 A.2d 36, 1998 D.C. App. LEXIS 25 (1998).

§ 22-3216. Taking property without right.

A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property without right shall be fined not more than \$300 or imprisoned for not more than 90 days, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 116, 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-3816.

Legislative history of Law 4-164. — For

legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

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Inconsistency of approximately one day between date of offense, as set forth in information, and date mentioned in trial testimony did not deprive defendant of any Fifth Amendment rights, in prosecution for taking property without right; defendant was fully aware of events consisting of charges against which he was defending, and transcript of trial was sufficiently detailed to preclude second prosecution for the same offense. D.C. Code 1981, § 22-3816; U.S. Const. Amend. 5. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Instructions.

Defendant charged with robbery was entitled to instruction on taking property without right as lesser included offense based on his testimony that he did not intend to steal complainant's purse but rather intended to retrieve his money from purse and only fled with purse because complainant began screaming and he saw an approaching police car. D.C. Code 1981, § 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Lesser included offenses.

Taking property without right (TPWR) was not lesser included offense of carjacking, where

TPWR required proof of asportation while carjacking required only possession or control of vehicle. *Moorer v. United States*, 868 A.2d 137, 2005 D.C. App. LEXIS 31 (2005).

Taking property without right is a lesser included offense of robbery inasmuch as larceny is a lesser included offense of robbery and taking property without right is a lesser included offense of larceny. D.C. Code 1981, §§ 22-2901, 22-3811, 22-3812, 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Nature and elements of offenses.

To convict person of taking property without right, government need not prove any specific intent; general intent to commit proscribed act is all that law requires. D.C. Code 1981, § 22-3816. *Schafer v. United States*, 656 A.2d 1185, 1995 D.C. App. LEXIS 82 (1995).

One element of taking property without right is that the defendant "carried away" the property of another. D.C. Code 1981, § 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Taking property without right requires only a general intent. D.C. Code 1981, § 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

In trials where illegal taking or possession of piece of property is an issue, to establish "value," the Government need not prove item's specific monetary worth; rather, it only need show that item had some value—any value at all, although less than the smallest coin. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Even if checking account lacked sufficient funds to cover check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, check would still have had "value," within meaning of statute making it crime to take property without right; defendant could have endorsed check and passed it to third party in exchange for cash, goods, or services, or, if check was dishonored, defendant could have sued drawer for the face amount of the check. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Fact that defendant never received cash equivalent for check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, because of stop-payment order did not affect conclusion that check had "value," within meaning of statute making it crime to take property without right; value of property is determined at time crime through which it is acquired occurs, and defendant committed crime of taking property without right at instant he tricked drawer into delivering check to him. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Consent evinced by drawer in voluntarily handing check to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident was of no significance, in prosecution for taking property without right; to be valid, consent must be informed and not product of trickery, fraud, or misrepresentation. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

It was not necessary, in order to convict of attempted taking of property without right, that Government show that defendant carried merchandise past cashier, or that she attempted to leave store with it. D.C. Code 1981, §§ 22-103, 22-3816. *Wormsley v. United States*, 526 A.2d 1373, 1987 D.C. App. LEXIS 369 (1987).

Elements of crime of taking property without right are that defendant took property, that defendant carried property away, that property in question belonged to another, and that defendant had no right to so act. D.C. Code 1981, § 22-3816. *Tibbs v. United States*, 507 A.2d 141, 1986 D.C. App. LEXIS 306 (1986).

Officer's exchange of ten dollars for bus pass which he realized was bogus before the exchange was not sufficient to support conviction for taking property without right [D.C. Code 1981, § 22-3816]; the money was not taken without the officer's knowledge and consent, and thus, Government had failed to prove the money was taken "against the will" of the

officer. *Fussell v. United States*, 505 A.2d 72, 1986 D.C. App. LEXIS 295 (1986).

There cannot be a taking of property without right in violation of D.C. Code 1981, § 22-3816, when property is voluntarily surrendered for the purpose of completing a criminal transaction, as the essential element of lack of consent is missing. *Fussell v. United States*, 505 A.2d 72, 1986 D.C. App. LEXIS 295 (1986).

Electricity may be taken and carried away within the meaning of this section. *United States v. Gray*, 115 WLR 265 (Super. Ct. 1987).

New trial.

Defendant did not exercise due diligence in procuring newly discovered evidence and, thus, was not entitled to new shoplifting trial based on attorney's reinspection of department store leading to conclusions that exhibits were factually erroneous and that security guard could not have seen what he purported to have seen and based on assertion of counsel's surprise at testimony that security guard was not the one encountered in the shoplifting incident. D.C. Code 1981, § 22-3813; Criminal Rule 33. *Harris v. United States*, 602 A.2d 1140, 1992 D.C. App. LEXIS 45 (1992).

Defendant, who had been convicted of taking property without right due to trial court's erroneous reliance on his postarrest silence was subject to retrial on charge, where despite error, state presented sufficient evidence to support finding of guilt, even though initial taking of money by defendant from employer was not without right, in that defendant was given money to deposit in employer's bank, and evidence was presented from which trier of fact could find that defendant took money anew when he failed to deposit money in bank as promised. *Baggett v. United States*, 528 A.2d 444, 1987 D.C. App. LEXIS 391 (1987).

Presumptions and burden of proof.

In order to sustain conviction for taking property without right, government must show that defendant took and carried away property of another without right to do so. D.C. Code 1981, § 22-3816. *Schafer v. United States*, 656 A.2d 1185, 1995 D.C. App. LEXIS 82 (1995).

To establish defendant's guilt for taking property without right, the Government must prove that defendant took and carried away property of another as defined in applicable statute without right to do so. D.C. Code 1981, §§ 22-3801, 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Where evidence supported finding that defendant charged with taking property without right was in possession of recently stolen check, court could infer that defendant participated in its theft. D.C. Code 1981, § 22-3816. *Tibbs v. United States*, 507 A.2d 141, 1986 D.C. App. LEXIS 306 (1986).

D.C. Code 1981, § 22-3816 prohibiting taking of property without right does not require proof that defendant took property in question from complainant's possession for conviction. *Tibbs v. United States*, 507 A.2d 141, 1986 D.C. App. LEXIS 306 (1986).

Statutes prohibiting breaking and entering, and taking property without right prohibit acts committed by defendant only if done without right and, therefore, government must prove beyond reasonable doubt that defendant lacked authority from rightful owner of the property. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

In case concerning breaking and entering of parking meter, trial court properly assigned burden to government to prove a taking without right where trial court instructed jury that government had burden of proving an attempt to break and enter without right. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

Questions of law and fact.

Trier of fact could have found asportation in the removal of the purse from the victim's shoulder without even considering defendant's subsequent flight with the purse in his hand. D.C. Code 1981, § 22-3816. *Simmons v. United States*, 554 A.2d 1167, 1989 D.C. App. LEXIS 36 (1989).

Weight and sufficiency of evidence.

Evidence supported convictions for taking property without right; defendant took alleged victim's notepad and other defendant was an intentional, active participant in offense. *Gatlin v. United States*, 833 A.2d 995, 2003 D.C. App. LEXIS 620 (2003).

Evidence was insufficient to establish, as required for offense of taking property without right, that defendant knew or had reason to know that television which he removed from complainant's apartment, which he formerly shared with complainant, was complainant's property; notwithstanding contention that television was gift to complainant from defendant; sales slip for television, which listed complain-

ant's name and address, did not establish ownership or, in absence of other evidence, establish that defendant intended television to be gift, and, although complainant testified that she understood that television was gift, there was no evidence of intention on part of defendant to make gift. D.C. Code 1981, § 22-3816. *Schafer v. United States*, 656 A.2d 1185, 1995 D.C. App. LEXIS 82 (1995).

Evidence was sufficient to support conviction of taking property without right for theft of flag from lamppost; defendant's motive was irrelevant. *Arlt v. United States*, 562 A.2d 633, 1989 D.C. App. LEXIS 147 (1989).

Direct evidence showing balance in checking account at time check was drawn was not required to establish that check, which was given to defendant after defendant pretended he owned parked vehicle damaged by drawer in accident, had "value," within meaning of statute making it crime to take property without right; when defendant received check, its useful functional purpose was to enable defendant to acquire amount for which it was drawn. D.C. Code 1981, § 22-3816. *Jeffcoat v. United States*, 551 A.2d 1301, 1988 D.C. App. LEXIS 220 (1988).

Defendant's apparent dissemblance in folding blue dress and concealing it inside her sweater, as well as defendant's change in story about what she had done with dress was sufficient for court to have found, beyond reasonable doubt, that defendant attempted to take dress and carry it away from store, for purpose of supporting conviction of attempted taking of property without right. D.C. Code 1981, §§ 22-103, 22-3816. *Wormsley v. United States*, 526 A.2d 1373, 1987 D.C. App. LEXIS 369 (1987).

In view of evidence that neither police officer nor anyone else had investigated to determine whether defendant was authorized to enter parking meters by District of Columbia government, officer's testimony "not to my knowledge," when asked whether defendant worked for District of Columbia government, was not sufficient to support a conviction for breaking and entering or taking property without right. D.C. Code 1981, §§ 22-3427, 22-3816. *Craig v. United States*, 490 A.2d 1173, 1985 D.C. App. LEXIS 377 (1985).

Subchapter II-A. Theft of Utility Service.

§ 22-3218.01. Definitions.

For the purposes of this subchapter, the term:

(1) "Company" means a person or enterprise engaged in the generation or distribution of natural gas or electricity.

(2) "Person" means any individual, corporation, company, association, firm, partnership, joint stock company, or other entity.

(Dec. 1, 1982, D.C. Law 4-164, § 118, as added June 12, 2003, D.C. Law 14-310, § 15, 50 DCR 1092.)

Legislative history of Law 14-310. — Law 14-310, the “Criminal Code and Miscellaneous Technical Amendments Act of 2002”, was introduced in Council and assigned Bill No. 14-954, which was referred to the Committee on Whole. The Bill was adopted on first and second readings on December 3, 2002, and December 17, 2002, respectively. Signed by the Mayor on January 22, 2003, it was assigned Act No. 14-622 and transmitted to both Houses of Congress for its review. D.C. Law 14-310 became effective on June 12, 2003.

Delegation of Authority. — Delegation of Authority Under D.C. Law 13-281, the “Abatement and Condemnation of Nuisance Property Omnibus Amendment Act of 2002”, see Mayor’s Order 2002-33, March 1, 2002 (49 DCR 1875).

Editor’s notes. — The provisions of D.C. Law 14-310 replaced the provisions of D.C. Law 13-281. D.C. Law 13-281 was ineffective because of a defective effective date clause for Title 22.

§ 22-3218.02. Unlawful acts.

Unless a person shall be authorized, or employed by, a company engaged in the generation or distribution of natural gas or electricity, a person shall not willfully connect or disconnect an electrical conductor belonging to the company; make any connection with an electrical conductor for the purpose of using or wasting the electric current or gas; tamper with a meter used to register gas or current consumed; interfere with the operation of an electrical or gas appliance of the company; or tamper, or interfere, with the poles, wires, or conduits used by the company. Nothing in this section shall prevent the lawful governmental regulation of gas or electric companies or electricity suppliers, or their conductors, appliances, machinery, and poles.

(Dec. 1, 1982, D.C. Law 4-164, § 118a, as added June 12, 2003, D.C. Law 14-310, § 15, 50 DCR 1092.)

Legislative history of Law 14-310. — For Law 14-310, see notes following § 22-3218.

§ 22-3218.03. Presumptions and rebuttal evidence.

(a) The presence of a connection, wire, conductor, meter alteration, or any device which effects the diversion of electric current or gas without the current or gas being measured or registered by or on a meter installed by a company engaged in the generation or distribution of electricity or natural gas, whether on a single property or within a multiple-unit building or complex, shall constitute prima facie evidence of intent to violate § 22-3218.02.

(b) If a check or test meter installed or employed by a company engaged in the generation or distribution of electricity or natural gas shows that a person is using a larger amount of electricity than is registered on the meter installed by the company on the person’s premises for the purpose of registering the natural gas or electricity used by the person, and the company has verified that the meter is not malfunctioning, it shall constitute prima facie evidence that the unregistered current or gas has been wrongfully diverted by such person and shall constitute prima facie evidence of intent to violate § 22-3218.02.

(c) The presumptions created by this section may be rebutted by a prepon-

derance of the evidence to the contrary that the person alleged to have violated § 22-3218a did not do so. If the person in actual possession of the property or unit has not received the direct benefit of the reduction of the cost in electric or gas services, the presumptions created by this section shall apply to the owner of the property or unit; provided, that the owner has received the direct benefit of unregistered services for at least one full billing cycle.

(Dec. 1, 1982, D.C. Law 4-164, § 118b, as added June 12, 2003, D.C. Law 14-310, § 15, 50 DCR 1092.)

Legislative history of Law 14-310. — For Law 14-310, see notes following § 22-3218.

§ 22-3218.04. Penalties for violation.

(a) A person who violates § 22-3218.02 shall be guilty of a misdemeanor, and, upon a conviction, shall be imprisoned for not more than 60 days, or fined, not more than \$500, or both. In the case of a second or subsequent conviction, a person who violates § 22-3218.02 shall be imprisoned for not more than 180 days, or fined, not more than \$1,500, or both.

(b) In addition to the criminal penalties in subsection (a) of this section, a person who is found to have violated § 22-3218.02 in a civil proceeding shall be liable to the company using or engaged in the generation or distribution of electricity or gas for restitution of the amount of any losses or damage sustained.

(Dec. 1, 1982, D.C. Law 4-164, § 118c, as added June 12, 2003, D.C. Law 14-310, § 15, 50 DCR 1092.)

Legislative history of Law 14-310. — For Law 14-310, see notes following § 22-3218.

Subchapter III. Fraud; Related Offenses.

§ 22-3221. Fraud.

(a) *Fraud in the first degree.* — A person commits the offense of fraud in the first degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise and thereby obtains property of another or causes another to lose property.

(b) *Fraud in the second degree.* — A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.

(c) *False promise as to future performance.* — Fraud may be committed by means of false promise as to future performance which the accused does not intend to perform or knows will not be performed. An intent or knowledge shall not be established by the fact alone that one such promise was not performed.

(Dec. 1, 1982, D.C. Law 4-164, § 121, 29 DCR 3976.)

Section references. — This section is referred to in §§ 22-3202 and 27-101.

Prior Codifications. — 1981 Ed., § 22-3821.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

CASE NOTES

ANALYSIS

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Evidence permitted jury to find that defendant was knowing participant in unlawful scheme to obtain real property for deflated price, supporting conviction for wire fraud and conspiracy to commit wire fraud, even though defendant was acquitted of charges under District of Columbia law for fraud, forgery, and uttering forged instrument; jury could conclude from defendant's connection to forged deed for property, which was filed by his real estate agent after owner's death, that he knowingly entered into scheme to defraud owner's heirs, particularly given check that he wrote to agent after she purportedly purchased property, and defendant falsely represented to executor for owner's estate that he was United States marshal and that police were protecting property on his behalf, suggesting that if property were not sold to his group, protection would cease, property would be ruined, and estate would be liable. *United States v. Brockenborough*, 575 F.3d 726, 2009 U.S. App. LEXIS 17672 (C.A.D.C. 2009).

Prior inconsistent statement that government's principal witness wrote during plea proceeding in federal court, which was a sworn factual statement of his participation in defendants' fraudulent scheme to use Water and Sewer Authority (WASA) equipment for their own purposes, was properly admitted as substantive evidence; witness was on stand when statement was offered into evidence by the government for impeachment purposes, and since statement was introduced at conclusion of witness's direct testimony, defense attorneys had opportunity to use it during cross-exami-

nation. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

Attempts.

To prove crime of attempted false pretenses, government must prove, as in any other attempt case, that defendant had intent to commit the crime and that he performed some act towards its commission. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

In prosecution for attempted false pretenses, government was not required to prove crime of false pretenses, but, rather, an intent to commit it, doing of some act toward its commission, and failure to consummate its commission. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Whether service station attendant relied on defendant's representations to his detriment when defendant attempted to pay for gasoline with stolen credit card was immaterial in context of defendant's attempted false pretense charge. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Attorney disciplinary proceedings.

Once Board on Professional Responsibility determines that violation of particular statute inherently involves moral turpitude, attorney convicted under that statute will be disbarred solely on basis of filing of certificate of conviction. D.C. Code 1981, § 11-2503(a). In re *McBride*, 602 A.2d 626, 1992 D.C. App. LEXIS 15 (1992).

For purpose of determining appropriate penalty for attorney who commits crime, crime can involve moral turpitude per se without involving intent to defraud. D.C. Code 1981, § 11-2503(a). In re *McBride*, 602 A.2d 626, 1992 D.C. App. LEXIS 15 (1992).

Lawyer convicted of misdemeanor, including one with intent to defraud, shall be entitled to hearing on whether that crime, on the facts, involves moral turpitude. D.C. Code 1981, § 11-2503(a). In re *McBride*, 602 A.2d 626, 1992 D.C. App. LEXIS 15 (1992).

Attorney's guilty pleas to federal bank fraud count and second-degree fraud involved crimes of moral turpitude, warranting disbarment. 18 U.S.C. § 1344; D.C. Code 1981, §§ 11-2503(a), 22-3821(b). In re *Rosenbleet*, 592 A.2d 1036, 1991 D.C. App. LEXIS 176 (1991).

Credibility of witnesses.

Rule authorizes use of conviction for crime

involving dishonesty or false statement to attack credibility of witness regardless of possible prejudice to defendant. Fed.Rules Evid.Rule 609(a)(2), 18 U.S.C. United States v. Coats, 652 F.2d 1002, 1981 U.S. App. LEXIS 19259 (C.A.D.C. 1981).

Discovery.

Defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to new trial where prosecution, without wrongdoing, withheld tax return of defendant's client for year which defendant did not prepare returns as undisclosed return raised reasonable probability of different result had it been disclosed at trial. United States v. Lloyd, 71 F.3d 408, 1995 U.S. App. LEXIS 34435 (C.A.D.C. 1995).

Defendant who was convicted of causing district to be deprived of tax revenues by helping prepare false district income tax returns for five of defendant's clients was entitled to new trial where prosecution failed to disclose prior tax returns for four of those clients as nondisclosed returns collectively provided exculpatory material evidence. United States v. Lloyd, 71 F.3d 408, 1995 U.S. App. LEXIS 34435 (C.A.D.C. 1995).

Defendant who was convicted of aiding and abetting in preparing false federal income tax return was not entitled to new trial based on prosecution's failure to disclose tax returns of defendant's clients who were not involved in present conviction as disclosure, considered as whole, would not have assisted defendant in impeaching defendant's client who was involved in present conviction or in buttressing defendant's version of events and, thus, those tax returns were not material to outcome. United States v. Lloyd, 71 F.3d 408, 1995 U.S. App. LEXIS 34435 (C.A.D.C. 1995).

Instructions.

Defendant's requested instructions on his "good faith" defense to charges of wire fraud and false pretenses, crimes that required proof of intent to defraud, were sufficiently covered by trial court's instructions emphasizing government's burden of proving element of specific intent beyond reasonable doubt. 18 U.S.C. § 1343; D.C. Code 1973, § 22-1301. United States v. Gambler, 662 F.2d 834, 1981 U.S. App. LEXIS 18562 (C.A.D.C. 1981).

Joint or separate trial.

Federal rule of criminal procedure allowed joinder of one count charging larceny after trust and four other counts, including two counts of larceny after trust, one count of wire fraud and one count of false pretenses, and district court did not abuse its discretion in denying motion for severance, where evidence would have been mutually admissible in separate trials. 18 U.S.C. § 1343; D.C. Code 1973, §§ 22-1301,

22-2203; Fed.R.Cr.Proc. Rules 8(a), 14, 18 U.S.C. United States v. Gambler, 662 F.2d 834, 1981 U.S. App. LEXIS 18562 (C.A.D.C. 1981).

Nature and elements of offenses.

Given elements of willfulness and intent to deceive, a false income tax statement may be material notwithstanding lack of tax consequences. 26 U.S.C. (I.R.C.1954) § 7201; D.C. Code § 22-2201. Baker v. United States, 401 F.2d 958, 1968 U.S. App. LEXIS 5836 (C.A.D.C. 1968).

Defendant could be convicted of larceny by trick, even though money involved had been embezzled by victim. D.C. Code 1961, § 22-2201. Levin v. United States, 338 F.2d 265, 1964 U.S. App. LEXIS 4853 (C.A.D.C. 1964), writ of certiorari denied by 379 U.S. 999, 85 S. Ct. 719, 13 L. Ed. 2d 701, 1965 U.S. LEXIS 1914 (1965).

Embassy employee who, with intent to steal, represented to superiors that money was needed for embassy's cash account and thus procured their signatures to checks, the proceeds of which he kept for himself, falsifying entries in cash journal to cloak transaction, was guilty of false pretenses and grand larceny, under District of Columbia law. D.C. Code 1951, §§ 22-1301, 22-2201. Skantze v. U.S., 288 F.2d 416, 1961 U.S. App. LEXIS 5256 (C.A.D.C. 1961).

Under District of Columbia law, grand larceny and false pretenses are not inconsistent offenses. D.C. Code 1951, §§ 22-1301, 22-2201. Skantze v. U.S., 288 F.2d 416, 1961 U.S. App. LEXIS 5256 (C.A.D.C. 1961).

In the District of Columbia, a fraud claim requires (1) a false representation, (2) in reference to a material fact, (3) with knowledge of falsity, (4) intent to deceive, and (5) action taken in reliance upon the representation. Webster v. Pacesetter, Inc., 259 F.Supp.2d 27, 2003 U.S. Dist. LEXIS 6284 (2003).

Under District of Columbia law, one commits fraud by making (1) a false representation, (2) in reference to a material fact, (3) with knowledge of the falsity, (4) intent to deceive, and (5) action is taken in reliance upon the representation. Dyson v. Winfield, 113 F.Supp.2d 35, 2000 U.S. Dist. LEXIS 14357 (2000), affirmed by 21 Fed. Appx. 2, 2001 U.S. App. LEXIS 24091 (D.C. Cir. 2001).

Under District of Columbia law, "third-party fraud claim" involves a misrepresentation made to one person with the expectation that its terms will be repeated to another, and that it will influence that other's conduct. Dyson v. Winfield, 113 F.Supp.2d 35, 2000 U.S. Dist. LEXIS 14357 (2000), affirmed by 21 Fed. Appx. 2, 2001 U.S. App. LEXIS 24091 (D.C. Cir. 2001).

Plaintiff suing for fraud in the District of Columbia may satisfy false representation element of claim by nondisclosure or silence.

Smith v. Brown & Williamson Tobacco Corp., 108 F.Supp.2d 12, 2000 U.S. Dist. LEXIS 11574 (2000).

Where a false pretense charge stems from unauthorized use of a credit card, it is not necessarily significant that the card was presented immediately after rather than just prior to receipt of goods in what is virtually a simultaneous change. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

An initial implicit false promise of future payment coupled with presentation of stolen credit card, which occurred in a single and continuous transaction, can support a conviction for false pretenses or attempted false pretenses provided that together they induce or would have induced victim to surrender title to the property. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Defendants' use of agents to pass bad checks in return for merchandise did not constitute grand larceny, but could only constitute the offense of uttering checks with intent to defraud. D.C. Code §§ 22-1410, 22-2201. *Locks v. United States*, 388 A.2d 873, 1978 D.C. App. LEXIS 539 (1978).

"Three-card monte" statute did not apply to commission of classic "short con" game known as "pigeon drop." D.C. Code §§ 22-1506, 22-2201. *Pender v. United States*, 310 A.2d 252, 1973 D.C. App. LEXIS 378 (1973).

Since the "three-card monte" statute deals with gambling, it is not a proper vehicle for prosecuting other forms of fraud or deceit. D.C. Code §§ 22-1301, 22-1506, 22-2201 to 22-2203. *United States v. Brown*, 309 A.2d 256, 1973 D.C. App. LEXIS 345 (1973).

Preemption.

Cardiac patient's fraud claim based on pacemaker manufacturer's alleged failure to provide the Food and Drug Administration (FDA) with information required by the Medical Device Amendments (MDA) was barred by Supreme Court precedent regarding federal preemption. *Webster v. Pacesetter, Inc.*, 259 F.Supp.2d 27, 2003 U.S. Dist. LEXIS 6284 (2003).

Presumptions and burden of proof.

Under District of Columbia law, patient failed to prove that package insert for prescription drug Provera affected her behavior, as she admitted that she did not read the insert, and thus, she could not establish the "action taken in reliance" requirement for proving her claim that she was defrauded by labeling on the medicine's packaging. *Dyson v. Winfield*, 113 F.Supp.2d 35, 2000 U.S. Dist. LEXIS 14357 (2000), affirmed by 21 Fed. Appx. 2, 2001 U.S. App. LEXIS 24091 (D.C. Cir. 2001).

Under District of Columbia law, patient's "fraud-on-the-FDA" claim, in which she pointed to several studies in drug manufacturer's possession that detailed Provera's risk of birth defects, had to fail where patient proffered no evidence that manufacturer withheld the information from Food and Drug Administration. *Dyson v. Winfield*, 113 F.Supp.2d 35, 2000 U.S. Dist. LEXIS 14357 (2000), affirmed by 21 Fed. Appx. 2, 2001 U.S. App. LEXIS 24091 (D.C. Cir. 2001).

Under District of Columbia law, a plaintiff must establish that she relied on a defendant's conduct in order to make out a claim of fraud. *Smith v. Brown & Williamson Tobacco Corp.*, 108 F.Supp.2d 12, 2000 U.S. Dist. LEXIS 11574 (2000).

To convict for crime of false pretenses, government must prove that defendant made a false representation with knowledge of its falsity and an intent to defraud, that defrauded party relied on the misrepresentation, and that defendant obtained title to something of value as result of the misrepresentation. D.C. Code 1981, §§ 22-103, 22-1301. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Questions for jury.

Jury question was presented whether defendant attorney aided and abetted fraud in connection with submission of investigator vouchers, compensating investigators for time spent on preparing defenses for indigent defendants, there were discrepancies in time of submissions, large volume of vouchers, and certifications bearing apparent signature of attorney that work in question was completed. *United States v. Hoover-Hankerson*, 406 F.Supp.2d 76, 2005 U.S. Dist. LEXIS 40668 (2005), affirmed by 511 F.3d 164, 379 U.S. App. D.C. 135, 2007 U.S. App. LEXIS 29521 (2007).

Review.

Court of Appeals would remand fraud case with directions for the trial court to enter a new order reducing restitution amount from \$2,100 to \$700; trial court sought to modify restitution amount but was without jurisdiction on ground that defendant noted his appeal, and Court of Appeals would interpret trial court's order purporting to reduce restitution as an indication that trial court was willing to modify the sentence. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

Where, absent improper convictions for forgery and uttering, sentencing judge might have imposed lesser period of probation, reviewing court vacated convictions of forgery and uttering, affirmed conviction of attempted false pretenses and remanded case for resentencing. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-

1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

Waiver of counsel.

Defendant charged with mail fraud, wire fraud, and securities fraud under federal law, and first degree fraud under District of Columbia law, had been aware of gravity of charges against him, as required for his waiver of counsel to be knowing or intelligent, where, among other things, district court had emphasized seriousness to defendant of felonies with which he had been charged, prosecutor alerted defendant to possibility of sentence in excess of one hundred years' imprisonment, and defendant responded that he understood these things. *United States v. Hall*, 610 F.3d 727, 2010 U.S. App. LEXIS 13596 (C.A.D.C. 2010).

Weight and sufficiency of evidence.

Evidence sustained larceny conviction of defendant who allegedly, by misrepresentation, obtained from union officer money which officer had embezzled from union. D.C. Code 1961, § 22-2201. *Levin v. United States*, 338 F.2d 265, 1964 U.S. App. LEXIS 4853 (C.A.D.C. 1964), writ of certiorari denied by 379 U.S. 999, 85 S. Ct. 719, 13 L. Ed. 2d 701, 1965 U.S. LEXIS 1914 (1965).

Evidence was sufficient to convict defendant as an aider and abettor for first-degree fraud, in regard to his using Water and Sewer Authority (WASA) equipment and employees for his own profit; evidence showed that defendant offered apartment building owner a contract price for water pipe connection work that was well below market price quoted by other private plumbers, and statement of government's principal witness, which he wrote during plea proceeding in federal court, implicated defendant as a co-conspirator in the fraudulent scheme. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

Evidence was sufficient to convict defendants as an aiders and abettors for first-degree fraud, in regard to their using Water and Sewer Authority (WASA) equipment for their own profit while they were WASA employees; statement of government's principal witness, which he wrote during plea proceeding in federal court, indicated that defendants were paid for water pipe connection work that they performed while they should have been working for WASA. *Bell v. United States*, 790 A.2d 523, 2002 D.C. App. LEXIS 9 (2002).

In prosecution for false pretenses and receiving stolen property arising from defendant's attempted use of stolen credit card, there was sufficient proof to permit jury to infer defendant's guilty knowledge that the card was stolen as well as his fraudulent intent to use the card. D.C. Code 1981, §§ 22-103, 22-1301, 22-2205. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Evidence permitted jury to find that defendant by presenting duplicate public assistance check for payment impliedly represented its validity and his ability to assign right to present it for payment and impliedly represented that he was entitled to receive proceeds and that, because he had already entered into a reimbursement agreement and had already cashed original check, such representations were false. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

Former at-will employee's allegations that employer violated federal tax statutes and District of Columbia fraud statute when it overstated the value of corporate assets that served as basis for obtaining bank loans, falsely billed advertisers, and understated company's "make-good" liability to its advertisers, and that employee refused to participate in such conduct were sufficient to state a claim that employee's termination violated a clear public policy mandate. *Crawford v. BET Holdings II*, 130 WLR 1737 (2002).

§ 22-3222. Penalties for fraud.

(a) *Fraud in the first degree.* —

(1) Any person convicted of fraud in the first degree shall be fined not more than \$5,000 or 3 times the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is \$1,000 or more; and

(2) Any person convicted of fraud in the first degree shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the property obtained or lost has some value.

(b) *Fraud in the second degree.* —

(1) Any person convicted of fraud in the second degree shall be fined not more than \$3,000 or 3 times the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or impris-

oned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is \$1,000 or more; and

(2) Any person convicted of fraud in the second degree shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.

(Dec. 1, 1982, D.C. Law 4-164, § 122, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(c), 41 DCR 2608; June 3, 2011, D.C. Law 18-377, § 12(a), 58 DCR 1174.)

Cross references. — Aggregation of theft, fraud, and credit card fraud offenses, see § 22-3202.

Failures in formal requisites of an instrument affecting real property, punishment under this section, see § 42-404.

Probate and administration of decedents' estates, effect of fraud and evasion, see § 20-108.01.

Prior Codifications. — 1981 Ed., § 22-3822.

Effect of amendments. — D.C. Law 18-377, in subsec. (a)(1), substituted "\$1,000" for "\$250"; in subsec. (a)(2), substituted "if the property obtained or lost has some value" for "if the value of the property which was the object of the scheme or systematic course of conduct was less than \$250"; in subsec. (b)(1), substituted "is \$1,000" for "was \$250"; and, in subsec. (b)(2), substituted "if the property that was the object of the scheme or systematic course of conduct has some value" for "if the value of the property which was the object of the scheme or systematic course of conduct was less than \$250".

Emergency legislation. — For temporary amendment of section, see § 113(c) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 512(a) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 512(a) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-3212.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

CASE NOTES

Sentencing.

District court that had explained that defendant would be sentenced "for what he did which was to cheat, lie, and steal to enrich himself and which caused great injury to others," and that no one was to blame for injury to investors "other than [defendant]," still had to explain choice of particular term of imprisonment for mail fraud, wire fraud, and securities fraud under federal law, and first degree fraud under District of Columbia law, in view of statutory sentencing factors, since United States Sentencing Guidelines (USSG) range was greater

than 24 months. *United States v. Hall*, 610 F.3d 727, 2010 U.S. App. LEXIS 13596 (C.A.D.C. 2010).

Sentencing court had to explain how it arrived at its estimate of amount of loss from defendant's mail fraud, wire fraud, and securities fraud under federal law, and first degree fraud under District of Columbia law, even though it only had to "make a reasonable estimate" of loss. *United States v. Hall*, 610 F.3d 727, 2010 U.S. App. LEXIS 13596 (C.A.D.C. 2010).

§ 22-3223. Credit card fraud.

(a) For the purposes of this section, the term "credit card" means an instrument or device, whether known as a credit card, debit card, or by any

other name, issued for use of the cardholder in obtaining or paying for property or services.

(b) A person commits the offense of credit card fraud if, with intent to defraud, that person obtains or pays for property or services by:

(1) Knowingly using a credit card, or the number or description thereof, which has been issued to another person without the consent of the person to whom it was issued;

(2) Knowingly using a credit card, or the number or description thereof, which has been revoked or cancelled;

(3) Knowingly using a falsified, mutilated, or altered credit card or number or description thereof;

(4) Representing that he or she is the holder of a credit card and the credit card had not in fact been issued; or

(5) Knowingly using for the employee's or contractor's own purposes a credit card, or the number on or description of the credit card, issued to or provided to an employee or contractor by or at the request of an employer for the employer's purposes.

(c) A credit card is deemed cancelled or revoked when notice in writing thereof has been received by the named holder as shown on the credit card or by the records of the issuer.

(d)(1) Except as provided in paragraph (2) of this subsection, any person convicted of credit card fraud shall be fined not more than \$1,000, imprisoned for not more than 180 days, or both.

(2) Any person convicted of credit card fraud shall be fined not more than \$5,000, imprisoned for not more than 10 years, or both, if the value of the property or services obtained or paid for is \$1,000 or more.

(Dec. 1, 1982, D.C. Law 4-164, § 123, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(d), 41 DCR 2608; Dec. 10, 2009, D.C. Law 18-88, § 214(f), 56 DCR 7413.)

Cross references. — Aggregation of theft, fraud, and credit card fraud offenses, see § 22-3202.

Prior Codifications. — 1981 Ed., § 22-3823.

Effect of amendments. — D.C. Law 18-88 rewrote subsecs. (a), (b), and (d).

Emergency legislation. — For temporary amendment of section, see § 113(d) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 102(e) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) amendment of section, see § 214(f) of Omnibus Public Safety and

Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(f) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-3212.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

CASE NOTES

ANALYSIS

Sentence and punishment.
Weight and sufficiency of evidence.

Sentence and punishment.

Defendant's nationality and his status as an illegal alien were not impermissibly considered as a basis for enhancing defendant's sentence on his guilty pleas to credit card fraud, receiving stolen property, and one count of failure to appear in court; court imposed a heavy sentence not because of defendant's ethnicity or alien status, but because of his unlawful conduct, particularly his conduct in the five and one-half years since he entered his guilty pleas, his flight from justice, and his refusal to accept responsibility for his actions. *Yemson v. United States*, 764 A.2d 816, 2001 D.C. App. LEXIS 3 (2001).

Issue as to whether sentencing court impermissibly considered defendant's national origin and his status as an illegal alien when imposing an enhanced sentence on his guilty pleas to credit card fraud, receiving stolen property, and one count of failure to appear in court would be reviewed for plain error, where defendant made assertion for first time on appeal and said nothing about such issue before the trial court. *Yemson v. United States*, 764 A.2d 816, 2001 D.C. App. LEXIS 3 (2001).

Sentencing court did not exceed its authority by telling prosecutor to take all necessary steps to effect defendant's deportation after he had served his sentence on his guilty pleas to credit card fraud, receiving stolen property, and one count of failure to appear in court; the court simply reminded prosecutor of an obligation that he already knew about, it was not an "order" from the court to assure his deportation, it was not part of his sentence, and it appeared that the Immigration and Naturalization Service (INS) had already lodged a detainer against defendant before he was sentenced. *Yemson v. United States*, 764 A.2d 816, 2001 D.C. App. LEXIS 3 (2001).

Weight and sufficiency of evidence.

Evidence was sufficient to convict defendants of credit card fraud, where there was evidence that gold bracelet and two gold chains were taken from defendants at time of their arrest, that gold bracelet and gold chains came from shop owner's shop, that shop owner identified defendants at show-up identification as men who purchased jewelry and toiletries, that credit card owner had never given defendants permission to use his credit cards, and that purchases had value in excess of \$250. D.C. Code 1981, § 22-3823(b)(1). *Zanders v. United States*, 678 A.2d 556, 1996 D.C. App. LEXIS 122 (1996).

§ 22-3224. **Fraudulent registration.**

(a) A person commits the offense of fraudulent registration if, with intent to defraud the proprietor or manager of a hotel, motel, or other establishment which provides lodging to transient guests, that person falsely registers under a name or address other than his or her actual name or address.

(b) Any person convicted of fraudulent registration shall be fined not more than \$300 or imprisoned for not more than 90 days, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 124, 29 DCR 3976.).

Cross references. — Rights and liabilities of hotel and lodging housekeepers, see §§ 30-101 to 30-103.

Prior Codifications. — 1981 Ed., § 22-3824.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

§ 22-3224.01. **Jurisdiction.**

An offense under this subchapter shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

(1) The person to whom a credit card was issued or in whose name the credit card was issued is a resident of, or located in, the District of Columbia;

- (2) The person who was defrauded is a resident of, or located in, the District of Columbia at the time of the fraud;
- (3) The loss occurred in the District of Columbia; or
- (4) Any part of the offense takes place in the District of Columbia.

(Dec. 1, 1982, D.C. Law 4-164, § 124a, as added Dec. 10, 2009, D.C. Law 18-88, § 214(g), 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 102(f) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) addition, see § 214(g) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 214(g) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Subchapter III-A. Insurance Fraud.

§ 22-3225.01. Definitions.

For the purposes of this subchapter, the term:

(1) “Business of insurance” means the writing of insurance or reinsuring the risks by an insurer, including acts necessary or incidental to writing insurance or reinsuring risks and the activities of persons who act as or are officers, directors, agents, or employees of insurers, or who are other persons authorized to act on their behalf.

(2) “Commissioner” means the Commissioner of the Department of Insurance, Securities, and Banking, the Commissioner’s designee, or the Department of Insurance, Securities, and Banking.

(3) “District” means the District of Columbia.

(4) “Insurance” means a contract or arrangement in which one undertakes to:

(A) Pay or indemnify another as to loss from certain contingencies called “risks,” including through reinsurance;

(B) Pay or grant a specified amount or determinable benefit to another in connection with ascertainable risk contingencies;

(C) Pay an annuity to another; or

(D) Act as a surety.

(5) “Insurance professional” means insurance sales agents or managing general agents, insurance brokers, insurance producers, insurance adjusters, and insurance third party administrators.

(6) “Insurer” includes any company defined by § 31-4202 and § 31-2501.03, authorized to do the business of insurance in the District, a hospital and medical services corporation, a fraternal benefit society, or a health maintenance organization. The term “insurer” shall not apply to a Medicaid health maintenance organization.

(7) “Malice” means an intentional or deliberate infliction of injury, by furnishing or disclosing information with knowledge that the information is false, or furnishing or disclosing information with reckless disregard for a

strong likelihood that the information is false and that injury will occur as a result.

(8) "Person" means a natural person, company, corporation, joint stock company, unincorporated association, partnership, professional corporation, trust, or any other entity or combination of the foregoing.

(9) "Practitioner" means a person, licensed to practice a profession or trade in the District, whose services are compensated either in whole or in part, directly or indirectly, by insurance proceeds.

(10) "Premium" means the money paid or payable as the consideration for coverage under an insurance policy.

(Dec. 1, 1982, D.C. Law 4-164, § 125a, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132; Mar. 27, 2003, D.C. Law 14-254, § 2(a), 50 DCR 233; June 18, 2003, D.C. Law 14-312, § 201, 50 DCR 306; June 11, 2004, D.C. Law 15-166, § 4(b)(1), 51 DCR 2817.)

Prior Codifications. — 1981 Ed., § 22-3825.1.

Effect of amendments. — D.C. Law 14-254, in par. (6), inserted the second sentence.

D.C. Law 14-312 rewrote par. (6) which had read as follows: "(6) 'Insurer' means any person who engages in the business of insurance for a fee or indemnifies another against loss, damage, or liability arising from a contingent or unknown event. The term 'insurer' shall include health maintenance organizations."

D.C. Law 15-166 rewrote par. (2) which had read as follows: "(2) 'Commissioner' means the Commissioner of Insurance and Securities Regulation, the Commissioner's designee, or the Department of Insurance and Securities Regulation."

Emergency legislation. — For temporary (90 day) amendment of section, see § 4(b)(1) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 12-273. — Law 12-273, the "Insurance Fraud Prevention and Detection Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-235, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor on December 29, 1998, it was assigned Act No. 12-595 and transmitted to both Houses of Congress for its review. D.C. Law 12-273 became effective on April 27, 1999.

Legislative history of Law 14-254. — Law 14-254, the "Insurance Fraud Prevention and

Detection Amendment Act of 2002", was introduced in Council and assigned Bill No. 14-236, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 2002, and December 3, 2002, respectively. Signed by the Mayor on December 23, 2002, it was assigned Act No. 14-551 and transmitted to both Houses of Congress for its review. D.C. Law 14-254 became effective on March 27, 2003.

Legislative history of Law 14-312. — Law 14-312, the "Health Organizations RBC Amendment Act of 2002", was introduced in Council and assigned Bill No. 14-159, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on November 7, 2002, and December 3, 2002, respectively. Signed by the Mayor on December 23, 2002, it was assigned Act No. 14-571 and transmitted to both Houses of Congress for its review. D.C. Law 14-312 became effective on June 18, 2003.

Legislative history of Law 15-166. — Law 15-166, the "Consolidation of Financial Services Amendment Act of 2004", was introduced in Council and assigned Bill No. 15-518, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on January 6, 2004, and February 3, 2004, respectively. Signed by the Mayor on February 27, 2004, it was assigned Act No. 15-385 and transmitted to both Houses of Congress for its review. D.C. Law 15-166 became effective on June 11, 2004.

§ 22-3225.02. Insurance fraud in the first degree.

A person commits the offense of insurance fraud in the first degree if that person knowingly engages in the following conduct with the intent to defraud or to fraudulently obtain property of another and thereby obtains property of

another or causes another to lose property and the value of the property obtained or lost is \$1,000 or more:

(1) Presenting false information or knowingly conceals information regarding a material fact in any of the following transactions:

(A) Application for, rating of, or renewal of an insurance policy or reinsurance contract;

(B) Claim for payment or benefit pursuant to an insurance policy or reinsurance contract;

(C) Premiums paid on an insurance policy or reinsurance contract;

(D) Payment made in accordance with the terms of an insurance policy or reinsurance contract;

(E) Application used in a premium finance transaction;

(F) Solicitation for sale of an insurance policy;

(G) Application for a license or certificate of authority filed with the Commissioner or the chief insurance regulatory official of another jurisdiction;

(H) Financial statement or condition of any insurer or reinsurer;

(I) Acquisition, formation, merger, affiliation, reconsolidation, dissolution, or withdrawal from one or more lines of insurance or reinsurance in the District by an insurer or reinsurer;

(J) Issuance of written evidence of insurance; or

(K) Application for reinstatement of an insurance policy;

(2) Soliciting or accepting insurance or renewal of insurance by or for an insurer which the person knows is insolvent or has a strong likelihood of insolvency;

(3) Removal or tampering with the records of transaction, documentation, and other material assets of an insurer from the insurer or from the Department of Insurance and Securities Regulation;

(4) Diversion, misappropriation, conversion, or embezzlement of funds of an insurer, an insured, claimant or applicant regarding any of the following:

(A) Insurance transaction;

(B) Other insurance business activities by an insurer or insurance professional; or

(C) Acquisition, formation, merger, affiliation or dissolution of an insurer.

(5) Transaction of the business of insurance in violation of laws requiring a license, certificate of authority, or other legal authority for the transaction of the business of insurance; or

(6) Employing or using any other person or acting as the agent of any other person to procure a client, patient, or customer for the purpose of falsely or fraudulently obtaining benefits under a contract of insurance or asserting a false or fraudulent claim against an insured or insurer.

(Dec. 1, 1982, D.C. Law 4-164, § 125b, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132; July 25, 2006, D.C. Law 16-144, § 2(a), 53 DCR 2838; June 3, 2011, D.C. Law 18-377, § 12(b), 58 DCR 1174.)

Prior Codifications. — 1981 Ed., § 22-3825.2.

Effect of amendments. — D.C. Law 16-144 rewrote the lead-in language and par. (6),

which had read as follows: “A person commits the offense of insurance fraud in the first degree if, knowingly and with intent to defraud, that person makes an act or omission concerning any of the following:” “(6) Attempt to commit, aiding and abetting in the commission of, or conspiracy to commit the acts or omissions specified in this section.”

D.C. Law 18-377 substituted “\$1,000” for “\$250”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 512(b) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 512(b) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 12-273. — For legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

Legislative history of Law 16-144. — Law 16-144, the “White Collar Insurance Fraud Amendment Act of 2006”, was introduced in Council and assigned Bill No. 16-208 which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 7, 2006, and March 7, 2006, respectively. Signed by the Mayor on March 30, 2006, it was assigned Act No. 16-340 and transmitted to both Houses of Congress for its review. D.C. Law 16-144 became effective on July 25, 2006.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

§ 22-3225.03. Insurance fraud in the second degree.

A person commits the offense of insurance fraud in the second degree if that person knowingly engages in conduct specified in § 22-3225.02 with the intent to defraud or to fraudulently obtain property of another and the value of the property which is sought to be obtained is \$1,000 or more.

(Dec. 1, 1982, D.C. Law 4-164, § 125c, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132; July 25, 2006, D.C. Law 16-144, § 2(b), 53 DCR 2838; June 3, 2011, D.C. Law 18-377, § 12(c), 58 DCR 1174.)

Prior Codifications. — 1981 Ed., § 22-3825.3.

Effect of amendments. — D.C. Law 16-144 rewrote the section.

D.C. Law 18-377 substituted “\$1,000” for “\$250”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 512(c) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 512(c) of Public Safety Legislation

Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 12-273. — For legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

Legislative history of Law 16-144. — For Law 16-144, see notes following § 22-3225.02.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

§ 22-3225.03a. Misdemeanor insurance fraud.

A person commits the offense of misdemeanor insurance fraud if that person knowingly engages in conduct specified in § 22-3225.02 with the intent to defraud or to fraudulently obtain property of another.

(Dec. 1, 1982, D.C. Law 4-164, § 125c-1, as added July 25, 2006, D.C. Law 16-144, § 2(c), 53 DCR 2838.)

Legislative history of Law 16-144. — For Law 16-144, see notes following § 22-3225.02.

§ 22-3225.04. Penalties.

(a) Any person convicted of insurance fraud in the first degree shall be fined not more than \$50,000 or imprisoned for not more than 15 years, or both.

(b)(1) Except as provided in paragraph (2) of this subsection, any person convicted of insurance fraud in the second degree shall be fined not more than \$10,000 or imprisoned for not more than 5 years, or both.

(2) Any person convicted of insurance fraud in the second degree who has been convicted previously of insurance fraud pursuant to § 22-3225.02 or § 22-3225.03, or a felony conviction based on similar grounds in any other jurisdiction, shall be fined not more than \$20,000 or imprisoned for not more than 10 years, or both.

(c) Any person convicted of misdemeanor insurance fraud shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

(d) A person convicted of a felony violation of this subchapter shall be disqualified from engaging in the business of insurance, subject to 18 U.S.C. § 1033(e)(2).

(Dec. 1, 1982, D.C. Law 4-164, § 125d, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132; June 19, 2001, D.C. Law 13-313, § 12(a), 48 DCR 1873; July 25, 2006, D.C. Law 16-144, § 2(d), 53 DCR 2838.)

Prior Codifications. — 1981 Ed., § 22-3825.4.

Effect of amendments. — D.C. Law 13-313, in subsec. (b)(2), validated a previously made technical correction.

D.C. Law 16-144 rewrote the section.

Legislative history of Law 12-273. — For

legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

Legislative history of Law 13-313. — For Law 13-313, see notes following § 22-2803.

Legislative history of Law 16-144. — For Law 16-144, see notes following § 22-3225.02.

§ 22-3225.05. Restitution.

(a) In addition to the penalties provided under § 22-3225.04, a person convicted under this subchapter shall make monetary restitution for any loss caused by the offense. The court shall determine the form and method of payment which, if by installment, shall not exceed 5 years.

(b) Any person, including the District, injured as the result of an insurance fraud in the first degree may bring suit in the appropriate court to recover ordinary damages including attorney's fees and other costs and punitive damages which shall not be less than \$500 nor more than \$50,000. Except where punitive damages are sought, the court shall award treble damages where the offense is proven by clear and convincing evidence to be in accordance with an established pattern or practice.

(c) Notwithstanding any action that may be brought by the United States Attorney's office to recoup its costs in prosecuting these cases, the Corporation Counsel may bring a civil suit against any person convicted under this subchapter in order to recover investigation and prosecution-related costs incurred by the District.

(d) A suit under subsection (b) of this section must be filed within 3 years of the act constituting the offense or within 3 years of the time the plaintiff

discovered or with reasonable diligence could have discovered the act, whichever is later. This 3 year statute of limitations shall not apply to the District.

(e) Remedies provided in this section shall be exclusive and may not be claimed in conjunction with any other remedies available under the law.

(Dec. 1, 1982, D.C. Law 4-164, § 125e, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132; June 19, 2001, D.C. Law 13-313, § 12(b), 48 DCR 1873.)

Prior Codifications. — 1981 Ed., § 22-3825.5.

Effect of amendments. — D.C. Law 13-313, in subsec. (a), validated a previously made technical correction.

Legislative history of Law 12-273. — For

legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

Legislative history of Law 13-313. — For Law 13-313, see notes following § 22-2803.

§ 22-3225.06. Indemnity.

An insurer shall not be liable for the following:

(1) Damages or restitution provided by this subchapter, either jointly, severably, or as a third party, for insurance fraud offense committed by an insured; or

(2) The defense of an insured or other person who is charged with insurance fraud.

(Dec. 1, 1982, D.C. Law 4-164, § 125f, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132.)

Prior Codifications. — 1981 Ed., § 22-3825.6.

Legislative history of Law 12-273. — For

legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

§ 22-3225.07. Practitioners.

(a) Notwithstanding any other provisions of law, the offenses of insurance fraud in the first degree or the second degree shall be deemed a crime of moral turpitude for the purposes of professional or trade license.

(b) The Commissioner, court, or prosecutor shall notify the appropriate licensing authority, and the person who is injured by the offense may notify the appropriate licensing authority of any conviction.

(Dec. 1, 1982, D.C. Law 4-164, § 125g, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132; Mar. 27, 2003, D.C. Law 14-254, § 2(b), 50 DCR 233; July 25, 2006, D.C. Law 16-144, § 2(e), 53 DCR 2838.)

Prior Codifications. — 1981 Ed., § 22-3825.7.

Effect of amendments. — D.C. Law 14-254, in subsec. (b), struck “The court or prosecutor” and inserted “The Commissioner, court, or prosecutor”, and deleted the second sentence which had read: “The Commissioner shall hold a disciplinary hearing to determine whether

the license or certificate of authority of the convicted practitioner should be suspended or revoked.”

D.C. Law 16-144, in subsec. (a), substituted “offenses of insurance fraud in the first degree or the second degree” for “offense of insurance fraud in the first degree”.

Legislative history of Law 12-273. — For

legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

Legislative history of Law 14-254. — For Law 14-254, see notes following § 22-3225.01.

Legislative history of Law 16-144. — For Law 16-144, see notes following § 22-3225.02.

§ 22-3225.08. Investigation and report of insurance fraud.

(a) Based upon a reasonable belief, an insurer, insurance professional, and any other pertinent person, shall report to the Metropolitan Police Department or the Department of Insurance, Securities, and Banking, actions that may constitute the commission of insurance fraud, and assist in the investigation of insurance fraud by reasonably providing information when required by an investigating authority.

(b) The Commissioner may investigate suspected fraudulent insurance acts and persons engaged in the business of insurance. Nothing in this subchapter shall preempt the authority or relieve the duty of other law enforcement or regulatory agencies to investigate, examine, and prosecute suspected violations of law.

(c) An insurer, insurance professional, or any other pertinent person who fails to reasonably assist the investigation of an insurance fraud or fails to report an insurance fraud, and who is injured by that insurance fraud, shall be estopped from receiving restitution as provided in § 22-3225.05.

(d) Any information, documentation, or other evidence provided under this section by an insurer, its employees, producers, or agents, or by any other person, to the Department of Insurance, Securities, and Banking, the Metropolitan Police Department, or any other law enforcement agency in connection with any investigation of suspected fraud is not subject to public inspection as long as the Commissioner or law enforcement agency deems the withholding to be necessary to complete an investigation of the suspected fraud or to protect the person or entity investigated from unwarranted injury.

(e) Repealed.

(Dec. 1, 1982, D.C. Law 4-164, § 125h, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132; Mar. 27, 2003, D.C. Law 14-254, § 2(c), 50 DCR 233; June 11, 2004, D.C. Law 15-166, § 4(b)(2), 51 DCR 2817; Mar. 2, 2007, D.C. Law 16-191, § 44(a), 53 DCR 6794.)

Prior Codifications. — 1981 Ed., § 22-3825.8.

Effect of amendments. — D.C. Law 14-254 repealed subsec. (e) which had read:

“(e) No person shall be subject to civil liability for any cause of action, or subject to criminal prosecution, for reporting any suspected insurance fraud if:

“(1) The report was made to the Department of Insurance and Securities Regulation, the Metropolitan Police Department, or any other law enforcement authority, or to any insurer, insurance agent, or other person who collects, reviews, or analyzes information concerning

insurance fraud, by any individual or entity suspecting insurance fraud; and

“(2) The person or entity reporting the suspected fraud acted without malice when making the report.”

D.C. Law 15-166, in subsecs. (a) and (d), substituted “Department of Insurance, Securities, and Banking” for “Department of Insurance and Securities Regulation”.

D.C. Law 16-191 validated a previously made technical correction in the directory language of D.C. Law 15-166 which required no change in text.

Emergency legislation. — For temporary

(90 day) amendment of section, see § 4(b)(2) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 12-273. — For legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

Legislative history of Law 14-254. — For Law 14-254, see notes following § 22-3225.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 22-3225.01.

Legislative history of Law 16-191. — Law 16-191, the “Technical Amendments Act of 2006”, was introduced in Council and assigned Bill No. 16-760, which was referred to the Committee of the whole. The Bill was adopted on first and second readings on June 20, 2006, and July 11, 2006, respectively. Signed by the Mayor on July 31, 2006, it was assigned Act No. 16-475 and transmitted to both Houses of Congress for its review. D.C. Law 16-191 became effective on March 2, 2007.

§ 22-3225.09. Insurance fraud prevention and detection.

(a) Within 6 months of April 27, 1999, every insurer licensed in the District shall submit to the Department of Insurance and Securities Regulation, an insurance fraud prevention and detection plan (“plan”). The plan shall indicate specific procedures for the accomplishment of the following:

- (1) Prevention, detection, and investigation of insurance fraud;
- (2) Orientation of employees on insurance fraud prevention and detection;
- (3) Employment of fraud investigators;
- (4) Reporting of insurance fraud to the appropriate authorities; and
- (5) Collection of restitution for financial loss caused by insurance fraud.

(b) The Commissioner may review the plan for compliance with this section and may order reasonable modification or request a summary of the plan. The Commissioner may establish by regulation a fine for an insurer failing to comply with the plan. The plan shall not be deemed a public record for the purposes of any public records or subchapter II of Chapter 5 of Title 2.

(c) Notwithstanding any other provisions of law, an insurer who fails to submit an insurance prevention and detection plan, or the warning provision required by subsection (d) of this section shall be subject to a fine of \$500 per day, not to exceed \$25,000.

(d) No later than 6 months after April 27, 1999, all insurance application forms and all claim forms shall contain a conspicuous warning in language the same or substantially similar to the following:

“WARNING: It is a crime to provide false or misleading information to an insurer for the purpose of defrauding the insurer or any other person. Penalties include imprisonment and/or fines. In addition, an insurer may deny insurance benefits if false information materially related to a claim was provided by the applicant.”.

(e) None of the requirements of this section shall be deemed to apply to reinsurers, reinsurance contracts, reinsurance agreements, or reinsurance claims transactions.

(Dec. 1, 1982, D.C. Law 4-164, § 125i, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132.)

Prior Codifications. — 1981 Ed., § 22-3825.9.

Legislative history of Law 12-273. — For

legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

§ 22-3225.10. Regulations.

The Commissioner may promulgate regulations deemed necessary by the Commissioner for the administration of this subchapter.

(Dec. 1, 1982, D.C. Law 4-164, § 125j, as added Apr. 27, 1999, D.C. Law 12-273, § 2, 46 DCR 1132.)

Prior Codifications. — 1981 Ed., § 22-3825.10.

legislative history of D.C. Law 12-273, see Historical and Statutory Notes following § 22-3225.01.

Legislative history of Law 12-273. — For

§ 22-3225.11. Limited law enforcement authority.

(a) The Commissioner shall have the power to issue and serve subpoenas, to compel witnesses to appear and testify, and to produce all books, records, papers, or documents in any insurance investigation or examination.

(b) Any willful false testimony by a witness before the Commissioner as to any material fact shall constitute perjury and shall be punished in the manner prescribed by law for such offense.

(c) If any witness having been personally summoned shall neglect or refuse to obey the subpoena issued pursuant to subsection (a) of this section, the Commissioner may, through the Corporation Counsel, report that fact to the Superior Court of the District of Columbia or one of the judges thereof and the Court, or any judge thereof, may compel obedience to the subpoena to the same extent as witnesses may be compelled to obey the subpoenas of the Court.

(d) The Commissioner may administer oaths to witnesses summoned in any investigation or examination as set forth in subsection (a) of this section.

(Dec. 1, 1982, D.C. Law 4-164, § 125k, as added Mar. 27, 2003, D.C. Law 14-254, § 2(d), 50 DCR 233.)

Legislative history of Law 14-254. — For Law 14-254, see notes following § 22-3225.01.

§ 22-3225.12. Annual anti-fraud activity reporting requirement.

Each insurer and health maintenance organization licensed in the District shall file an annual anti-fraud activity report on March 31st of each year with the Commissioner, which shall contain information about the special investigation unit's insurance fraud activities during the preceding calendar year. Annual anti-fraud activity reports filed with the Commissioner shall be kept confidential and shall not be subject to the disclosure requirements of subchapter II of Chapter 5 of Title 2.

(Dec. 1, 1982, D.C. Law 4-164, § 125ll, as added Mar. 27, 2003, D.C. Law 14-254, § 2(d), 50 DCR 233.)

Legislative history of Law 14-254. — For Law 14-254, see notes following § 22-3225.01.

§ 22-3225.13. Immunity.

No person shall be subject to civil liability or criminal prosecution for reporting any suspected insurance fraud if:

(1) The report was made to:

(A) The Department of Insurance, Securities, and Banking, the Metropolitan Police Department, or any other law enforcement authority; or

(B) Any insurer, insurance agent, or other person who collects, reviews, or analyzes information concerning insurance fraud; and

(2) The person or entity reporting the suspected fraud acted without malice when making the report.

(Dec. 1, 1982, D.C. Law 4-164, § 125m, as added Mar. 27, 2003, D.C. Law 14-254, § 2(d), 50 DCR 233; June 11, 2004, D.C. Law 15-166, § 4(b)(3), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166, in par. (1)(A), substituted “Department of Insurance, Securities, and Banking” for “Department of Insurance and Securities Regulation”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 4(b)(3) of

Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 14-254. — For Law 14-254, see notes following § 22-3225.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 22-3225.01.

§ 22-3225.14. Prohibition of solicitation.

(a)(1) Except as provided in paragraph (2) of this subsection, it is unlawful for a practitioner, whether directly or through a paid intermediary, to solicit for financial gain a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident.

(2) The prohibition in paragraph (1) of this subsection does not prohibit:

(A) A practitioner from soliciting a client, patient, or customer by regular mail through the U.S. Postal Service or through the use of general advertising directed to the public;

(B) A practitioner or his agents from contacting a potential client, patient, or customer, or a family member, friend, or coworker of the potential client, patient, or customer, where the practitioner has a preexisting business or personal relationship with the potential client, patient, or customer;

(C) A practitioner or his agents from contacting a potential client, patient, or customer where the contact was initiated by the potential client, patient, or customer, or by a family member, friend, or coworker of the potential client, patient or customer; or

(D) Providing advice and assistance to incarcerated persons in pursuing administrative remedies that may be a prerequisite to suit or in seeking appropriate medical care and treatment.

(b) Except as provided in subsection (a)(2) of this section, it is unlawful for a person to solicit for financial gain a client, patient, or customer within 21 days of a motor vehicle accident for the purpose of directing the client, patient, or customer to a practitioner.

(c) A person or practitioner found by clear and convincing evidence to have violated the provisions of this section shall be subject to a civil penalty of \$1,000. The Mayor may increase this penalty by rulemaking.

(d)(1) If a person involved in an automobile accident, or his parent or guardian, executes, within 21 days of a motor vehicle accident, a release of liability, without the assistance or guidance of legal counsel, pursuant to the settlement of a claim for personal injury, that person or his parent or guardian may void the release; provided, that the insurance carrier or other settling party receives written notice of the intent to void the release within 14 days of the date that the release was executed, and the written notice is accompanied by any check or settlement proceeds related to the claim for personal injury that had been delivered to the claimant.

(2) A release of liability executed within 21 days of the accident giving rise to the claim of personal injury by a person who is not represented by counsel shall contain a notice of the claimant's right to rescind conspicuously and separately stated on the release.

(e) The provisions of this section are not severable.

(Dec. 1, 1982, D.C. Law 4-164, § 125n, as added July 25, 2006, D.C. Law 16-144, § 2(f), 53 DCR 2838.)

Legislative history of Law 16-144. — For Law 16-144, see notes following § 22-3225.02.

CASE NOTES

Validity.

White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006, restricting licensed practitioners' solicitation of business within 21 days of a person's motor vehicle accident, did not violate separation of powers by virtue of its restricting, *inter alia*, certain practices by members of the District of Columbia Bar; Act did not affect the organization or jurisdiction of the courts or unduly interfere with Court of Appeals's authority over Bar admission or attorney discipline. *Bergman v. District of Columbia*, 986 A.2d 1208, 2010 D.C. App. LEXIS 3 (2010), writ of certiorari denied by 131 S. Ct. 179, 178 L. Ed. 2d 41, 2010 U.S. LEXIS 5915, 79 U.S.L.W. 3196 (U.S. 2010).

White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006, restricting licensed practitioners' solicitation of business within 21 days of a person's motor vehicle accident, did not improperly discriminate on the basis of the speaker's viewpoint, in violation of the First Amendment; although Act did not subject insurance agents, adjusters, and attorneys for prospective defendants to the same restrictions as it imposed on practitioners, statute provided reasonable and constitutionally adequate protection to consumers from overreaching by insurers and their agents, and Act was demonstrably aimed at regulating the

intrusive conduct of practitioners and not their message or viewpoint. *Bergman v. District of Columbia*, 986 A.2d 1208, 2010 D.C. App. LEXIS 3 (2010), writ of certiorari denied by 131 S. Ct. 179, 178 L. Ed. 2d 41, 2010 U.S. LEXIS 5915, 79 U.S.L.W. 3196 (U.S. 2010).

White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006, restricting licensed practitioners' solicitation of business within 21 days of a person's motor vehicle accident, was content neutral for purposes of evaluation under the First Amendment protection of free speech; purpose of the Act was to prevent intrusive solicitation and harassment, not to chill the exercise by accident victims of their right to seek legal redress, and Act was not aimed at the content of practitioners' speech, but at the offensive behavior often accompanying its delivery. *Bergman v. District of Columbia*, 986 A.2d 1208, 2010 D.C. App. LEXIS 3 (2010), writ of certiorari denied by 131 S. Ct. 179, 178 L. Ed. 2d 41, 2010 U.S. LEXIS 5915, 79 U.S.L.W. 3196 (U.S. 2010).

White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006, restricting licensed practitioners' solicitation of business within 21 days of a person's motor vehicle accident, did not, under the applicable intermediate scrutiny standard, constitute an impermissible restriction on commercial speech un-

der the First Amendment; Act addressed a substantial governmental interest in protecting consumers from unsolicited and often distressing intrusions upon their privacy in the immediate aftermath of an automobile accident, Act substantially advanced such interest, and Act imposed only a brief time restriction and dealt

only with the specific harm sought to be addressed. *Bergman v. District of Columbia*, 986 A.2d 1208, 2010 D.C. App. LEXIS 3 (2010), writ of certiorari denied by 131 S. Ct. 179, 178 L. Ed. 2d 41, 2010 U.S. LEXIS 5915, 79 U.S.L.W. 3196 (U.S. 2010).

§ 22-3225.15. Jurisdiction.

An offense under this subchapter shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

(1) The insured, insurer, claimant, or applicant is a resident of, or located in, the District of Columbia;

(2) A District of Columbia address is used on an application, policy, or claim for payment or benefit;

(3) The services for which a claim is made were provided or alleged to have been provided in the District of Columbia;

(4) Payment of a claim or benefit was made or was to be made to an address in the District of Columbia;

(5) The loss occurred or is alleged to have occurred in the District of Columbia; or

(6) Any part of the offense takes place in the District of Columbia.

(Dec. 1, 1982, D.C. Law 4-164, § 125o, as added Dec. 10, 2009, D.C. Law 18-88, § 214(h), 56 DCR 7413.)

Emergency legislation. — For temporary (90 day) addition, see § 102(g) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) addition, see § 214(h) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) addition, see § 214(h) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Subchapter III-B. Telephone Fraud.

§ 22-3226.01. Definitions.

For the purposes of this subchapter, the term:

(1) “Applicant” means any individual, sole proprietorship, partnership, association, cooperative, corporation, nonprofit organization, and any other organization required to register with the District to conduct telemarketing in the District of Columbia.

(2) “Certificate of registration” means a document issued by the District government showing that a named individual or business has registered as a telephone solicitor with the Mayor of the District of Columbia.

(3) “Consumer” means a person who is or may be required to pay for goods or services offered by a telephone solicitor through telemarketing.

(4) “Goods” or “services” means any real property or any tangible or

intangible personal property or services of any kind provided or offered to a consumer.

(5) “Licensed securities, commodities or investment broker” means a licensed or registered securities, commodities or investment broker.

(6) “Seller” means any person, who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(7) “Telemarketing” means a plan, program or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones. Telemarketing does not include a one-time or infrequent transaction unrelated to a pattern of repeated transactions. Telemarketing does not include a telephone call to a consumer:

(A) As a one-time or infrequent transaction unrelated to a pattern of repeated transactions;

(B) To provide information to a consumer and in which payment for the sale of good or services is not accepted in that telephone call;

(C) To administer an existing account or service an existing customer (including product safety recalls);

(D) To respond to a consumer’s request; or

(E) In which payment for the sale of good or services is not accepted in that telephone call.

(8) “Telephone solicitor” means a person (acting himself or itself, or through an agent) who initiates a telephone call to a consumer in the District of Columbia as a part of a plan, program, or campaign which is conducted to induce the purchase of goods or services by the use of one or more telephones. A telephone solicitor does not include a person who initiates a telephone call to a consumer:

(A) As a one-time or infrequent transaction unrelated to a pattern of repeated transactions;

(B) To provide information to a consumer and in which payment for the sale of good or services is not accepted in that telephone call;

(C) To administer an existing account or service an existing customer (including product safety recalls);

(D) To respond to a consumer’s request; or

(E) Does not accept payment for the sale of good or services in that telephone call.

(Dec. 1, 1982, D.C. Law 4-164, § 126a, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039; Oct. 26, 2001, D.C. Law 14-42, § 18, 48 DCR 7612.)

Effect of amendments. — D.C. Law 14-42, in par. (8)(E), made a nonsubstantive change.

Emergency legislation. — For temporary (90 day) amendment of section, see § 18 of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

Legislative history of Law 13-301. — Law 13-301, the “Senior Protection Amendment Act

of 2000”, was introduced in Council and assigned Bill No. 13-297, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 26, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 2, 2000, it was assigned Act No. 13-396 and transmitted to both Houses of Congress for its review. D.C. Law 13-301 became effective on June 8, 2001.

Legislative history of Law 14-42. — Law 14-42, the “Technical Correction Amendment Act of 2001”, was introduced in Council and assigned Bill No. 14-216, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 5,

2001, and June 26, 2001, respectively. Signed by the Mayor on July 24, 2001, it was assigned Act No. 14-107 and transmitted to both Houses of Congress for its review. D.C. Law 14-42 became effective on October 26, 2001.

§ 22-3226.02. Application for a certificate of registration of telephone solicitor.

(a) No person shall transact any business as a telephone solicitor without first having obtained a certificate of registration from the Mayor.

(b) The application for certificate of registration shall be made at least 60 business days prior to offering for sale consumer goods or services by telephone.

(c) The Mayor shall provide an application form for the annual certificate of registration.

(d) The application for a certificate of registration as a telephone solicitor shall include, but not be limited to, the following information:

(1) The true name, current address, telephone number and location of the telephone solicitor and the telemarketing business, including each name and trade name under which the telephone solicitor intends to engage in telephone solicitations;

(2) Each occupation or business that the telemarketing business’ principal owner or owners have engaged in for the 2 years immediately preceding the date of the application;

(3) Whether the applicant has been convicted or pled guilty to, or is being prosecuted by indictment for racketeering, violations of state or federal securities laws, or a theft offense;

(4) Whether there has been entered against the applicant an injunction, temporary restraining order or a final judgment in any civil or administrative action involving fraud, theft, racketeering, embezzlement, fraudulent conversion or misappropriation of property, including any pending litigation;

(5) Whether the applicant, at any time during the previous 7 years, has filed for bankruptcy, been adjudged bankrupt or been reorganized because of insolvency;

(6) The true name, mailing address, and date of birth of the following:

(A) Each seller or other person employed by the applicant;

(B) Each person participating in or responsible for the management of the applicant’s business;

(C) Each person principally responsible for the management of the applicant’s business; and

(7) The name and true address of a registered agent for service of process in the District of Columbia for the applicant’s business.

(e) The Mayor shall serve as the registered agent if no registered agent is appointed or if the individual or organization named ceases to serve as the registered agent and no successor is appointed.

(f) The Mayor shall investigate the veracity of an application.

(g) The Mayor shall deny a certificate of registration when the Mayor determines that an application contains false information.

(h) The Mayor shall provide written notification to an applicant when an application has been denied.

(i) The Mayor shall notify the applicant in writing of the information that the Mayor finds to be false.

(j) No person may conduct telemarketing in the District of Columbia without having first obtained a certificate of registration.

(k) The Mayor shall either deny or grant an application within 30 days of the filing of an application.

(l) The Mayor may establish reasonable fees for filing of applications. The Mayor shall make available printed license application forms as well as electronic forms, which may be downloaded by computer.

(m) Certificates of registration issued in accordance with this subchapter shall be valid for one year. Prior to expiration of a certificate of registration, an applicant may obtain a new certificate by the filing of a new application.

(n) If any person has obtained a certificate of registration under false pretenses, including providing false information in an application, the certificate of registration shall be revoked and may be reinstated only upon proof of correction.

(Dec. 1, 1982, D.C. Law 4-164, § 126b, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.03. Surety bond requirements for telephone solicitors.

(a) The application for registration or renewal shall be accompanied by a surety bond in the amount of \$50,000. The bond shall provide for the indemnification of any person suffering a loss as the result a violation of this subchapter.

(b) The surety may terminate the bond upon giving a 60-day written notice to the principal and to the Mayor.

(c) Unless the bond is replaced by that of another surety before the expiration of the 60-day notice of cancellation, the registration of the principal shall be treated as lapsed.

(Dec. 1, 1982, D.C. Law 4-164, § 126c, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.04. Security alternative to surety bonds.

(a) An applicant required under this subchapter to file a bond with a registration application may file with the Mayor, in lieu thereof, a certificate of deposit or government bond in the amount of \$50,000.

(b) The Mayor shall hold the certificate of deposit or government bond for 3

years starting from the date the telemarketing business ceases to operate or the registration lapses in order to pay claims made against the telemarketing business during its period of operation after which time the Mayor shall return any remaining balance.

(c) The registration of the telemarketing business shall be treated as lapsed if, at any time, the amount of bond, cash, certificate of deposit or government bonds falls below the amount required by this section.

(d) The surety bond shall remain in effect for 3 years from the period the telemarketing business ceases to operate in the District.

(e) The aggregate liability of the surety company to all persons injured by a telephone solicitor's violations of this subchapter shall not exceed the amount of the bond.

(Dec. 1, 1982, D.C. Law 4-164, § 126d, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.05. Exemptions.

(a) A telephone solicitor shall be exempt from the registration and bonding requirements of this subchapter if the telephone solicitor is engaged in any of the following activities:

(1) Telephone solicitation for religious or political purposes, or for a charitable or educational institution, or fundraising for other tax-exempt, nonprofit organizations;

(2) A home solicitation sale that involves a subsequent face to face meeting between the seller and the consumer;

(3) Sales by a licensed securities, commodities, investment broker, or investment advisor when soliciting over the telephone within the scope of the person's license;

(4) A solicitation for the sale of a newspaper of general circulation and other publications that have a predominantly editorial or news-related content;

(5) A solicitation for a sale regulated by the Commodities Futures Trading Commission;

(6) A solicitation for the sale of any goods whenever the person allows a 7-day review period and a full refund within 30 days after the return of such goods to the person;

(7) A solicitation by a financial institution, such as a bank, trust company, a saving and loan association, a credit union, a commercial and consumer finance lender, regulated by the United States government;

(8) A solicitation by an insurance company or other organization that is licensed or authorized to conduct business in the District of Columbia;

(9) A solicitation for the sale of cable television services operating under the authority of a governmental franchise or permit;

(10) Fundraising on behalf of a college or university or any other public or private educational institution;

(11) A solicitation for sales pursuant to a catalog that includes clear disclosure of sales prices, shipping, handling and other charges;

(12) A solicitation by a political subdivision or instrumentality of the United States or any state of the United States, or any public utility that is subject to regulation by the District of Columbia Public Service Commission;

(13) A solicitation by a person who is a licensed travel agent acting within the scope of the agent's license; or

(14) A solicitation by a person who is a licensed real estate broker within the scope of the broker's license.

(Dec. 1, 1982, D.C. Law 4-164, § 126e, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.06. Unlawful acts and practices.

(a) A telephone solicitor commits the offense of telephone solicitation fraud when engaged in any one of the following:

(1) Fails to obtain or maintain a valid certificate of registration;

(2) Obtains a certificate of registration through any false or fraudulent pretence or representation in any registration application;

(3) Knowingly fails to have received written consent to use the name of a charitable organization;

(4) Knowingly misrepresents any of the following:

(A) The total cost of the goods or services that are the subject of the telephone solicitation sales call;

(B) Material restrictions, material limitations, or material conditions to the purchase of goods or services that are the subject of a telephone solicitation;

(C) Material aspects of the performance, efficacy, nature or characteristics of goods or services that are the subject of a telephone solicitation; or

(D) Material aspects of the nature of terms of the telephone solicitor's refund, cancellation, exchange or repurchase policies;

(5) Induces a consumer to purchase goods or services by means of a false or fraudulent pretense, representation or promise;

(6) Charges a consumer's checking or savings account without the consumer's express written authorization; or

(7) Procures the services of any professional delivery, courier, or other pickup service to obtain immediate receipt and/or possession of a consumer's payment unless the goods are delivered with the opportunity to inspect before payment is collected.

(b) A person who violates any provision of this section shall be subject to the penalties provided in §§ 22-3226.09 and 22-3226.10.

(Dec. 1, 1982, D.C. Law 4-164, § 126f, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.07. Deceptive acts and practices prohibited.

(a) It is a deceptive telemarketing act or practice for any seller or telephone solicitor to misrepresent any of the following material information:

(1) The total purchase cost to the consumer of the goods or services to be received;

(2) The true name of the telephone solicitor; or

(3) Material aspects of the quality or basic characteristics of the goods or services purchased.

(b) It is a deceptive telemarketing act or practice for any seller or telephone solicitor to misrepresent any material fact regarding the goods or services purchased that has a tendency to mislead.

(c) No person shall commit a deceptive telemarketing act or practice.

(Dec. 1, 1982, D.C. Law 4-164, § 126g, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.08. Abusive telemarketing acts or practices.

It is an abusive telemarketing act or practice and violation of this subchapter for a seller or telephone solicitor to engage in the following conduct:

(1) Cause a telephone to ring more than 15 times in an intended telephone solicitation call;

(2) Initiate a telephone solicitation call to a consumer after the same consumer has expressly stated that he or she does not wish to receive solicitation calls from that seller; or

(3) Engage in telephone solicitation to a consumer's residence at any time before 8:00 a.m. and after 9:00 p.m., local time at the place of the consumer called.

(Dec. 1, 1982, D.C. Law 4-164, § 126h, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.09. Civil penalties.

(a) The following penalties may be imposed in addition to those otherwise available at law:

(1) Any telephone solicitor who violates any provision of this subchapter may be fined up to \$1,000 per violation.

(2) A permit or license shall be revoked or suspended if the seller or telephone solicitor fails to comply with the registration requirements of this subchapter.

(3) A judge may impose treble damages against any telephone solicitor who knowingly targets elderly persons or persons with disabilities.

(b) Fines shall be payable to the Fraud Prevention Fund established in § 22-3226.14.

(Dec. 1, 1982, D.C. Law 4-164, § 126i, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039; Apr. 24, 2007, D.C. Law 16-305, § 36, 53 DCR 6198.)

Effect of amendments. — D.C. Law 16-305, in subsec. (a)(3), substituted “persons or persons with disabilities” for “or disabled persons”.

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

Legislative history of Law 16-305. — Law 16-305, the “People First Respectful Language Modernization Act of 2006”, was introduced in

Council and assigned Bill No. 16-664, which was referred to Committee on the Whole. The Bill was adopted on first and second readings on June 20, 2006, and July 11, 2006, respectively. Signed by the Mayor on July 17, 2006, it was assigned Act No. 16-437 and transmitted to both Houses of Congress for its review. D.C. Law 16-305 became effective on April 24, 2007.

§ 22-3226.10. Criminal penalties.

Any telephone solicitor who violates § 22-3226.06 and obtains property thereby shall be guilty of the crime of telemarketing fraud, which is punishable as follows:

(1) If the amount of the transaction is valued at \$20,000 or more, the seller or telephone solicitor shall upon conviction be guilty of a felony, and shall be subject to a fine of not more than \$10,000 or imprisonment for not more than 4 years, or both.

(2) If the amount of the transaction is valued at less than \$20,000 but more than \$5,000, the seller or telephone solicitor shall upon conviction be guilty of a felony, and shall be subject to a fine of not more than \$5,000 or imprisonment for not more than 3 years, or both.

(3) If the amount of the transaction is valued at less than \$5,000 or less, the seller or telephone solicitor shall upon conviction be guilty of a misdemeanor and shall be subject to a fine of not more than \$500 or imprisonment for not more than 6 months, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 126j, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.11. Private right of action.

(a) Any consumer injured as a result of a violation of § 22-3226.06, § 22-3226.07, or § 22-3226.08 may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following:

- (1) A declaratory judgment;
- (2) Injunctive relief;
- (3) Reasonable attorney’s fees and costs;
- (4) Actual damages;
- (5) Punitive damages; and

(6) Any other equitable relief which the court deems proper.

(b) Nothing in this subchapter shall prevent any consumer who is injured by any other trade practice from exercising any right or seeking any remedy to which the consumer might be entitled.

(Dec. 1, 1982, D.C. Law 4-164, § 126k, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.12. Statute of limitations period.

Claims for damages or compensation under this subchapter shall be filed within 3 years of the time the seller or telephone solicitor initiated the solicitation telephone call.

(Dec. 1, 1982, D.C. Law 4-164, § 126l, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.13. Task force to combat fraud.

(a) The Mayor shall form a task force for the following purposes:

- (1) Collecting information on telephone fraud;
- (2) Taking steps to educate the public about fraud, including telephone fraud;
- (3) Sharing information related to telephone fraud with District government agencies;
- (4) Sharing information related to telephone fraud with other state and federal law enforcement agencies; and
- (5) Advising the Mayor on enforcement of the provisions of this subchapter.

(b) The task force may include representatives from the following agencies:

- (1) Metropolitan Police Department;
- (2) Department of Consumer and Regulatory Affairs;
- (3) Office of Corporation Counsel; and
- (4) Any other agency the Mayor deems appropriate.

(Dec. 1, 1982, D.C. Law 4-164, § 126m, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.14. Fraud Prevention Fund.

(a) There is established a Fraud Prevention Fund ("Fund"). This Fund shall be nonlapsing. Monies in the Fund shall not be commingled with the General

Fund, nor shall the operation of the Fund impose a burden or charge on the General Fund.

(b) Monies in the Fund shall consist of fines paid pursuant to this subchapter.

(c) Monies from this fund may be used for the purposes of educating the public regarding fraud and crime prevention, supporting the task force to combat fraud, and enforcing this subchapter.

(d) The District of Columbia Auditor shall perform an annual audit of the Fraud Prevention Fund.

(Dec. 1, 1982, D.C. Law 4-164, § 126n, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

§ 22-3226.15. General disclosures.

(a) Within the first 30 seconds of a telephone call, the telephone solicitor shall identify himself or herself by stating his or her true name, the company on whose behalf the solicitation is being made, and the goods or services to be sold.

(b) Any person who violates this section shall be subject to civil penalties pursuant to § 22-3226.09.

(Dec. 1, 1982, D.C. Law 4-164, § 126o, as added June 8, 2001, D.C. Law 13-301, § 102, 47 DCR 7039.)

Legislative history of Law 13-301. — For Law 13-301, see notes following § 22-3226.01.

Subchapter III-C. Identity Theft.

§ 22-3227.01. Definitions.

For the purposes of this subchapter, the term:

(1) “Financial injury” means all monetary costs, debts, or obligations incurred by a person as a result of another person obtaining, creating, possessing, or using that person’s personal identifying information in violation of this subchapter, including, but not limited to:

(A) The costs of clearing the person’s credit rating, credit history, criminal record, or any other official record, including attorney fees;

(B) The expenses related to any civil or administrative proceeding to satisfy or contest a debt, lien, judgment, or other obligation of the person that arose as a result of the violation of this subchapter, including attorney fees;

(C) The costs of repairing or replacing damaged or stolen property;

(D) Lost time or wages, or any similar monetary benefit forgone while the person is seeking redress for damages resulting from a violation of this subchapter; and

(E) Lost time, wages, and benefits, other losses sustained, legal fees,

and other expenses incurred as a result of the use, without permission, of one's personal identifying information by another as prohibited by § 22-3227.02.

(2) Repealed.

(3) "Personal identifying information" includes, but is not limited to, the following:

(A) Name, address, telephone number, date of birth, or mother's maiden name;

(B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;

(C) Savings, checking, or other financial account number;

(D) Social security number or tax identification number;

(E) Passport or passport number;

(F) Citizenship status, visa, or alien registration card or number;

(G) Birth certificate or a facsimile of a birth certificate;

(H) Credit or debit card, or credit or debit card number;

(I) Credit history or credit rating;

(J) Signature;

(K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;

(L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(M) Place of employment, employment history, or employee identification number; and

(N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.

(4) "Property" shall have the same meaning as provided in § 22-3201(3) and shall include credit.

(Dec. 1, 1982, D.C. Law 4-164, § 127a, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809; Dec. 10, 2009, D.C. Law 18-88, § 214(i), 56 DCR 7413.)

Effect of amendments. — D.C. Law 18-88, in par. (1), deleted "and" from the end of subpar. (C); substituted "; and" for a period at the end of par. (D), and added subpar. (E); and repealed par. (2), which had read as follows: "(2) 'Person' means an individual, whether living or dead."

Emergency legislation. — For temporary (90 day) amendment of section, see § 102(h) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) amendment of section, see § 214(i) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(i) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 15-106. — Law 15-106, the "Identity Theft Amendment Act of 2003", was introduced in Council and assigned Bill No. 15-36, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on July 8, 2003, and October 7, 2003, respectively. Signed by the Mayor on October 24, 2003, it was assigned Act No. 15-196 and transmitted to both Houses of Congress for its review. D.C. Law 15-106 be-

came effective on March 27, 2004.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

§ 22-3227.02. Identity theft.

A person commits the offense of identity theft if that person knowingly:

(1) Uses personal identifying information belonging to or pertaining to another person to obtain, or attempt to obtain, property fraudulently and without that person's consent;

(2) Obtains, creates, or possesses personal identifying information belonging to or pertaining to another person with the intent to:

(A) Use the information to obtain, or attempt to obtain, property fraudulently and without that person's consent; or

(B) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the information by that third person to obtain, or attempt to obtain, property fraudulently and without that person's consent; or

(3) Uses personal identifying information belonging to or pertaining to another person, without that person's consent, to:

(A) Identify himself or herself at the time of his or her arrest;

(B) Facilitate or conceal his or her commission of a crime; or

(C) Avoid detection, apprehension, or prosecution for a crime.

(Dec. 1, 1982, D.C. Law 4-164, § 127b, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809; Dec. 10, 2009, D.C. Law 18-88, § 214(j), 56 DCR 7413.)

Effect of amendments. — D.C. Law 18-88, deleted “; or” from the end of par. (1); substituted “; or” for a period at the end of par. (2); and added par. (3).

Emergency legislation. — For temporary (90 day) addition of this section, see § 2(c) of Identity Theft Emergency Amendment Act of 2003 (D.C. Act 15-285, December 18, 2003, 51 DCR 204).

For temporary (90 day) addition of this section, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

For temporary (90 day) addition of this section, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

For temporary (90 day) amendment of section, see § 102(i) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) amendment of section, see § 214(j) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(j) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 15-106. — For Law 15-106, see notes following § 22-3227.01.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

§ 22-3227.03. Penalties for identity theft.

(a) *Identity theft in the first degree.* — Any person convicted of identity theft shall be fined not more than (1) \$10,000, (2) 3 times the value of the property obtained or (3) 3 times the amount of the financial injury, whichever is greatest, or imprisoned for not more than 10 years, or both, if the property obtained, or attempted to be obtained, or the amount of the financial injury is \$1,000 or more.

(b) *Identity theft in the second degree.* — Any person convicted of identity theft shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the property obtained, or attempted to be obtained, or the amount of the financial injury, has some value, or if another person is falsely accused of, or arrested for, committing a crime because of the use, without permission, of that person's personal identifying information.

(c) *Enhanced penalty.* — Any person who commits the offense of identity theft against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1½ times the maximum term of imprisonment otherwise authorized for the offense, or both. It is an affirmative defense that the accused:

(1) Reasonably believed that the victim was not 65 years of age or older at the time of the offense; or

(2) Could not have determined the age of the victim because of the manner in which the offense was committed.

(Dec. 1, 1982, D.C. Law 4-164, § 127c, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809; Apr. 24, 2007, D.C. Law 16-306, § 218, 53 DCR 8610; Dec. 10, 2009, D.C. Law 18-88, § 214(k), 56 DCR 7413; June 3, 2011, D.C. Law 18-377, § 12(d), 58 DCR 1174.)

Effect of amendments. — D.C. Law 16-306, in subssecs. (a) and (b), inserted "or attempted to be obtained," following "of the property obtained".

D.C. Law 18-88, in subsec. (a), substituted "\$1,000 or more" for "\$250 or more"; and, in subsec. (b), substituted "has some value, or if another person is falsely accused of, or arrested for, committing a crime because of the use, without permission, of that person's personal identifying information" for "whichever is greater, is less than \$250".

D.C. Law 18-377, in subsec. (b), substituted "if" for "if the value of".

Temporary Amendment of Section. — Section 2 of D.C. Law 16-141, in subsec. (a), inserted "or attempted to be obtained" following "if the property obtained"; and, in subsec. (a), inserted "or attempted to be obtained" following "of the property obtained".

Section 4(b) of D.C. Law 16-141 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) addition, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

For temporary (90 day) amendment of section, see § 2 of Identity Theft Technical Emergency Amendment Act of 2006 (D.C. Act 16-257, January 26, 2006, 53 DCR 772).

For temporary (90 day) amendment of section, see § 2 of Identity Theft Technical Con-

gressional Review Emergency Amendment Act of 2006 (D.C. Act 16-359, April 26, 2006, 53 DCR 3615).

For temporary (90 day) amendment of section, see § 218 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) amendment of section, see § 218 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) amendment of section, see § 218 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) amendment of section, see § 218 of Omnibus Public Safety Second Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 102(j) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

Legislative history of Law 15-106. — For Law 15-106, see notes following § 22-3227.01.

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

§ 22-3227.04. Restitution.

When a person is convicted of identity theft, the court may, in addition to any other applicable penalty, order restitution for the full amount of financial injury.

(Dec. 1, 1982, D.C. Law 4-164, § 127d, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809.)

Emergency legislation. — For temporary (90 day) addition, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

Legislative history of Law 15-106. — For Law 15-106, see notes following § 22-3227.01.

§ 22-3227.05. Correction of public records.

(a) When a person is convicted, adjudicated delinquent, or found not guilty by reason of insanity of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of this subchapter.

(b) In all other cases, a person who alleges that he or she is a victim of identity theft may petition the court for an expedited judicial determination that a District of Columbia public record contains false information as a result of a violation of this subchapter. Upon a finding of clear and convincing evidence that the person was a victim of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of this subchapter.

(c) Notwithstanding any other provision of law, District of Columbia agencies shall comply with orders issued under subsection (a) of this section within 30 days of issuance of the order.

(d) For the purposes of this section, the term “District of Columbia public record” means any document, book, photographic image, electronic data recording, paper, sound recording, or other material, regardless of physical form or characteristic, made or received pursuant to law or in connection with the transaction of public business by any officer or employee of the District of Columbia.

(Dec. 1, 1982, D.C. Law 4-164, § 127e, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809.)

Emergency legislation. — For temporary (90 day) addition, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

Legislative history of Law 15-106. — For Law 15-106, see notes following § 22-3227.01.

§ 22-3227.06. Jurisdiction.

The offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if:

(1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia; or

(2) Any part of the offense takes place in the District of Columbia.

(Dec. 1, 1982, D.C. Law 4-164, § 127f, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809; Dec. 10, 2009, D.C. Law 18-88, § 214(l), 56 DCR 7413.)

Effect of amendments. — D.C. Law 18-88, in par. (1), substituted “resident of, or located in,” for “resident of”.

Emergency legislation. — For temporary (90 day) addition, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

For temporary (90 day) amendment of section, see § 102(k) of Crime Bill Emergency Amendment Act of 2009 (D.C. Act 18-129, June 29, 2009, 56 DCR 5495).

For temporary (90 day) amendment of sec-

tion, see § 214(l) of Omnibus Public Safety and Justice Emergency Amendment Act of 2009 (D.C. Act 18-181, August 6, 2009, 56 DCR 6903).

For temporary (90 day) amendment of section, see § 214(l) of Omnibus Public Safety and Justice Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-227, October 21, 2009, 56 DCR 8668).

Legislative history of Law 15-106. — For Law 15-106, see notes following § 22-3227.01.

Legislative history of Law 18-88. — For Law 18-88, see notes following § 22-404.

§ 22-3227.07. Limitations.

Obtaining, creating, possessing, and using a person’s personal identifying information in violation of this subchapter shall constitute a single scheme or course of conduct, and the applicable period of limitation under § 23-113 shall not begin to run until after the scheme or course of conduct has been completed or terminated.

(Dec. 1, 1982, D.C. Law 4-164, § 127g, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809.)

Emergency legislation. — For temporary (90 day) addition, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

Legislative history of Law 15-106. — For Law 15-106, see notes following § 22-3227.01.

§ 22-3227.08. Police reports.

The Metropolitan Police Department shall make a report of each complaint of identity theft and provide the complainant with a copy of the report.

(Dec. 1, 1982, D.C. Law 4-164, § 127h, as added Mar. 27, 2004, D.C. Law 15-106, § 2(c), 50 DCR 9809.)

Emergency legislation. — For temporary (90 day) addition, see § 2(c) of Identity Thief Congressional Review Emergency Amendment Act of 2004 (D.C. Act 15-388, March 18, 2004, 51 DCR 3382).

Legislative history of Law 15-106. — For Law 15-106, see notes following § 22-3227.01.

*Subchapter IV. Stolen Property.***§ 22-3231. Trafficking in stolen property.**

(a) For the purposes of this section, the term “traffics” means:

(1) To sell, pledge, transfer, distribute, dispense, or otherwise dispose of property to another person as consideration for anything of value; or

(2) To buy, receive, possess, or obtain control of property with intent to do any of the acts set forth in paragraph (1) of this subsection.

(b) A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen.

(c) It shall not be a defense to a prosecution under this section, alone or in conjunction with § 22-1803, that the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be.

(d) Any person convicted of trafficking in stolen property shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 131, 29 DCR 3976; Apr. 20, 2012, D.C. Law 19-120, § 101(b), 58 DCR 11235.)

Prior Codifications. — 1981 Ed., § 22-3831.

Effect of amendments. — D.C. Law 19-120, in subsec. (c), substituted “section, alone or in conjunction with § 22-1803,” for “section”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 101(b) of Receiving Stolen Property and Public Safety Amendments Emergency Amendment Act of 2011 (D.C. Act 19-261, December 21, 2011, 58 DCR 11232).

For temporary (90 day) amendment of sec-

tion, see § 101(b) of Receiving Stolen Property and Public Safety Amendments Congressional Review Emergency Amendment Act of 2012 (D.C. Act 19-326, March 19, 2012, 59 DCR 2384).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 19-120. — For history of Law 19-120, see notes under § 22-2701.

CASE NOTES**ANALYSIS**

Admissibility of evidence.

Arrest.

Instructions.

Validity.

Admissibility of evidence.

Defendant's income tax returns, purportedly showing his grocery store to be in good financial condition and thus reducing his motive to traffic in stolen property for profit, were properly excluded in prosecution for that offense. D.C. Code 1981, § 22-3831. *German v. United States*, 525 A.2d 596, 1987 D.C. App. LEXIS 353 (1987), writ of certiorari denied by 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358, 1987 U.S. LEXIS 4655, 56 U.S.L.W. 3338 (1987).

Arrest.

Where jewelry had been taken from scene of

murder and officers were informed that a man was selling some jewelry on a street, they had right and duty to approach, confront and interrogate him though they had no warrant. D.C. Code 1951, § 22-2201. *Lee v. U.S.*, 221 F.2d 29, 1954 U.S. App. LEXIS 3315 (C.A.D.C. 1954).

Instructions.

Trial court adequately instructed jury on specific intent required for receiving stolen property where court gave standard instruction on specific intent, but replaced “intending with bad purpose either to disobey or disregard the law” with “intending to disobey or in conscious disregard of the law” and, additionally, quoted intent language of governing statute. D.C. Code 1981, § 22-3832. *DiGiovanni v. United States*, 580 A.2d 123, 1990 D.C. App. LEXIS 242 (1990).

Validity.

Criminal defendant charged with trafficking in stolen property had no standing to assert rights and interests of third parties through overbreadth and vagueness challenges to statute under which he was charged, which did not implicate any First Amendment concerns. D.C. Code 1981, § 22-3831; U.S. Const. Amend. 1. *German v. United States*, 525 A.2d 596, 1987 D.C. App. LEXIS 353 (1987), writ of certiorari denied by 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358, 1987 U.S. LEXIS 4655, 56 U.S.L.W. 3338 (1987).

As applied to grocery store owner accused of purchasing food stamps and purportedly stolen property from undercover police officer, statute prohibiting trafficking in stolen property was not constitutionally vague or overbroad; those activities fell squarely and unambiguously within statute's terms. D.C. Code 1981, § 22-3831(b). *German v. United States*, 525 A.2d 596, 1987 D.C. App. LEXIS 353 (1987), writ of certiorari denied by 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358, 1987 U.S. LEXIS 4655, 56 U.S.L.W. 3338 (1987).

§ 22-3232. Receiving stolen property.

(a) A person commits the offense of receiving stolen property if that person buys, receives, possesses, or obtains control of stolen property, knowing or having reason to believe that the property was stolen.

(b) It shall not be a defense to a prosecution under this section, alone or in conjunction with § 22-1803, that the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be.

(c)(1) Any person convicted of receiving stolen property shall be fined not more than \$5,000 or imprisoned not more than 7 years, or both, if the value of the stolen property is \$1,000 or more.

(2) Any person convicted of receiving stolen property shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both, if the stolen property has some value.

(d) For the purposes of this section, the term "stolen property" includes property that is not in fact stolen if the person who buys, receives, possesses, or obtains control of the property had reason to believe that the property was stolen.

(Dec. 1, 1982, D.C. Law 4-164, § 132, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(f), 41 DCR 2608; June 3, 2011, D.C. Law 18-377, § 12(e), 58 DCR 1174; Apr. 20, 2012, D.C. Law 19-120, § 101(c), 58 DCR 11235.)

Prior Codifications. — 1981 Ed., § 22-3832.

Effect of amendments. — D.C. Law 18-377, in subsec. (c)(1), substituted "\$1,000" for "\$250"; and, in subsec. (c)(2), substituted "if the stolen property has some value" for "if the value of the stolen property is less than \$250".

D.C. Law 19-120, in subsec. (a), substituted "stolen" for "stolen, with intent to deprive another of the right to the property or a benefit of the property"; in subsec. (b), substituted "under this section, alone or in conjunction with § 22-1803," for "for an attempt to commit the offense described in this section"; and added subsec. (d).

Emergency legislation. — For temporary

amendment of section, see § 113(f) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary (90 day) amendment of section, see § 512(e) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 512(e) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

For temporary (90 day) amendment of section, see § 101(c) of Receiving Stolen Property

and Public Safety Amendments Emergency Amendment Act of 2011 (D.C. Act 19-261, December 21, 2011, 58 DCR 11232).

For temporary (90 day) amendment of section, see § 101(c) of Receiving Stolen Property and Public Safety Amendments Congressional Review Emergency Amendment Act of 2012 (D.C. Act 19-326, March 19, 2012, 59 DCR 2384).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 10-151. — For legislative history of D.C. Law 10-151, see Historical and Statutory Notes following § 22-3212.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

Legislative history of Law 19-120. — For history of Law 19-120, see notes under § 22-2701.

CASE NOTES

ANALYSIS

Admissibility of evidence.
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Admissibility of evidence.

Defendant failed to establish that witness's testimony during trial for receiving stolen property and unauthorized use of a vehicle, specifically that her father was the registered owner of the stolen car, constituted inadmissible hearsay; defendant's hearsay challenge was based entirely on speculation and conjecture. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

Market value of a chattel may be established by testimony of its nonexpert owner, in prosecution for felony charge of receiving stolen property. D.C. Code 1981, § 22-3832(a), (c)(1). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

Victim's testimony describing articles stolen from his vehicle was relevant in prosecution for receiving stolen property to explain circumstance surrounding charged offense and was not unduly prejudicial, although defendant was not charged with theft of either vehicle or its contents; victim's reference to stolen articles was limited, and defendant's exculpatory statements suggested that he at least helped accomplice steal vehicle. D.C. Code 1981, § 22-3832. *Morrison v. United States*, 547 A.2d 996, 1988 D.C. App. LEXIS 174 (1988).

Arguments and conduct of counsel.

Counsel's continued refusal to participate in first day of trial on charges of unauthorized use

of vehicle and receiving stolen property after request for continuance was denied warranted presumption that juvenile was deprived of due process and statutory right to counsel that was not rebutted by trial court's attempts on second day of trial to remedy situation; counsel's refusal to participate resulted in admission of evidence and of juvenile's statement to police without objection and no cross-examination of State's witnesses, trooper who identified juvenile as one of passengers in vehicle was not recalled, and there was no explanation as to why counsel did not recall him. *In re R.K.S.*, 905 A.2d 201, 2006 D.C. App. LEXIS 443 (2006).

In prosecution for receiving stolen property, counsel was not ineffective in not using prisoner's property receipt to impeach arresting officer's testimony that he found defendant's house keys in stolen car's ignition, which state argued implied guilty knowledge; officer did not prepare receipt and it did not refute his testimony. *Leftridge v. United States*, 780 A.2d 266, 2001 D.C. App. LEXIS 199 (2001).

In prosecution for receiving stolen property, counsel was not ineffective in eliciting and emphasizing testimony that arresting officer gave defendant keys that were removed from the stolen car; state argued that keys were house keys and defendant's placing them in the car's ignition was an act of deception proving guilty knowledge, which counsel attempted to discredit by arguing that officer's returning keys implied they were never in ignition, as they would have been seized as proof. *Leftridge v. United States*, 780 A.2d 266, 2001 D.C. App. LEXIS 199 (2001).

Defendant was not denied due process in receiving stolen property trial when the prosecutor did not correct arresting officer's testimony that he gave defendant's house keys, which were found in stolen car's ignition, back to defendant; officer responded to a leading question from defense counsel, and prosecutor had no duty to amplify testimony that was arguably incomplete, but not false or materially

misleading. *Leftridge v. United States*, 780 A.2d 266, 2001 D.C. App. LEXIS 199 (2001).

Prosecutor's rebuttal summation in prosecution for receiving stolen property, in which he argued that defendant stole vehicle and picked up a passenger later for a joyride, was improperly based on facts not in evidence, but did not result in substantial prejudice to defendant; defendant's own admission established that he at least helped accomplice start vehicle, and, given other evidence and permissible inferences from it, jury could have inferred that accomplice and defendant together stole it from parking lot. D.C. Code 1981, § 22-3832. *Morrison v. United States*, 547 A.2d 996, 1988 D.C. App. LEXIS 174 (1988).

Indictment and information.

Defendant, who was convicted of receiving stolen property and unauthorized use of a vehicle, failed to establish that he was prejudiced by variance between indictment and evidence at trial regarding owner of the stolen vehicle; defendant's defense that he did not know the car was stolen was unaffected by the variance. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

Evidence at trial for receiving stolen property and unauthorized use of a vehicle, showing that the owner of the stolen car was someone other than the person named in the indictment, was merely a variance, and not a constructive amendment; government's evidence did not prove a "complex of facts" that was "distinctly different" from the facts alleged by the grand jury. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

Instructions.

In prosecution for housebreaking and grand larceny, trial court committed no reversible error in charging that if defendant's possession of recently stolen property was not accounted for in that satisfactory, straightforward and truthful way that would stamp it as an honest accounting, then such possession would be a foundation for a presumption of guilt against the possessor, even though trial court could have chosen more exact language in its attempt to express limited character of presumption to which it was referring. D.C. Code 1940, §§ 22-1801, 22-2201. *Wright v. U.S.*, 189 F.2d 699, 1951 U.S. App. LEXIS 3219 (C.A.D.C. 1951).

Trial court need not specifically instruct jury that element of statute prohibiting receiving stolen property is "intent to defraud," as intent required by statute, i.e., "intent to deprive another of the right to their property or a benefit of the property," is not materially different from "intent to defraud" required by former statute prohibiting receiving stolen property. D.C. Code 1981, § 22-2205 (repealed); § 22-

3832. *DiGiovanni v. United States*, 580 A.2d 123, 1990 D.C. App. LEXIS 242 (1990).

To properly instruct jury on intent required for conviction of receiving stolen property, trial court may either use appropriate standard jury instruction on specific intent or, where statute itself sets out specific intent, court may substitute statutory language. D.C. Code 1981, § 22-3832. *DiGiovanni v. United States*, 580 A.2d 123, 1990 D.C. App. LEXIS 242 (1990).

Trial court adequately instructed jury on specific intent required for receiving stolen property where court gave standard instruction on specific intent, but replaced "intending with bad purpose either to disobey or disregard the law" with "intending to disobey or in conscious disregard of the law" and, additionally, quoted intent language of governing statute. D.C. Code 1981, § 22-3832. *DiGiovanni v. United States*, 580 A.2d 123, 1990 D.C. App. LEXIS 242 (1990).

In prosecution where the same evidence, that is, unexplained possession of recently stolen goods, tended to support all counts charging second-degree burglary, grand larceny and receiving stolen property, failure to instruct that jury could not find defendants guilty of receiving stolen property if it also found them guilty of burglary or larceny was error requiring reversal and new trial. D.C. Code §§ 22-1801(b), 22-2201, 22-2205. *Franklin v. United States*, 382 A.2d 20, 1978 D.C. App. LEXIS 410 (1978).

Nature and elements of offense.

In prosecution of defendants for felony receipt of stolen property, government had to prove only that the stolen minivan had a value of at least \$250 at the time defendants received it; the absolute value of the stolen minivan was not an issue. *Banks v. United States*, 902 A.2d 817, 2006 D.C. App. LEXIS 413 (2006).

An element of the offense of receiving stolen property is that at the time the defendant received, possessed or obtained control over the property, he knew or had reason to believe that the property was stolen. *Leftridge v. United States*, 780 A.2d 266, 2001 D.C. App. LEXIS 199 (2001).

Government must produce sufficient evidence of "value," as element of felony charge of receiving stolen property, to eliminate possibility that jury's verdict is being based on surmise or conjecture. D.C. Code 1981, § 22-3832(c)(1). *Curtis v. United States*, 611 A.2d 51, 1992 D.C. App. LEXIS 187 (1992).

Defendant can properly be convicted of both unauthorized use of vehicle (UUV) and receiving stolen property (RSP) arising out of same act or course of conduct, even though State is statutorily precluded from consecutively sentencing a defendant upon convictions for RSP and UUV arising out of same act or course of conduct. D.C. Code 1981, §§ 22-3803, 22-3815,

22-3832, 23-112; U.S. Const. Amend. 5. *Byrd v. United States*, 598 A.2d 386, 1991 D.C. App. LEXIS 283 (1991).

Defendant could not be convicted of both receiving stolen property and unauthorized use of motor vehicle, as unauthorized use merged with offense of receiving stolen property. D.C. Code 1981, §§ 22-3832(a), (c)(1), 22-3851. *Alston v. United States*, 552 A.2d 526, 1989 D.C. App. LEXIS 4 (1989).

Because receiving stolen property is lesser included offense of theft, defendant cannot be convicted of both theft and receipt of stolen goods with respect to same property. D.C. Code 1981, §§ 22-3811, 22-3812(a, b), 22-3832(a), (c)(2). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

Persons liable.

Conviction of principal on charges covering episodes of receiving stolen property, in which defendant participated, was not a prerequisite to defendant's conviction of aiding and abetting. D.C. Code 1981, §§ 22-105, 22-3832(a), (c)(1). *United States v. Richardson*, 817 F.2d 886, 1987 U.S. App. LEXIS 5606 (C.A.D.C. 1987).

Conviction as an aider and abettor in receiving stolen property was not invalid for failure of evidence to support conviction of principal; testimony of codefendant plus corroborative evidence gave cause for jury to infer that codefendant was guilty as a principal in crime for which defendant was convicted as an aider and abettor. D.C. Code 1981, §§ 22-105, 22-3832(a), (c)(1). *United States v. Richardson*, 817 F.2d 886, 1987 U.S. App. LEXIS 5606 (C.A.D.C. 1987).

Presumptions and burden of proof.

There was evidence from which a jury, without speculating, could have found that the government did not meet its burden of proving the \$250 value necessary to convict defendant of felony receipt of stolen property, and as such, defendant was entitled to instruction on the lesser-included offense of misdemeanor receipt of stolen property; there was evidence that a used car of unknown date of manufacture had experienced damage amounting to three-fourths of its \$4000 purchase-price before defendant "received" it and that the insurance appraisal had concluded that vehicle was not worth the cost of repairing. *Banks v. United States*, 902 A.2d 817, 2006 D.C. App. LEXIS 413 (2006).

In both unauthorized use of a vehicle and receiving stolen property cases, there is no requirement that the government prove the actual name of the owner, because that is not an essential element of the offense. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

To prove a receiving stolen property charge, the government must show that property of value was received by the defendant with an intent to defraud and with knowledge or reason to believe that the property was stolen. *Zacarias v. United States*, 884 A.2d 83, 2005 D.C. App. LEXIS 502 (2005).

In a prosecution for receiving stolen property in which possession is not satisfactorily explained, the requisite state of mind may be inferred just from the fact that the property was stolen recently. *Leftridge v. United States*, 780 A.2d 266, 2001 D.C. App. LEXIS 199 (2001).

In order to convict defendant of receiving stolen property, the government had to prove that: (1) the property in question was stolen by someone; (2) defendant received, possessed or obtained control of the property in question; (3) at the time defendant received, possessed or obtained control over the property, he knew or had reason to believe that the property was stolen; (4) at the time defendant so acted, he had the intent to deprive another of the right to the property or to a benefit of the property; (5) at the time defendant acted, he intended to disobey the law or acted in conscious disregard of the law; and (6) the property had a value of \$250 or more. *Moore v. United States*, 757 A.2d 78, 2000 D.C. App. LEXIS 188 (2000).

Value, as an element of a felony charge of receiving stolen property, must be proved with precision. D.C. Code 1981, § 22-3832(a), (c)(1). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

To prove value as an element of a felony charge of receiving stolen property, government must introduce evidence of value sufficient to eliminate possibility that jury's verdict was based on surmise or conjecture about value of property. D.C. Code 1981, § 22-3832(a), (c)(1). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

In prosecutions for receiving stolen property, government must prove that a stolen item of value was received by defendant with intent to defraud while defendant knew or had reason to know that the item was stolen. D.C. Code 1981, § 22-2205. *Blackledge v. United States*, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

Charge of receiving stolen property requires proof that the property was received, that at the time of its receipt it was stolen, that the individual receiving the property had guilty knowledge that it was stolen, that he had a fraudulent intent in receiving the property, and that the property had some real value to the owner. D.C. Code 1973, § 22-2205. *In re S.*, 434 A.2d 461, 1981 D.C. App. LEXIS 340 (1981).

Questions of law and fact.

Defendant's motion for judgment of acquittal on charge of receiving stolen property, viz.,

motorcycle license plates, should have been granted, where the government established only that defendant was in possession of tags reported as stolen, where at no point did the government attempt to link defendant to the particular tags missing from complainant's motorbike, and where the government did not introduce evidence as to the value of the tags or that they were current. D.C. Code 1973, § 22-2205. *In re S.*, 434 A.2d 461, 1981 D.C. App. LEXIS 340 (1981).

Review.

Because it was impossible to determine from the record whether defendant's convictions for theft of personal property and receiving stolen property were duplicative, remand was necessary for clarification, and resentencing, if necessary. D.C. Code 1981, §§ 22-3811, 22-3812(a, b), 22-3832(a), (c)(2). *Roberts v. United States*, 508 A.2d 110, 1986 D.C. App. LEXIS 318 (1986).

Sentence and punishment.

Convictions of second defendant for burglary and grand larceny were mutually exclusive with conviction for receiving stolen property and bringing it into the District of Columbia, and vacating the burglary and larceny convictions which carried longer sentences cured any prejudice which resulted from the failure to properly instruct. D.C. Code §§ 22-108, 22-1801, 22-2201. *United States v. Lemonakis*, 485 F.2d 941, 1973 U.S. App. LEXIS 9078 (C.A.D.C. 1973), writ of certiorari denied by 415 U.S. 989, 94 S. Ct. 1586, 94 S. Ct. 1587, 39 L. Ed. 2d 885, 1974 U.S. LEXIS 757 (1974).

Convictions for unauthorized use of a vehicle (UUV) and receiving stolen property (RSP), which arose from the taking of victim's vehicle, did not merge under double jeopardy prohibition against multiple punishments for the same offense; each offense contained an element that the other did not. *Sutton v. United States*, 988 A.2d 478, 2010 D.C. App. LEXIS 28 (2010).

Defendant's nationality and his status as an illegal alien were not impermissibly considered as a basis for enhancing defendant's sentence on his guilty pleas to credit card fraud, receiving stolen property, and one count of failure to appear in court; court imposed a heavy sentence not because of defendant's ethnicity or alien status, but because of his unlawful conduct, particularly his conduct in the five and one-half years since he entered his guilty pleas, his flight from justice, and his refusal to accept responsibility for his actions. *Yemson v. United States*, 764 A.2d 816, 2001 D.C. App. LEXIS 3 (2001).

Issue as to whether sentencing court impermissibly considered defendant's national origin and his status as an illegal alien when imposing an enhanced sentence on his guilty pleas to credit card fraud, receiving stolen property, and

one count of failure to appear in court would be reviewed for plain error, where defendant made assertion for first time on appeal and said nothing about such issue before the trial court. *Yemson v. United States*, 764 A.2d 816, 2001 D.C. App. LEXIS 3 (2001).

Sentencing court did not exceed its authority by telling prosecutor to take all necessary steps to effect defendant's deportation after he had served his sentence on his guilty pleas to credit card fraud, receiving stolen property, and one count of failure to appear in court; the court simply reminded prosecutor of an obligation that he already knew about, it was not an "order" from the court to assure his deportation, it was not part of his sentence, and it appeared that the Immigration and Naturalization Service (INS) had already lodged a detainer against defendant before he was sentenced. *Yemson v. United States*, 764 A.2d 816, 2001 D.C. App. LEXIS 3 (2001).

Sentence imposed upon probationer under the Narcotics Addiction Rehabilitation Act for revocation of probation following conviction for receiving property stolen from the District of Columbia, namely, for "20 to 60 months," could not stand because the court had no discretion under the statute to establish a 20-month minimum sentence, since the statute requires an indeterminate sentence limited only by a prescribed minimum of six months of treatment; therefore, court could have imposed only an indeterminate sentence not to exceed five years. 18 U.S.C. § 4253; D.C. Code 1973, § 22-2207. *Mulky v. United States*, 451 A.2d 855, 1982 D.C. App. LEXIS 449 (1982).

Verdict.

Evidence can be sufficient for a reasonable jury to infer that a defendant knew he had possession of a motor vehicle under circumstances which indicated that he had not acquired possession with the consent of the true owner, and support a conviction for unauthorized use of a motor vehicle; yet based on the same evidence, it may be impermissible speculation or conjecture on the part of a jury to infer the defendant had the specific intent to deprive the owner permanently of his property, to sustain his conviction for receiving stolen property. *United States v. Brown*, 120 WLR 697 (Super. Ct. 1992).

Weight and sufficiency of evidence.

In prosecution for the grand larceny of an automobile and unauthorized use of the vehicle, there was legally sufficient evidence to support defendant's conviction on both counts, including the fact that, three weeks after the automobile's theft, it was found in the exclusive possession of defendant. D.C. Code §§ 22-2201, 22-2204. *United States v. Weston*, 466 F.2d 435, 1972 U.S. App. LEXIS 8038 (C.A.D.C. 1972).

Exclusive and unsatisfactorily explained possession of property proven to have been recently stolen permits an inference that the possessor is the thief; and where the stolen property is a motor vehicle, that inference may serve to support convictions of grand larceny and unauthorized use. D.C. Code §§ 22-2201, 22-2204. *United States v. Weston*, 466 F.2d 435, 1972 U.S. App. LEXIS 8038 (C.A.D.C. 1972).

Offer of defendant to sell goods, his leading prospective buyers to where they were stored, and his remaining with goods during an interval when others had departed, was sufficient evidence to allow jury to find that defendant was in possession of recently stolen property and to infer larceny and housebreaking. D.C. Code §§ 22-1801, 22-2201. *Garris v. United States*, 418 F.2d 467, 1969 U.S. App. LEXIS 12665 (C.A.D.C. 1969).

Evidence in delinquency proceeding was insufficient to show that juvenile knew that car was stolen so as to support his convictions for unauthorized use of a motor vehicle, receiving stolen property, and theft; juvenile was a back seat passenger in car, and there was no evidence that the punched ignition was visible to a person in juvenile's position in the car, nor did the government introduce evidence that, in addition to having a punched ignition, the car was so badly damaged as to warrant inference that juvenile knew that it was being used without the owner's consent, and there was no basis for attributing juvenile's flight to consciousness of guilt than to a purpose consistent with innocence. *In re D.P.*, 996 A.2d 1286, 2010 D.C. App. LEXIS 278 (2010).

Evidence was sufficient to show that juvenile possessed stolen vehicle for his own benefit, as required to support adjudication of delinquency for receiving stolen property; juvenile stated that he and others had walked around for hours until his "buddy found a car," stolen vehicle was used to transport juvenile and his brother back home, and juvenile knew that vehicle had been stolen. *In re R.K.S.*, 905 A.2d 201, 2006 D.C. App. LEXIS 443 (2006).

Evidence in prosecution of defendants for felony receipt of stolen property was sufficient to permit jury to find beyond a reasonable doubt that the stolen minivan was worth at least \$250; jury could reasonably infer the required value from evidence of the vehicle's purchase date and the price owner paid for it, owner testified that he had bought the vehicle approximately a month before it was stolen for \$4,000, and although minivan was seriously damaged when defendants were found occupying it, it remained somewhat operable. *Banks v. United States*, 902 A.2d 817, 2006 D.C. App. LEXIS 413 (2006).

Evidence was sufficient to support defendants' convictions for felony receipt of stolen property; although defendant contended that

minivan stolen from vehicle's owner was not the same vehicle recovered, the testimony of owner and officer allowed the jury to find that the stolen vehicle and the van defendants occupied were the same, and defendants' knowledge that the van was stolen could be inferred reasonably from officer's testimony that, from where he stood outside the vehicle on passenger side, he could see that ignition was punched or missing, dashboard was broken, and there was no key in ignition, even though vehicle was running. *Banks v. United States*, 902 A.2d 817, 2006 D.C. App. LEXIS 413 (2006).

Police officer's testimony at postconviction hearing in receiving stolen property case, that he left defendant's house keys that he found in stolen car's ignition on top of car's hood and that he did not give them to defendant or place them with defendant's personal property, did not satisfy requirements for new trial based on newly discovered evidence; to extent officer provided any additional information, it was at best merely cumulative or impeaching. *Leftridge v. United States*, 780 A.2d 266, 2001 D.C. App. LEXIS 199 (2001).

Evidence was sufficient to allow inference of intent required for conviction of receiving stolen property; fact that the key defendant used to operate stolen car was bent and did not easily fit in the ignition permitted inference of defendant's knowledge that the car in his possession was stolen, and police officer's testimony that defendant sped off at a high speed when officer informed defendant that he was going to check out the car allowed inference that defendant knew the car was stolen and that he wished to escape before officer could investigate, and defendant's volunteered statement to officer that the car was a company car and was not stolen was significant evidence of his consciousness of guilt. *Moore v. United States*, 757 A.2d 78, 2000 D.C. App. LEXIS 188 (2000).

Victim's testimony about \$21,000 price she paid for five-year-old minivan when new, "good working" condition of minivan when stolen, \$1700 repair estimate revealing items of value in minivan, and new purchaser's ability to drive minivan away was sufficient to prove that minivan's value was at least \$250 at time of offense, so as to support convictions for first-degree theft, receiving stolen property, and destruction of property. D.C. Code 1981, §§ 22-403, 22-3811, 22-3812(a), 22-3832(a), (c)(1). *Terrell v. United States*, 721 A.2d 957, 1998 D.C. App. LEXIS 225 (1998).

Finding that property's value exceeded \$250 at time of offense, thereby supporting felony conviction for receiving stolen property, was supported by evidence that property was nearly new four-door sedan, fully operable and in good condition when recovered by police one day after theft. D.C. Code 1981, § 22-3832(c)(1).

Curtis v. United States, 611 A.2d 51, 1992 D.C. App. LEXIS 187 (1992).

Defendant's unexplained, or unsatisfactorily explained, possession of recently stolen property (RSP) may support conviction of larceny, or RSP. D.C. Code 1981, §§ 22-2201, 22-3832. Byrd v. United States, 598 A.2d 386, 1991 D.C. App. LEXIS 283 (1991).

In prosecution for false pretenses and receiv-

ing stolen property arising from defendant's attempted use of stolen credit card, there was sufficient proof to permit jury to infer defendant's guilty knowledge that the card was stolen as well as his fraudulent intent to use the card. D.C. Code 1981, §§ 22-103, 22-1301, 22-2205. Blackledge v. United States, 447 A.2d 46, 1982 D.C. App. LEXIS 381 (1982).

§ 22-3233. Altering or removing motor vehicle identification numbers.

(a) It is unlawful for a person to knowingly remove, obliterate, tamper with, or alter any identification number on a motor vehicle or a motor vehicle part.

(b)(1) Any person who violates subsection (a) of this section shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned for not more than 180 days, or fined not more than \$1,000, or both.

(2) Any person who violates subsection (a) of this section shall be guilty of a felony if the value of the motor vehicle or motor vehicle part is \$1,000 or more and, upon conviction, shall be imprisoned for not more than 5 years, or fined not more than \$5000, or both.

(c) For the purposes of this section, the term:

(1) "Identification number" means a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification.

(2) "Motor vehicle" means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.

(Dec. 1, 1982, D.C. Law 4-164, § 133, as added Apr. 24, 2007, D.C. Law 16-306, § 217, 53 DCR 8610; June 3, 2011, D.C. Law 18-377, § 12(f), 58 DCR 1174.)

Effect of amendments. — D.C. Law 18-377, in subsec. (b)(2), substituted "\$1,000" for "\$250".

Emergency legislation. — For temporary (90 day) addition, see § 217 of Omnibus Public Safety Emergency Amendment Act of 2006 (D.C. Act 16-445, July 19, 2006, 53 DCR 6443).

For temporary (90 day) addition, see § 217 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-490, October 18, 2006, 53 DCR 8686).

For temporary (90 day) addition, see § 217 of Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-10, January 16, 2007, 54 DCR 1479).

For temporary (90 day) addition, see § 217 of Omnibus Public Safety Second Congressional

Review Emergency Amendment Act of 2007 (D.C. Act 17-25, April 19, 2007, 54 DCR 4036).

For temporary (90 day) amendment of section, see § 512(f) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 512(f) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 16-306. — For Law 16-306, see notes following § 22-404.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

§ 22-3234. Altering or removing bicycle identification numbers.

(a) It is unlawful for a person to knowingly remove, obliterate, tamper with, or alter any identification number on a bicycle or bicycle part.

(b) Any person who violates subsection (a) of this section shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned for not more than 180 days, or fined not more than \$1,000, or both.

(c) For the purposes of this section, the term:

(1) "Bicycle" shall have the same meaning as provided in § 50-1609(1).

(2) "Identification number" shall have the same meaning as provided in § 50-1609(1A).

(Dec. 1, 1982, D.C. Law 4-164, § 134, as added May 1, 2008, D.C. Law 17-149, § 3, 55 DCR 1272.)

*Subchapter V. Forgery.***§ 22-3241. Forgery.**

(a) For the purposes of this subchapter, the term:

(1) "Forged written instrument" means any written instrument that purports to be genuine but which is not because it:

(A) Has been falsely made, altered, signed, or endorsed;

(B) Contains a false addition or insertion; or

(C) Is a combination of parts of 2 or more genuine written instruments.

(2) "Utter" means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify.

(3) "Written instrument" includes, but is not limited to, any:

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;

(B) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;

(C) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profitsharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;

(D) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or

(E) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

(b) A person commits the offense of forgery if that person makes, draws, or utters a forged written instrument with intent to defraud or injure another.

(Dec. 1, 1982, D.C. Law 4-164, § 141, 29 DCR 3976.)

Cross references. — Credit card fraud, see § 22-3223.

Forgery of authorization for medical consent for a minor by an adult caregiver, see § 16-4901.

Fraud, see § 22-3221.

Prior Codifications. — 1981 Ed., § 22-3841.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

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ANALYSIS

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Admissibility of evidence.

Evidence permitted jury to find that defendant was knowing participant in unlawful scheme to obtain real property for deflated price, supporting conviction for wire fraud and conspiracy to commit wire fraud, even though defendant was acquitted of charges under District of Columbia law for fraud, forgery, and uttering forged instrument; jury could conclude from defendant's connection to forged deed for property, which was filed by his real estate agent after owner's death, that he knowingly entered into scheme to defraud owner's heirs, particularly given check that he wrote to agent after she purportedly purchased property, and defendant falsely represented to executor for owner's estate that he was United States marshal and that police were protecting property on his behalf, suggesting that if property were not sold to his group, protection would cease, property would be ruined, and estate would be liable. *United States v. Brockenborough*, 575 F.3d 726, 2009 U.S. App. LEXIS 17672 (C.A.D.C. 2009).

Evidence that witness who participated in check forging scheme was aware of defendant's prior criminal record was relevant in bank fraud prosecution to lend credence to witness' claim that she feared for her safety if she did not comply with defendant's demands for bogus checks. *Fed.Rules Evid.Rules 403, 404(b)*, 18 U.S.C. *United States v. Miller*, 895 F.2d 1431, 1990 U.S. App. LEXIS 1572 (C.A.D.C. 1990),

writ of certiorari denied by 498 U.S. 825, 111 S. Ct. 79, 112 L. Ed. 2d 52, 1990 U.S. LEXIS 4059, 59 U.S.L.W. 3245 (1990).

Evidence that witness was aware of defendant's criminal record when she agreed to cash forged check on defendant's behalf was inadmissible in bank fraud prosecution to explain witness' motivation in agreeing to cash check, where witness had already testified that she received \$2,000 for cashing check, and defendant did not put witness' state of mind in issue. *Fed.Rules Evid.Rules 403, 404(b)*, 18 U.S.C. *United States v. Miller*, 895 F.2d 1431, 1990 U.S. App. LEXIS 1572 (C.A.D.C. 1990), writ of certiorari denied by 498 U.S. 825, 111 S. Ct. 79, 112 L. Ed. 2d 52, 1990 U.S. LEXIS 4059, 59 U.S.L.W. 3245 (1990).

Admission of fraudulent checks that were not connected with defendant was plain error in bank fraud and forgery prosecution arising when defendant presented check written on account of nonexistent Nigerian company for payment; government insinuated through use of other checks that defendant and his associate in Nigeria were connected with other fraudulent check activity even though there was no evidence of such a connection, undermining defendant's defense that he lacked knowledge that check he presented was bad. *Fed.Rules Evid.Rules 403, 404(b)*, 18 U.S.C.; 18 U.S.C. § 1344; D.C. Code 1981, § 22-3841(a, b); *Fed.R.Cr.Proc. Rule 52(a)*, 18 U.S.C. *United States v. Rhodes*, 886 F.2d 375, 1989 U.S. App. LEXIS 14246 (C.A.D.C. 1989).

Reception, in forgery prosecution, of exhibit consisting of card completed voluntarily by defendant while in custody on which he had listed prior arrests, received to permit comparison of handwriting with that on checks, was prejudicially erroneous and required new trial notwithstanding that it was not clear that jury saw card and that there was other evidence of his guilt. D.C. Code 1961, § 22-1401. *Leigh v. U.S.*, 308 F.2d 345, 1962 U.S. App. LEXIS 4032 (C.A.D.C. 1962).

Where Secret Service Agent's testimony identified the documents presented in court as coming directly from financial transaction processing company, which was used by merchant in regular course of his check-cashing business, and company vice president's testimony identified the documents as containing data identical to those present in the original records, the

trial court in no way erred in failing sua sponte to exclude them for lack of proper foundation or authentication under business records hearsay exception in forged check prosecution. *Dutch v. United States*, 997 A.2d 685, 2010 D.C. App. LEXIS 336 (2010).

In forged check prosecution, transaction report documents, containing images of photo ID for defendant, defendant's fingerprints, and check cashed by defendant, were admissible as business records of the financial transaction processing company, which was used by store, pursuant to business records hearsay exception; all of data used to create transaction documents were data stored in company's system created and used by its merchants in regular course of their check-cashing businesses, and fact that creator of actual documents used in court did not testify to their creation did not disqualify their admissibility, in that testimony of company's vice president and store owner gave adequate reason to trust authenticity and accuracy of documents and computer data set forth therein. *Dutch v. United States*, 997 A.2d 685, 2010 D.C. App. LEXIS 336 (2010).

Record disclosed sufficient proof of a reasonable search for original writings so that trial court acted within its discretion, and did not violate best evidence rule, when it admitted photocopies and microfilm reproductions of credit card invoices, in prosecution for forgery and uttering allegedly arising out of the use of stolen credit card to purchase gas. D.C. Code § 22-1401; Fed. Rules Evid. rules 1001(3), 1002, 18 U.S.C. Walker v. United States, 402 A.2d 813, 1979 D.C. App. LEXIS 378 (1979).

In prosecution for forgery and uttering, trial judge did not abuse his discretion in admitting handwriting exemplars which were taken from police files and which were accompanied by information that the person who had written them had the same name and date of birth as the defendant. D.C. Code § 22-1401. *Banks v. United States*, 359 A.2d 8, 1976 D.C. App. LEXIS 297 (1976).

Codefendant's statement to arresting officer, to effect that defendant had given codefendant check in question, was admissible in uttering prosecution in which codefendant testified and affirmed statement and was subjected to cross-examination. D.C. Code § 22-1401; U.S. Const. Amend. 6. *Ellsworth v. United States*, 300 A.2d 456, 1973 D.C. App. LEXIS 220 (1973).

Arguments and conduct of counsel.

Inadvertent remark which was made in prosecutor's closing argument and which related to lack of surprise by witness' failure to identify defendant's signature in view of defendant's prior involvement in similar cases did impermissibly suggest that handwriting analyst could not tie signatures to defendant because

defendant was experienced in disguising his hand through prior involvement with similar cases. 18 U.S.C. § 1341; D.C. Code 1973, §§ 22-1301, 22-1401. *United States v. Coats*, 652 F.2d 1002, 1981 U.S. App. LEXIS 19259 (C.A.D.C. 1981).

Arrest.

Where police officer, who saw defendant walking along street about 2:00 in the morning, and who thought defendant had narcotics, without a warrant stopped defendant, who admitted that he had not worked for over a year, and had maintained himself by gambling, and officer then informed defendant that he was arresting him for vagrancy and required him to disrobe, search, which led to discovery of stolen money orders, was an unreasonable and unlawful violation of defendant's rights as a citizen, rendering stolen money orders inadmissible in prosecution for forgery, house-breaking, grand larceny, and interstate transportation of falsely made securities. D.C. Code 1951, §§ 22-1401, 22-1801, 22-2201, 22-2202; U.S. Const. Amend. 4; 18 U.S.C. § 2314; Fed. Rules Crim. Proc. rule 41(e), 18 U.S.C. White v. U.S., 271 F.2d 829, 1959 U.S. App. LEXIS 3238 (C.A.D.C. 1959).

Attorney discipline.

Attorney's forgery of signature on document purporting to be agreement between law firm for which attorney was a partner and state of Arkansas to enter into contingency fee agreement with respect to underlying natural resource damage litigation constituted violation of rule of professional conduct prohibiting an attorney from engaging in criminal act that reflects adversely on attorney's honesty, trustworthiness, or fitness as an attorney in other respects. *In re Slaughter*, 929 A.2d 433, 2007 D.C. App. LEXIS 469 (2007).

Obstruction of justice and forgery and uttering are crimes involving moral turpitude per se. D.C. Code 1981, §§ 11-2503(a), 22-3841, 22-3842(c); 18 U.S.C. § 1505. *In re Schwartz*, 619 A.2d 39, 1993 D.C. App. LEXIS 5 (1993).

Convictions for obstruction of justice and for forgery and uttering warrant disbarment. D.C. Code 1981, §§ 11-2503(a), 22-3841, 22-3842(c); 18 U.S.C. § 1505. *In re Schwartz*, 619 A.2d 39, 1993 D.C. App. LEXIS 5 (1993).

Common law.

Forgery statute did not indicate return to common-law elements of forgery, that required finding writing in question was not genuine, a writing which purported to be something that it was not, rather than false statement or misrepresentation of authority entered on otherwise legitimate document. D.C. Code 1981, § 22-3841. *Driver v. United States*, 521 A.2d 254, 1987 D.C. App. LEXIS 287 (1987).

Defenses.

In forgery prosecution, testimony of two psychiatrists and a lay witness to effect that defen-

dant was, in their opinion, suffering from mental illness when he committed the crimes charged satisfied requirement that defendant produce some evidence, and shifted burden of proving sanity to government. Fed.Rules Crim.Proc. rules 29, 33, 18 U.S.C.; D.C. Code 1951, §§ 22-1401, 24-301(a, b, d). U.S. v. Amburgey, 189 F.Supp. 687, 1960 U.S. Dist. LEXIS 3236 (D.D.C.1960).

Harmless or reversible error.

Erroneous admission of evidence that witness was aware of defendant's prior criminal record when she agreed to cash forged check on defendant's behalf was harmless in bank fraud prosecution, where two other witnesses had previously testified concerning their agreement to cash bogus checks supplied by defendant, and witness' motivation in cashing check was not central to case against defendant. Fed.Rules Evid.Rule 403, 18 U.S.C.; Fed.Rules Cr.Proc.Rule 52(a), 18 U.S.C. United States v. Miller, 895 F.2d 1431, 1990 U.S. App. LEXIS 1572 (C.A.D.C. 1990), writ of certiorari denied by 498 U.S. 825, 111 S. Ct. 79, 112 L. Ed. 2d 52, 1990 U.S. LEXIS 4059, 59 U.S.L.W. 3245 (1990).

In prosecution for forging and uttering department store charge slips, although court charged that falsity was element of offense, it erred in refusing to advise jury that proof of lack of authority to sign for another was required to establish falsity; in view of overwhelming evidence, however, error was harmless. D.C. Code § 22-1401; Fed.Rules Crim.Proc. rule 52(a), 18 U.S.C. United States v. Gilbert, 433 F.2d 1172, 1970 U.S. App. LEXIS 7441 (C.A.D.C. 1970).

Any error in forgery prosecution in permitting store manager to testify to policy store had adopted in effort to catch people who had been stealing money orders and checks was harmless in light of all evidence. D.C. Code § 22-1401; Fed.Rules Crim.Proc. rule 52(a), 18 U.S.C. Hough v. United States, 397 F.2d 708, 1968 U.S. App. LEXIS 6798 (C.A.D.C. 1968).

Trial court's failure to instruct jury that lack of authority was an element of both forgery and uttering was harmless where circumstantial evidence against defendant was strong and lack of authority was clear from record. D.C. Code § 22-1401. Hall v. United States, 383 A.2d 1086, 1978 D.C. App. LEXIS 436 (1978).

Joinder of receiving stolen property count with forgery and uttering counts was not prejudicial misjoinder where all counts related to offenses at certain shop, where evidence on all counts was sufficient for jury and where, though evidence was elicited as to accused's use of stolen credit card at another shop, such evidence was probative as corroborative of handwriting evidence and limiting instruction was given. D.C. Code §§ 22-1401, 22-2205; D.C.

Code SCR, Criminal Rules 8(a), 14. Hurt v. United States, 314 A.2d 489, 1974 D.C. App. LEXIS 351 (1974).

Indictment or information.

Counts in indictment charging defendant with uttering forged documents in interference proceeding in United States Patent Office "with intent to defraud and injure" were not required to name persons whom defendant intended to defraud and injure. D.C. Code 1940, § 22-1401. Mas v. U.S., 151 F.2d 32, 1945 U.S. App. LEXIS 4537 (1945).

Subject to evidence which might be adduced at trial as to counts involving interstate transportation of two different checks on the same date, counts charging defendant with interstate transportation of altered securities and uttering and forgery could have been prosecuted separately from those contained in criminal complaint which had originally charged defendant with interstate transportation of a forged security and which had been dismissed by the Government, and thus were not "required to be joined" in original indictment so that their dismissal was not required for failure to timely indict. 18 U.S.C. §§ 2314, 3161(d); D.C. Code § 22-1401; U.S. Dist.Ct. Rules Dist. of Col., Rule 2-7, subd. 4(b). United States v. Peters, 434 F. Supp. 357, 1977 U.S. Dist. LEXIS 15410 (1977), affirmed in part and vacated in part by 587 F.2d 1267, 190 U.S. App. D.C. 370, 1978 U.S. App. LEXIS 8762 (1978).

An indictment charging defendant with having forged name of another individual to a letter and procuring of money for such letter from still another party with intent to defraud was sufficient to charge crimes of forgery and uttering, as against contention that instrument was not capable of effecting a fraud. D.C. Code 1940, § 22-1401. U.S. v. Briggs, 54 F.Supp. 731, 1944 U.S. Dist. LEXIS 2485 (D.D.C.1944).

An indictment charging defendant in one count with forgery and in second count with uttering same forged letter was not demurrable on ground that it was "repugnant". D.C. Code 1940, §§ 22-1301, 22-1401. U.S. v. Briggs, 54 F.Supp. 731, 1944 U.S. Dist. LEXIS 2485 (D.D.C.1944).

There was no fatal variance between indictment and government's proof at trial on charges of forgery and uttering, though indictment charged forgery and uttering relating to \$135.60 sales transaction and evidence was presented on unrelated theft and credit card fraud charges that related to \$1,000 sales transaction, where in instructing jury regarding forgery and uttering, trial court referred only to evidence relating to \$135.60 sales transaction and proof mentioned in indictment and presented in court lowered count to misdemeanor. D.C. Code 1981, § 22-3841(b). Zanders

v. United States, 678 A.2d 556, 1996 D.C. App. LEXIS 122 (1996).

Instruction on uttering that did not require a finding of representation of genuineness of false bus flashpass did not constitute an improper constructive amendment of indictment even though indictment alleged that defendants presented flashpass as true and genuine; it was not obvious that words in indictment referred only to defendants' fraudulent intent in presenting document, not at all to document itself as capable of being taken for genuine, indictment linked those words to a "falsely made and altered" flashpass, and copy of flashpass was attached to indictment. D.C. Code 1981, § 22-3841. *Short v. United States*, 676 A.2d 910, 1996 D.C. App. LEXIS 88 (1996).

Forgery and uttering indictment was not fatally defective on basis that indictment charged defendant in the conjunctive form, i.e., "falsely made and altered the handwritten entries," whereas statute reads in disjunctive form, i.e., "falsely makes or alters any writing." D.C. Code 1973, § 22-1401. *Martin v. United States*, 435 A.2d 395, 1981 D.C. App. LEXIS 362 (1981).

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Indictment charging defendant with uttering forged checks was fatally defective for failure to allege that defendant had knowledge that checks were forged. D.C. Code § 22-1401. *Rosser v. United States*, 307 A.2d 752, 1973 D.C. App. LEXIS 321 (1973).

Instructions.

Whether lack of authority to sign name of another is considered separate element of offense of forgery and uttering department store charge slips or part of element of falsity, jury must be advised that without proof of lack of authority, prosecution may not succeed. D.C. Code § 22-1401. *United States v. Gilbert*, 433 F.2d 1172, 1970 U.S. App. LEXIS 7441 (C.A.D.C. 1970).

Instructing jury that defendants were guilty of uttering if defendants sold bus flashpass, if flashpass objectively purported to be genuine, if defendants knew flashpass to be falsely made, and if defendants intended to defraud Washington Metropolitan Area Transit Authority (WMATA) was proper even though instruction did not require jury to find that defendants displayed flashpass to someone representing that it was true and genuine. D.C. Code 1981,

§ 22-3841. *Short v. United States*, 676 A.2d 910, 1996 D.C. App. LEXIS 88 (1996).

Nature and elements of offense.

Uttering forged checks in District of Columbia, followed by their rejection by Maryland drawee, brought home to defendant the interstate transportation which occurred. D.C. Code § 22-1401; 18 U.S.C. § 2314. *United States v. Abston*, 448 F.2d 1189, 1971 U.S. App. LEXIS 8734 (C.A.D.C. 1971).

Statutes proscribing forgery of any writing and any writing of public or private nature which might operate to prejudice another included defendant's forging of name of attorney on praecipes by which defendant entered appearances in cases, and forging of a registration card. 18 U.S.C. § 494; D.C. Code 1961, § 22-1401. *Morgan v. U.S.*, 309 F.2d 234, 1962 U.S. App. LEXIS 4011 (C.A.D.C. 1962).

Forgery by false making has been committed where the accused, with intent to defraud, proffers a blank note to a customer and then induces the customer, who is reasonably justified in believing the representation, to sign it on the false representation that the paper is something other than a note, and the accused then fills in blanks and negotiates note. D.C. Code 1951, § 22-1401. *Lieberman v. U.S.*, 253 F.2d 46, 1958 U.S. App. LEXIS 3823 (C.A.D.C. 1958).

Where contractor deceived customers into signing blank promissory notes and deeds of trust and later filled in instruments and passed them, he was guilty of forgery. D.C. Code 1951, § 22-1401. *Lieberman v. U.S.*, 253 F.2d 46, 1958 U.S. App. LEXIS 3823 (C.A.D.C. 1958).

Under District of Columbia statute on forgery, which is written in the disjunctive, forging and uttering the same instrument are distinct offenses and, under such statute, a second uttering constitutes still another offense. D.C. Code § 22-1401. *United States v. Peters*, 434 F. Supp. 357, 1977 U.S. Dist. LEXIS 15410 (1977), affirmed in part and vacated in part by 587 F.2d 1267, 190 U.S. App. D.C. 370, 1978 U.S. App. LEXIS 8762 (1978).

To constitute "forgery" under statute, there must be a false making or other alteration of some instrument in writing, there must be fraudulent intent, and instrument must be apparently capable of effecting a fraud. D.C. Code 1940, § 22-1401. *U.S. v. Briggs*, 54 F.Supp. 731, 1944 U.S. Dist. LEXIS 2485 (D.D.C.1944).

All instruments that might operate to the prejudice of another are covered by the statutory definition of forgery. In re *Slaughter*, 929 A.2d 433, 2007 D.C. App. LEXIS 469 (2007).

A "forged written instrument" is one that purports to be genuine, but is not because it has been falsely made, altered, signed or endorsed. In re *Slaughter*, 929 A.2d 433, 2007 D.C. App. LEXIS 469 (2007).

A person commits the crime of forgery if the person makes, draws, or utters a forged written instrument with the intent to defraud or injure another and the instrument is capable of effecting the fraud. In re Slaughter, 929 A.2d 433, 2007 D.C. App. LEXIS 469 (2007).

Defendant's conviction of uttering did not merge with his conviction of attempted second-degree theft, where each offense required proof of element not required by the other; uttering required proof that defendant "issue[d], authenticate[d], transfer[red], publish[ed], s[old], deliver[ed], transmit[ted], present[ed], display[ed], use[d], or certifi[ed] [a forged written instrument,]" while attempted second-degree theft required proof that defendant acted with intent "[t]o deprive [victim] of a right to the property or a benefit of the property" or "[t]o appropriate the property to his own use or to the use of a third person." Boyd v. United States, 870 A.2d 70, 2005 D.C. App. LEXIS 40 (2005).

Person "utters" so long as he or she displays instrument that is reasonably adapted to deceive person of ordinary intelligence, knowing it to be forged and intending thereby to defraud or injure another; no additional words or action constituting representation are necessary. D.C. Code 1981, § 22-3841. Short v. United States, 676 A.2d 910, 1996 D.C. App. LEXIS 88 (1996).

All written instruments that might operate to the prejudice of another, including time slips, fall within the definition of "written instrument" under the statutory prohibition against forgery and uttering. D.C. Code 1981, § 22-3841(a)(3). Gholson v. United States, 532 A.2d 118, 1987 D.C. App. LEXIS 462 (1987).

Defendant was properly convicted of forgery and uttering based on his completion of money orders not purchased by him or endorsed to him and presentation of them for payment, even though defendant did not complete money orders prior to entering bank, but rather, did so at teller's window upon her instruction. D.C. Code 1981, § 22-3841. Driver v. United States, 521 A.2d 254, 1987 D.C. App. LEXIS 287 (1987).

Defendants made a false writing or alteration which satisfied language of forgery and uttering statute despite their contention that the insertion of their true names on blank money orders known by them to have been stolen did not constitute false making or alteration of the blank money orders purchased by robbery victim, in that it was unauthorized completion of the stolen money orders which rendered the instruments "falsely made or altered," and absent true owner's authority to complete the blank money orders, insertion by defendants of any information onto such orders was a false making or alteration of documents in violation of the statute. D.C. Code 1973, § 22-1401. Martin v. United States, 435 A.2d 395, 1981 D.C. App. LEXIS 362 (1981).

Essential elements of statutory crime of forgery in District of Columbia are false making or other alteration of some instrument in writing, a fraudulent intent, and that the instrument must be apparently capable of effecting a fraud. D.C. Code 1973, § 22-1401. Martin v. United States, 435 A.2d 395, 1981 D.C. App. LEXIS 362 (1981).

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The essential elements of the crime of forgery are: a false making or alteration of some instrument in writing; fraudulent intent; and instrument must be apparently capable of effecting a fraud. D.C. Code § 22-1401. Hall v. United States, 383 A.2d 1086, 1978 D.C. App. LEXIS 436 (1978).

Intent to defraud is an essential element of the offense of forgery, but the existence of the necessary mens rea is a question of fact, and such intent, under proper circumstances, may be inferred from the presentment of a forged instrument. D.C. Code § 22-1401. Ashby v. United States, 363 A.2d 685, 1976 D.C. App. LEXIS 360 (1976).

Offense of forgery requires only the signing of a fictitious name, accompanied by the necessary fraudulent intent, to an instrument capable of working a prejudice to the interests of another; it need not be shown that the accused in some manner assumed the identity of the fictitious individual and that there was some reliance thereupon. D.C. Code § 22-1401. Ashby v. United States, 363 A.2d 685, 1976 D.C. App. LEXIS 360 (1976).

Pleas.

Prosecutor's statement that Government had same concern as court that drug rehabilitation program for defendant would fail implied that,

but for plea arrangement, Government would have recommended period of incarceration, and Government, by such conduct, broke its agreement not to oppose substantial suspended sentence and residential drug program for defendant, in exchange for his agreement to plead guilty to charges of second-degree burglary and forgery. D.C. Code §§ 22-1401, 22-1801(b). *White v. United States*, 425 A.2d 616, 1980 D.C. App. LEXIS 421 (1980).

Presumptions and burden of proof.

Government has burden of proving all elements of offense of forging and uttering department store charge slips, and there is no obligation on defendant to offer proof of authority to sign name of another. D.C. Code § 22-1401. *United States v. Gilbert*, 433 F.2d 1172, 1970 U.S. App. LEXIS 7441 (C.A.D.C. 1970).

Purposes and legislative intent.

Intent of drafters of current forgery statute was that each separate commission of forgery or uttering constitute separate offense. D.C. Code 1981, § 22-3841. *Driver v. United States*, 521 A.2d 254, 1987 D.C. App. LEXIS 287 (1987).

Questions of law and fact.

Evidence in prosecution for obtaining property by false pretenses was sufficient for jury to infer that lending company relied on veracity of documents presented to it in connection with mortgage loan applications despite claim of defendants that there was insufficient evidence to prove the element of reliance on documents which actually reflected false sales of property. D.C. Code §§ 22-1301, 22-1401. *United States v. Stamp*, 458 F.2d 759, 1971 U.S. App. LEXIS 6547 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2424, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2406 (1972), writ of certiorari denied by 409 U.S. 842, 93 S. Ct. 104, 34 L. Ed. 2d 81, 1972 U.S. LEXIS 1258 (1972).

In prosecution for forging and uttering bank checks and transporting forged securities in interstate commerce, evidence on insanity defense presented jury question. D.C. Code § 22-1401; 18 U.S.C. § 2314. *United States v. Eichberg*, 439 F.2d 620, 1971 U.S. App. LEXIS 12283 (C.A.D.C. 1971).

Where there was evidence that an uttering had occurred and evidence that placed defendant at the scene of the uttering, question of whether defendant passed and uttered a forged sales receipt was for jury. D.C. Code § 22-1401. *Hall v. United States*, 383 A.2d 1086, 1978 D.C. App. LEXIS 436 (1978).

Evidence, in prosecution for forging or uttering a forged document, that credit card taken from robbery victim was used to procure gasoline and services from filling stations, that automobile license recorded on sales slips coincided with registration of defendant's car and

that it was highly probable that handwriting on the slips was that of defendant made submissible case. D.C. Code §§ 22-1301, 22-1401. *Long v. United States*, 298 A.2d 213, 1972 D.C. App. LEXIS 307 (1972).

Review.

Examination of record failed to disclose any abuse of discretion with respect to limitations placed on cross-examination of prosecution witnesses by defense counsel who claimed that he was prevented from testing the explanation given by the witnesses of general lending procedures by eliciting from them procedure followed with respect to the 17 transactions listed in indictment charging false pretenses in view of fact that nothing in record showed that defense was intimidated from further inquiry into the specific loan transactions. 18 U.S.C. § 371; D.C. Code §§ 22-1301, 22-1401. *United States v. Stamp*, 458 F.2d 759, 1971 U.S. App. LEXIS 6547 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2424, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2406 (1972), writ of certiorari denied by 409 U.S. 842, 93 S. Ct. 104, 34 L. Ed. 2d 81, 1972 U.S. LEXIS 1258 (1972).

Search and seizure.

Examination of record in prosecution for conspiracy, obtaining property by false pretenses, and forgery showed that information obtained by Internal Revenue agents, who were conducting valid civil tax audits of the principals, prior to those persons being advised of the rights of criminal suspects was obtained properly with respect to the defendants who were persons well versed in finance, taxation and the law. 18 U.S.C. § 371; 26 U.S.C. (I.R.C.1954) § 7602; U.S. Const. Amend. 4; D.C. Code §§ 22-1301, 22-1401. *United States v. Stamp*, 458 F.2d 759, 1971 U.S. App. LEXIS 6547 (C.A.D.C. 1971), writ of certiorari denied by 406 U.S. 975, 92 S. Ct. 2424, 32 L. Ed. 2d 675, 1972 U.S. LEXIS 2406 (1972), writ of certiorari denied by 409 U.S. 842, 93 S. Ct. 104, 34 L. Ed. 2d 81, 1972 U.S. LEXIS 1258 (1972).

Speedy trial.

Where Government's case in prosecution for forgery, uttering and receiving stolen property rested on documents and unchallenged identification of accused, seven-month nondeliberate delay between date of such offenses and accused's arrest did not deprive accused of fair trial in violation of due process, notwithstanding contentions that if accused had been charged more promptly, he might have remembered what he was doing when he was accused of being in certain shop and could have located "former marine buddy" who assertedly accompanied accused to a second shop. D.C. Code §§ 22-1401, 22-2205. *Hurt v. United States*,

314 A.2d 489, 1974 D.C. App. LEXIS 351 (1974).

Weight and sufficiency of evidence.

There was sufficient showing that false signatures or endorsements on checks and drafts defendant deposited were material to bank and that defendant intended to use kiting scheme to defraud bank to support finding that she committed fraud or larceny by false pretenses, as bank would not have granted defendant immediate credit if she had merely made drafts payable to herself, but by creating fictitious payees and forging endorsements, she was able to convince bank to accept her deposits. 18 U.S.C. §§ 2113(b), 2314. *United States v. Sayan*, 968 F.2d 55, 1992 U.S. App. LEXIS 14239 (C.A.D.C. 1992).

Evidence concerning check-forging scheme was sufficient to support jury's finding of single conspiracy, as alleged in indictment, despite defendant's claim that he had not communicated with bank employee who furnished forged checks and that codefendant was involved in separate conspiracy with bank employee; co-conspirators had common goal of defrauding bank, and made interdependent efforts to achieve that end. 18 U.S.C. § 371. *United States v. Miller*, 895 F.2d 1431, 1990 U.S. App. LEXIS 1572 (C.A.D.C. 1990), writ of certiorari denied by 498 U.S. 825, 111 S. Ct. 79, 112 L. Ed. 2d 52, 1990 U.S. LEXIS 4059, 59 U.S.L.W. 3245 (1990).

Evidence, in prosecution for uttering forged check was sufficient for jury to draw inference that defendant had knowledge that the checks in question were forged. D.C. Code § 22-1401. *United States v. Abston*, 448 F.2d 1189, 1971 U.S. App. LEXIS 8734 (C.A.D.C. 1971).

Testimony and manner in which it was given, with defendant's acquiescence, in forgery prosecution, supported inference that signatures had not been authorized by person whose signatures they purported to be. D.C. Code § 22-1401; Fed.Rules Crim.Proc. rule 52(a), 18 U.S.C. *Hough v. United States*, 397 F.2d 708, 1968 U.S. App. LEXIS 6798 (C.A.D.C. 1968).

Sufficient evidence demonstrated authenticity of documents admitted into evidence in attorney disciplinary proceeding, which were offered to show that attorney forged signature on document purporting to be agreement between law firm for which attorney was a partner and state of Arkansas to enter into contingency fee agreement with respect to underlying natural resource damage litigation; memorandum and letter agreement were both written on firm stationery, representations made in documents were consistent with oral statements attorney had previously made to firm, and, with respect to letter agreement, head of firm's litigation department testified that attorney admitted that agreement was forged. In re *Slaughter*, 929 A.2d 433, 2007 D.C. App. LEXIS 469 (2007).

Evidence permitted jury to find that defendant by presenting duplicate public assistance check for payment impliedly represented its validity and his ability to assign right to present it for payment and impliedly represented that he was entitled to receive proceeds and that, because he had already entered into a reimbursement agreement and had already cashed original check, such representations were false. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

While defendant, who was charged with forgery and uttering a forged instrument, alleged that he negotiated check, though he was not the payee thereon, with bona fide reliance upon the representations of a former counselor of rehabilitation bureau that he could cash the check without getting into any "trouble," the finding of intent to defraud was supported by the fact of defendant's acknowledged awareness that the name he affixed to the check for the purpose of cashing it was not his own, as well as other circumstantial evidence, e. g., the fact that on two previous occasions when he received assistance from the bureau, the checks had been made out in his own name. D.C. Code § 22-1401. *Ashby v. United States*, 363 A.2d 685, 1976 D.C. App. LEXIS 360 (1976).

§ 22-3242. Penalties for forgery.

(a) Any person convicted of forgery shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both, if the written instrument purports to be:

(1) A stamp, legal tender, bond, check, or other valuable instrument issued by a domestic or foreign government or governmental instrumentality;

(2) A stock certificate, bond, or other instrument representing an interest in or claim against a corporation or other organization of its property;

(3) A public record, or instrument filed in a public office or with a public servant;

(4) A written instrument officially issued or created by a public office, public servant, or government instrumentality;

(5) A check which upon its face appears to be a payroll check;

(6) A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or

(7) A written instrument having a value of \$10,000 or more.

(b) Any person convicted of forgery shall be fined not more than \$5,000 or imprisoned for not more than 5 years, or both, if the written instrument is or purports to be:

(1) A token, fare card, public transportation transfer certificate, or other article manufactured for use as a symbol of value in place of money for the purchase of property or services;

(2) A prescription of a duly licensed physician or other person authorized to issue the same for any controlled substance or other instrument or devices used in the taking or administering of controlled substances for which a prescription is required by law; or

(3) A written instrument having a value of \$1,000 or more.

(c) Any person convicted of forgery shall be fined not more than \$2,500 or imprisoned for not more than 3 years, or both, in any other case.

(Dec. 1, 1982, D.C. Law 4-164, § 142, 29 DCR 3976; June 3, 2011, D.C. Law 18-377, § 12(g), 58 DCR 1174.)

Cross references. — Forgery of authorization for medical consent for a minor by an adult caregiver, see § 16-4901.

Prior Codifications. — 1981 Ed., § 22-3842.

Effect of amendments. — D.C. Law 18-377, in subsec. (b)(3), substituted “\$1,000” for “\$250”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 512(g) of Public Safety Legislation Sixty-Day Layover Emergency Amendment Act of 2010 (D.C. Act 18-693, January 18, 2011, 58 DCR 640).

For temporary (90 day) amendment of section, see § 512(g) of Public Safety Legislation Sixty-Day Layover Congressional Review Emergency Amendment Act of 2011 (D.C. Act 19-45, April 20, 2011, 58 DCR 3701).

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

Legislative history of Law 18-377. — For history of Law 18-377, see notes under § 22-303.

CASE NOTES

ANALYSIS

Attorney discipline.

Indictment and information.

Instructions.

Parole and probation.

Review.

Attorney discipline.

Obstruction of justice and forgery and uttering are crimes involving moral turpitude per se. D.C. Code 1981, §§ 11-2503(a), 22-3841, 22-3842(c); 18 U.S.C. § 1505. In re Schwartz, 619 A.2d 39, 1993 D.C. App. LEXIS 5 (1993).

Convictions for obstruction of justice and for

forgery and uttering warrant disbarment. D.C. Code 1981, §§ 11-2503(a), 22-3841, 22-3842(c); 18 U.S.C. § 1505. In re Schwartz, 619 A.2d 39, 1993 D.C. App. LEXIS 5 (1993).

Indictment and information.

Indictment charging defendant with forging and uttering sufficiently alleged value of forged and uttered money order was \$250 or more, even though the indictment did not state value of money order was \$250 or more, where indictment's forgery count contained copy of actual money order that clearly revealed value of money order was \$300, and uttering count incorporated photocopy by reference. D.C. Code

§ 22-3842. *Driver v. United States*, 521 A.2d 254, 1987 D.C. App. LEXIS 287 (1987).

Instructions.

Where trial court omitted element of intermediate level of forgery in its instruction to jury setting forth elements of the offense, and neither party called omission to court's attention, instructional error was not reversible error where no rational jury could have found that the writing in question was falsely made or altered by the defendant, as the instruction required, and not found that writing was or purported to be a value in excess of \$250. D.C. Code 1981, § 22-3842(b)(3). *White v. United States*, 613 A.2d 869, 1992 D.C. App. LEXIS 198 (1992).

Parole and probation.

Where defendant was sentenced to concurrent terms of imprisonment of one to three years on each of two counts of uttering forged checks and five years on each count of interstate transportation of the checks, trial court properly specified that defendant would be eligible for parole under the latter sentence from any time after the first year. D.C. Code § 22-1401; 18 U.S.C. §§ 2314, 4208(a)(2). *United States v. Abston*, 448 F.2d 1189, 1971 U.S. App. LEXIS 8734 (C.A.D.C. 1971).

Where, absent improper convictions for forgery and uttering, sentencing judge might have imposed lesser period of probation, reviewing court vacated convictions of forgery and uttering, affirmed conviction of attempted false pretenses and remanded case for resentencing. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

Where, absent improper convictions for forgery and uttering, sentencing judge might have imposed lesser period of probation, reviewing

court vacated convictions of forgery and uttering, affirmed conviction of attempted false pretenses and remanded case for resentencing. D.C. Code 1973, §§ 22-103, 22-1301(a), 22-1401. *Stepney v. United States*, 443 A.2d 555, 1982 D.C. App. LEXIS 309 (1982).

Review.

Whether delivery of two sequentially numbered cashier's checks to investment firm on same day was one violation of interstate transportation of money taken by fraud, rather than two, would not have to be determined on appeal, because resolution would result, at best, in reversal of sentence that would otherwise run concurrently with other sentences being affirmed, and thus would have no effect on severity of defendant's sentence. 18 U.S.C. § 2314. *United States v. Sayan*, 968 F.2d 55, 1992 U.S. App. LEXIS 14239 (C.A.D.C. 1992).

Appeal from conviction for forgery and uttering was not proper occasion for consideration of sentencing and credit question which had in no way been presented to district court. D.C. Code 1961, § 22-1401; 18 U.S.C. § 3568; Fed. Rules Crim. Proc. rule 38(a)(2), 18 U.S.C. *McCoy v. United States*, 370 F.2d 224, 1966 U.S. App. LEXIS 4580 (C.A.D.C. 1966).

Concurrent sentences of two-to-ten years' imprisonment imposed for forgery and uttering convictions were improper, and defendant had to be resentenced in accordance with section providing for sentencing if instrument has value of \$250 or more, where written instrument involved was of value of more than \$250 but less than \$10,000, and concurrent sentences had been imposed under section providing for sentencing if instrument has value of \$10,000 or more. D.C. Code 1981, § 22-3842(a, b). *Driver v. United States*, 521 A.2d 254, 1987 D.C. App. LEXIS 287 (1987).

Subchapter VI. Extortion.

§ 22-3251. Extortion.

(a) A person commits the offense of extortion if:

(1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or

(2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.

(b) Any person convicted of extortion shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 151, 29 DCR 3976.)

Cross references. — Enhanced penalty for crimes committed against senior citizen victims, see § 22-3601.

Prior Codifications. — 1981 Ed., § 22-3851.

Legislative history of Law 4-164. — For legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

CASE NOTES

ANALYSIS

Nature and elements of offenses.
Racketeering.

Nature and elements of offenses.

Intent to extort is not element of felony threat statute. D.C. Code 1981, § 22-2307. *Holt v. United States*, 565 A.2d 970, 1989 D.C. App. LEXIS 227 (1989).

Statute making it a crime whenever a person "transmits within" the District of Columbia a communication containing a demand or request for ransom or reward for the release of a kidnapped person pertained to any part of a communication transmitted within the District and, hence, included the utterance of a ransom demand in Maryland and the communication of the demand via telephone to a place in the District of Columbia. D.C. Code 1981, § 22-2306. *Battle v. United States*, 515 A.2d 1120, 1986 D.C. App. LEXIS 443 (1986).

Racketeering.

Shareholder and director operated investment company through pattern of racketeering activity, including mail and wire fraud, travel in aid of racketeering, money laundering and

extortion, in order to surreptitiously obtain substantial funds from international banking group, and thus was liable under civil Racketeer Influenced and Corrupt Organizations Act (RICO) for losses to group proximately caused by such activity. 18 U.S.C. §§ 1341, 1343, 1951, 1952, 1956, 1962(c), 1964(c); D.C. Code 1981, § 22-3851. *BCCI Holdings (Lux.), S.A. v. Khalil*, 56 F.Supp.2d 14, 1999 U.S. Dist. LEXIS 9469 (1999), affirmed in part and reversed in part by, remanded by 214 F.3d 168, 341 U.S. App. D.C. 408, 2000 U.S. App. LEXIS 11922, RICO Bus. Disp. Guide P9886 (2000).

Corporation, its officer, and claimant to shares made out claim for extortion as predicate act to racketeering charge by specifying instances where defendant tax exempt corporation, its officers and shareholders threatened plaintiffs with information gained from wire-tapping to deprive him of their property, including attempts to keep them from selling their business, thus depriving them of cash, and attempts to eliminate claimant's interest in plaintiff corporation. D.C. Code 1981, § 22-3851; 18 U.S.C. § 1961 et seq. *Federal Information Systems, Corp. v. Boyd*, 753 F. Supp. 971, 1990 U.S. Dist. LEXIS 13738 (1990).

§ 22-3252. Blackmail.

(a) A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens:

- (1) To accuse any person of a crime;
- (2) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
- (3) To impair the reputation of any person, including a deceased person.

(b) Any person convicted of blackmail shall be fined not more than \$1,000 or imprisoned for not more than 5 years, or both.

(Dec. 1, 1982, D.C. Law 4-164, § 152, 29 DCR 3976.)

Prior Codifications. — 1981 Ed., § 22-3852.

Legislative history of Law 4-164. — For

legislative history of D.C. Law 4-164, see Historical and Statutory Notes following § 22-3201.

CASE NOTES

Threats.

In view of facts that in prosecution of defen-

dant for three counts of "threats" and four counts of "obstructing justice" instructions in-

dictated that only one of the four essential elements of an obstruction of justice charge involved proof of "threats", that proof of "threats" was not absolutely necessary to defendant's conviction since proof of force would also have led to his conviction, and that defendant was acquitted of threats against one witness, although the jury found him guilty of obstructing justice with regard to the same conduct towards the same witness, proof of guilt on the obstruction of justice counts did not necessarily establish guilt of the "threats" counts, and therefore defendant's convictions of both offenses did not constitute double jeopardy. D.C. Code §§ 22-703(a), 22-2307; U.S. Const. Amend. 5. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

In view of facts that the offenses of "threats" and "obstructing justice" include provisions not included in the other, so that conduct prohibited by the threat statute would not necessarily be prohibited under the obstruction of justice statute, that the "threats" sentence carries a much more severe penalty than the "obstructing justice" offense, and that the two offenses lack a similar purpose and the "inherent relationship" required to apply the doctrines of merger and lesser included offenses, the offense of "threats" is not a lesser included offense of "obstructing justice." D.C. Code §§ 22-703(a), 22-2307. *Ball v. United States*, 429 A.2d 1353, 1981 D.C. App. LEXIS 262 (1981).

